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Introduction

The debate on Irish reunification has intensified in recent years, with the literature and levels of interest growing.¹ Brexit appears to be driving this process of reflection, combined with the changing electoral fortunes of political parties. One jurisdiction on the island of Ireland is outside the European Union (EU), an outcome achieved against the wishes of a voting majority.² Unionist parties have witnessed their electoral status being steadily eroded.³ There is an emerging sense that the ‘constitutional question’ may be put to the democratic test in the decade ahead, and the people of the island of Ireland faced with a choice about their preferred constitutional future.

The continuing place of Northern Ireland within the United Kingdom (UK) rests on majority consent. An exercise in popular sovereignty, in both jurisdictions on the island of Ireland, will determine whether the region remains part of the UK. Although this basic statement masks a more complicated picture, it is the case that Northern Ireland is free - subject to the constraints provided in the Good Friday Agreement 1998 (the 1998 Agreement) - to end the Union with Britain based on a popular vote. This is embedded in the legal orders of both states, underpinned by international law, and has also gained recognition in the Brexit negotiations. The formulation is intended to address the core dispute in Northern Ireland’s ethno-national conflict by leaving the ‘sovereignty question’ open-ended. This chapter examines the context for, and implications of, this way of addressing competing national demands and aspirations. It ends with thoughts on possible ways forward.

Observing and Being One of ‘the People’ in Contested Constitutional Space

All societies are pluralist, divided and contested in their own particular ways. The violent conflict in Northern Ireland has been largely brought to an end, but political contestation continues and is an ever-present feature of life throughout the public and private spheres. For

* Thanks to Dr Conor O’Mahony and Professor Colm O’Cinneide for their insightful comments and helpful feedback. The usual disclaimers apply.

¹ See, for example, Colin Harvey and Mark Bassett, *The EU and Irish Unity: Planning and Preparing for Constitutional Change in Ireland* (2019, The European United Left and the Nordic Green Left (GUE/NGL) Parliamentary Group) <http://qpol.qub.ac.uk/the-eu-and-irish-unity/>; Alan Whysall, *A Northern Ireland Border Poll* (UCL Constitution Unit, March 2019) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/185_a_northern_ireland_border_poll.pdf; Oran Doyle and David Kenny, *Models of Irish Unification* (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552375; David Kenny, *The Irish Constitution, a United Ireland, and the Ship of Theseus: Radical Constitutional Change as Constitutional Replacement* (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399054. See also the various contributions to the IACL-AIDC *Symposium on Constitutional Dimensions of Irish Unification* (2020) available here: <https://blog-iacl-aidc.org/irish-unification>. Oran Doyle in his introduction to this symposium captures the dominant mood in the conversation: ‘This symposium is predicated on the belief that if unification is to occur, issues should be explored in advance and voters should have a clear idea of what they are voting for.’

² See <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>.

³ See Dr Raymond Russell, *Election Report: Northern Ireland Assembly Election*, 2 March 2017 NIAR 20-172017 [http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2017-general/2217.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2017/general/2217.pdf); Dr Raymond Russell and Keara McKay, *Election Report: Westminster General Election*, 12 December 2019 NIAR 180-19, [http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2019-general/0719.pdf](http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2019/general/0719.pdf).

academics that may mean working in, and writing about, a community they are from and inhabit. Subject position thus becomes a relevant question when the linguistic and physical world in which legal scholarship takes place is disputed. Rather than ignore this, or pretend it is not there, it is better to acknowledge that people are not abstract entities removed from context, and to situate interventions in ways that are open about starting points and perspectives. In societies such as Northern Ireland it seems contradictory to defend the right of people to hold divergent views on the constitutional future while also suggesting that these be masked in the public sphere.

This chapter makes use of many of the dominant concepts and categories of law, and that approach has a definite outcome in terms of the language employed. The symbolism and practice of constitutional law within the UK remains, for reasons that are not hard to understand, dominated by default positions that favour ‘unionist’ symbolism and language. This means that legalism does not occupy a ‘neutral’ space. Courtesy and care suggest an awareness of that, and an appreciation of how concepts sound to different audiences. Academics are not removed from ‘the people’, and are often part of the public conversation. In Northern Ireland, for example, it is instructive to observe what is labelled ‘neutral’, and what is judged to be contentious or divisive in the field of constitutional law and politics. The experience of teaching constitutional law in Belfast over many years has been telling, and reflective educational practice requires noting how alienating the language of British constitutionalism can be to those who experience the mismatch between communal identity and legal culture. As in any contested space, where you start and stand will determine how the constitutional world is seen and how engagement takes place. The problematic aspect of all this in Northern Ireland, where even the name of the region is politically disputed, is how to encourage inclusive dialogue and interventions that are sensitive to these nuances without descending into bland binaries.

This points to a tension woven through the current arrangements, which has an impact on legal scholarship. On one reading of the 1998 Agreement, and what has followed, there is supposed to be ‘parity of esteem’ and equal treatment between the two main ethno-national communities. Both constitutional options are meant to be recognised as equally legitimate, with people able to identify as they wish, and work freely for their preferred outcomes. A close reading of the constitutional provisions suggests that ‘parity of esteem’ should be much more of a feature of life in Northern Ireland than it currently is.

Another reading is that Northern Ireland is part of the UK and its legal order, and should function as such until that position formally changes, with a minimalist approach to any accommodations provided for in the 1998 Agreement. This is often fought out in the public sphere on matters of cultural expression and symbols in particular.

In this chapter, the aim is simply to acknowledge that this tension exists, and the impact it has for those contributing to this conversation. There are too many examples of existing literature that simply glides over problems that legal scholarship evades by adherence to more doctrinal approaches that neglect the wider political context.

British-Irish Constitutional Contexts

The 1998 Agreement, and subsequent agreements, frame much of the discussion of context, and this would historically have included common membership of the EU. Brexit has altered that picture significantly, with much more emphasis now on post-Brexit architecture, bilateralism and other intergovernmental bodies. Because of the ethno-national nature of the conflict in and about Northern Ireland, the 1998 Agreement could never simply be an internal ‘settlement’ within established constitutional boundaries. There is a strong commitment reflected in it to forms of relational thinking across these islands that owes something to the

EU, but also the extended history of bilateral co-operation. And in that sense, it anticipated more pluralist understandings of constitutional relationships that began to emerge later. It also raises hard questions about how ‘popular sovereignty’ unfolds in such complex contexts.

Two things are worth noting at this stage, when thinking about context. First, the 1998 Agreement resulted in the creation of institutional connections across these islands. The North-South Ministerial Council on the island of Ireland provides a focus for intergovernmental relations in specific areas between the Northern Ireland Executive and the Irish Government.⁴ The British-Irish Council is a forum for discussion among democratic institutions across the islands.⁵ British-Irish bilateralism is enabled and facilitated through the British-Irish Intergovernmental Conference. The 1998 Agreement therefore laid out an institutional basis for encouraging ongoing political relationships

Second, ‘consent’ has several meanings within the 1998 Agreement. The main function of the term, when deployed as the ‘principle of consent’, is to signal the dispute over constitutional status, and the position that the status quo rests on majority support. The route to testing this is via a referendum in Northern Ireland (and concurrent consent in the south). There are, however, other understandings of the term for different purposes, and there was often considerable confusion in its usage during the Brexit debates. For example, the power-sharing nature of the governing institutions in Northern Ireland embrace notions of cross-community consent. This is evident in the Assembly when a cross-community vote takes place. Here the method of establishing ‘consent’ is through a mechanism that effectively offers a community veto.⁶ A further way that the notion of ‘consent’ is used is through the operation of the British constitution’s attempt to accommodate devolution. Here the idea is that although the Westminster Parliament remains ‘supreme’, as a matter of constitutional convention it will not normally legislate in areas of devolved competence without consent.

The difficulty is that the different understandings can be confused, only one of the above embraces a vote by ‘the people’, the other two connect to votes in the Northern Ireland Assembly. The ‘principle of consent’, as used here, refers exclusively to the idea of possible Irish reunification.

The ‘Principle of Consent’/The Right of Self-Determination

The constitutional compromise at the heart of the 1998 Agreement is intended to anchor the status of Northern Ireland on majority support. The formulation is more complex than this simple statement suggests, and there will be more than one referendum, but this ‘sub-national’ level decision will in effect determine what happens on the island of Ireland - there is a ‘northern lock’ on reunification (a ‘southern lock’ too, of course). It is a position reached in a multi-party negotiation that is underpinned by international law and reflected in the domestic legal systems of both states. It has also gained recognition in the Brexit negotiations, with reference to the 1998 Agreement included in the Ireland/Northern Ireland Protocol.⁷

Who are ‘the People’?

What are the relevant provisions of the 1998 Agreement? The overriding status of the Agreement in this constitutional conversation means that it is worth spending time on the precise language used, as this will frame the practical discussion of how this process is taken

⁴ See <https://www.northsouthministerialcouncil.org>.

⁵ See <https://www.britishirishcouncil.org>.

⁶ See Northern Ireland Act 1998, s 4(5).

⁷ See, for example, article 2(1), https://ec.europa.eu/commission/publications/revised-protocol-ireland-and-northern-ireland-included-withdrawal-agreement_en.

forward. In what is essentially a compromise between competing positions on the future, a formulation was adopted that does not resolve the central dilemma or reach a final settlement, but leaves it open.

In a section entitled ‘Constitutional Issues’ the ‘participants in the multi-party negotiations’ endorse the commitment by both governments in the British-Irish Agreement to:

- (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland ...

This rests the status of Northern Ireland on a vote by a majority of ‘the people’. Notable here is that the British-Irish Agreement includes a definition of ‘the people of Northern Ireland’ for the express purposes of the birth right guarantee, but not the other provisions, including this one.⁸ The ‘people’ as a concept here is therefore not defined. The choice is between support for the Union with Britain or a united Ireland; these are the only two options on offer.

Questions have arisen over the meaning of ‘a majority’. Is this, for example, 50+1 or should some special rule apply?⁹ The underlying concern that appears to motivate the question is the potential impact of a narrow win for advocates of Irish reunification. Despite the framing within the context of the 1998 Agreement, with its insistence on peaceful and democratic means only, the fear is the threat of violence, in particular from unionist/loyalist armed groups dissatisfied with the outcome. Given the history of Northern Ireland this is not an imaginary worry. However, there are alternative ways of addressing this anxiety other than changing the voting rules. It would be helpful, for example, if as much agreement as is possible is forged around the process leading to the referendums taking place, and detail provided on the implications. This includes on matters of voting rights, the question itself and the consequences of the vote. The suggestion of a vote that is then followed by elite-led negotiation is potentially problematic. That level of civic disengagement, combined with uncertainty, would be unwise and is likely to increase levels of anxiety around these votes. If read in this spirit, there is no need for either side in this debate to defer mutual respect and accommodation to some future date. A strong guide to the future is the action that is taken now. This could, for example, be combined with the required assurances that whoever ‘wins’ there will be no diminution in existing protections and guarantees.

Another question that arises is: who will be entitled to vote? As noted, there is a definition of ‘the people’ for a limited and specific purpose, but this does not apply to voter eligibility in this referendum. That means that the question remains open, and although the 1998 Act provides that this is a matter for the Secretary of State, it will be intriguing to see how this is eventually taken forward. So, in significant senses the concept of the ‘people’ for these purposes is undetermined. Although a guide may be found in previous referendums that does not provide a definitive answer in this context. For example, should the approach to the Brexit referendum be adopted or the process used in the Scottish independence referendum? It should be recalled that in the Scottish independence referendum 16 and 17-year olds and EU citizens could, for example, vote. Given the impact of the outcome on everyone living in

⁸ British-Irish Agreement Annex 2: ‘The British and Irish Governments declare that it is their joint understanding that the term “the people of Northern Ireland” in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.’

⁹ The suggestion was made by the late Seamus Mallon that the 50+1 approach would not be appropriate, see Seamus Mallon (with Andy Pollak), *A Shared Home Place* (2019, The Lilliput Press Ltd). This was rejected by, among others, Gerry Adams, see ‘The Numbers Game’ <http://leargas.blogspot.com/2019/05/the-numbers-game.html>.

Northern Ireland, including future generations, there is a strong case for a generous and inclusive franchise.

Concurrent Consent

This process will not simply involve a referendum in Northern Ireland only.

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland ...

Here reference moves to the 'people of the island', and the recognition that it is their right of self-determination that will determine whether there is a united Ireland, subject to a Northern Ireland consent lock. There is acceptance that this will be of the 'two parts' of the island, and thus two jurisdictions, and the fact that consent must be 'freely and concurrently given' by 'the people'. It is plain that there will be more than one referendum. Following on from the approach adopted to the 1998 Agreement, and in the spirit of this provision, this strongly suggests referendums *on the same date* - it is hard to read the paragraph in any other way (although other interpretations are theoretically possible). If the right of self-determination really does belong to the people of the island of Ireland then it should be exercised together, respecting the fact that there are distinctive jurisdictions with associated constitutional differences and always subject to the 'northern lock'. No definition is provided for 'people' in this context either, but it is notable that, for example, voter eligibility for Irish referendums is already well-established, which may raise questions about reciprocity and differences in the relevant franchises.

The Equal Legitimacy of Constitutional Aspirations

The 1998 Agreement is an 'agreement to disagree', but to nonetheless attempt to work together within power-sharing arrangements. One basis for this is the acceptance that seeking constitutional change by peaceful and democratic means is entirely legitimate: they are not in opposition. The participants therefore:

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people ...

This provides a statement of the basis for the constitutional status quo. The paragraph contains, as does the 1998 Agreement as a whole, an indication of something that is easily missed, but is significant in the context of Northern Ireland's contested public sphere. The desire to achieve Irish reunification is 'legitimate'. Equally it is noted that the 'present wish' is to retain the Union with Britain, and that is what maintains Northern Ireland's current status. There is agreement that change without such consent would be 'wrong'.

Despite the fine words in the 1998 Agreement it is not apparent that the legitimacy of open support for constitutional change has achieved this level of universal recognition within Northern Ireland or the island of Ireland. This is often evident in the response to anyone who raises serious questions about Irish unity in the public sphere.

Voting for a United Ireland

What happens if people vote for a united Ireland?

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish ...

This paragraph addresses the question of what happens if ‘the people’ do vote for constitutional change. There is agreement that there is a ‘binding obligation’ on both governments to take this forward and to ‘give effect’ to the outcome. This obligation in international law will unfold differently in the distinctive constitutional contexts of the UK and Ireland. Both are dualist states and, for example, there is no guarantee in the UK that what the Government wants to achieve always happens domestically.

There is also nothing here about what the content of that legislation might be. Again, and as argued elsewhere in this chapter, if the referendums are to be informed and evidence based, then there are good reasons to ensure as much planning is done in advance as possible. As a matter of principle, and learning the lessons from the Brexit experience in the UK, those voting in these referendums should have a clear idea what they are voting for or against. Advocates of either constitutional outcome have the principal responsibility for articulating the case, but the proposals will have to be achievable and deliverable, with relevant governmental ‘buy in’. The gaps and silences will need to be filled in, and major questions surround how any transition would be managed.

Some of the more intriguing debates, as noted further below, will be how transformative any change might be. To put this simply: would a united Ireland mean little more than a ‘sovereignty switch’ with relevant minor adjustments made within existing Irish constitutional parameters, or would this be an opportunity for a constitutional ‘fresh start’? The answer to some of this is already available.¹⁰ Richard Humphreys, for example, makes the case for the continuity of the 1998 Agreement framework and notes the following:

The pinch points of the Agreement for nationalism include the permanent nature of the 6-county entity within either a united Ireland or the United Kingdom, and the permanent nature of the Northern Irish Assembly and executive ... under the Agreement they are in perpetuity, unless the UK government were hypothetically to agree otherwise in an amending treaty.¹¹

One of the more intriguing questions will be how widespread the desire is to maintain the existing framework. Should it be assumed, for example, that unionists will be content for the Northern Ireland power-sharing institutions to continue in their current form?

Rigorous Impartiality

¹⁰ See Richard Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (2018, Merrion Press).

¹¹ *Ibid*, 238.

One reason the UK Government cannot simply act as if Northern Ireland is like any other part of the state is the obligation of ‘rigorous impartiality’. There is intended to be recognition of the ethno-national conflict between communities and an obligation to respond accordingly.

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities ...

The question arises of what happens in the present, and what are the obligations of the government with overall responsibility? The 1998 Agreement speaks to an idea that applies now and will apply in a united Ireland: the notion of ‘rigorous impartiality’. There is, in this concept, a recognition of existing diversity as well as a reference to human rights, non-discrimination, parity of esteem and equal treatment. This concept attracted surprisingly little interest until recently. It was raised, in particular, with respect to the implications of the ‘confidence and supply agreement’ between the Conservative Party and the Democratic Unionist Party (DUP) in 2017.¹² Like a number of core concepts from the Agreement, this has never been legislated for.

The Right to be British or Irish or Both

There is, as noted, acceptance that national aspirations in Northern Ireland are ‘equally legitimate’, in theory at least. This combines with a birth right guarantee.

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

This is a further attempt to acknowledge the ‘binational’ nature of Northern Ireland, through a birth right protection to be identified and accepted as British or Irish or both. Several questions have emerged. Does it mean simply a right to hold both or does this incorporate a right to either as well? The use of the term ‘be accepted’, along with ‘identify’ suggests something more than a purely abstract and symbolic cultural right. Although there is subsequent confirmation that dual nationality is recognised, it would be odd to read ‘accepted’ in a way that did not include citizenship. Therefore it is entirely appropriate to read this as including a right to hold either citizenship and thus not to have one nationality imposed.

¹² See <https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament>. For comment, Colin Harvey, ‘Northern Ireland and rigorous impartiality: untangling a constitutional mess’ (2017) <http://qppl.qub.ac.uk/ni-rigorous-impartiality/>.

There is an intense debate on this provision¹³, and that is likely to remain a live discussion in a future context where these guarantees would also depend not simply on the Irish state, but on a British system willing to offer citizenship to a significant number of relevant persons born in a part of Ireland indefinitely into the future. There would also be ongoing implications for the Irish Government, for example, if a person wished to identify and be accepted as British only in a reunified Ireland, a position that is complicated even further by Brexit, where British citizens are no longer EU citizens.

Changing the UK 'Constitution'

The 1998 Agreement included further details about what both governments would do, with a level of precision on what changes in their domestic legal systems would look like.¹⁴ In the UK, the draft clauses became section 1 and Schedule 1 of the Northern Ireland Act 1998.

1 Status of Northern Ireland.

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

This is both confirmation of the current constitutional position and incorporation, within the constraints of the British constitution, of the 'binding' international obligation in the British-Irish Agreement. The Secretary of State has the power to hold an initial poll at any time.¹⁵ There is a duty to do so 'if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'.¹⁶ Once this is triggered it cannot be repeated for another seven years.¹⁷ The Secretary of State is required to specify who is entitled to vote, and the question or questions to be asked.¹⁸ The Electoral Commission will have a role in potentially influencing the nature of the question, and the rules governing referendums in the UK will also shape the approach.¹⁹

The provisions of the Northern Ireland Act 1998 were considered by the Northern Ireland Court of Appeal in *Raymond McCord's Application: Border Poll*.²⁰ In particular, the question of whether the Secretary of State should publish a policy in order to provide more

¹³ Joint Committee on Justice and Equality debate, 4 Dec 2019, *Citizenship Rights and DeSouza Judgment: Discussion*, https://www.oireachtas.ie/en/debates/debate/joint_committee_on_justice_and_equality/2019-12-04/3/. See also, Alison Harvey, *A Legal Analysis of Incorporating Into UK Law the Birthright Commitment under the Belfast (Good Friday) Agreement 1998* (2020, Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission).

¹⁴ Constitutional Issues, Annex A.

¹⁵ Northern Ireland Act 1998 sch 1, para 1. See s 96(2) on orders under this Schedule (the affirmative procedure will be used).

¹⁶ Northern Ireland Act 1998 sch 1, para 2.

¹⁷ Northern Ireland Act 1998 sch 1, para 3.

¹⁸ Northern Ireland Act 1998 sch 1, para 4(1).

¹⁹ Political Parties, Elections and Referendums Act 2000, Part VII Referendums.

²⁰ *Re McCord* [2020] NICA 23.

certainty, and in the interests of transparency. The application was dismissed at first instance in a judgment that provided a detailed exploration of the provisions²¹, and the appeal suffered a similar fate. It is plain that there is no legal obligation to publish a policy, however, the judgment provides useful clarification of key points.

Stephens LJ, delivering the judgment for the Court²², emphasised the need for flexibility in the interpretation of the relevant provisions, and noted the role of the British-Irish Agreement as an interpretative aid.²³ Constitutional value is attached in the judgment to flexibility and power-sharing participation.

The respondent might form the view that such a process together with the publication of such a policy would be highly contentious disrupting the value of participation by the unionist and nationalist communities in shared political institutions. If that was so then in addition to contravention of the value of flexibility a policy would be contrary to the value of participation underpinning the constitutional arrangements for Northern Ireland set out in the NIA.²⁴

Although the language here is tentative, the judgment thus frames the discussion as ‘contentious’ in a way that risks constructing it as in opposition to the 1998 Agreement’s understanding of power-sharing. In reality these processes are intended to be complementary and interlocking.

It is, however, plain that the Court of Appeal favoured the retention of flexibility given the complexities involved.²⁵ The fact that the Secretary of State and the Westminster Parliament are so central to the process provided further evidence for the Court of ‘the essentially political and democratic decisions to be made under paragraphs 1 and 2’.²⁶ On the matters of who can vote²⁷ and the question or questions, the Court observes how extensive the discretion is, but indicates:

We consider that these powers in paragraph 4 must be exercised honestly in the public interest with rigorous impartiality in the context that it is for the people of Ireland alone to exercise their right of self-determination.²⁸

²¹ *Re McCord* [2018] NIQB 106. For comment see Mark Bassett and Colin Harvey, *The Future of Our Shared Island: A Paper on the Logistical and Legal Questions Surrounding Referendums on Irish Unity* (2019) https://pureadmin.qub.ac.uk/ws/portalfiles/portal/165227852/Our_Shared_Island_A_Paper_on_Unity_CCG_2019.pdf.

²² The other judges were: Treacy LJ and Colton J.

²³ Paras 47-51.

²⁴ Para 51.

²⁵ Stephens LJ (para 57): ‘Thus the need for flexibility rather than consistency.’

²⁶ Para 63: ‘Political in the sense that a decision having been made by the respondent, a politician it has to be positively endorsed by other politicians in both Houses of Parliament. Democratic in that the process of laying the draft before both Houses of Parliament ensures that the order is overseen by political representatives.’

²⁷ Note this at para 100: ‘We add that a decision as to who should vote is also a political judgment as to what is acceptable or appropriate in our community. That involves political judgment in the context of differing and unpredictable events. An instance is in relation to lowering the voting age to 16 as in the Scottish referendum. We accept that this may have a considerable impact on the outcome of a border poll. The present voting age in Northern Ireland is 18. However, there may be a changing consensus in the island of Ireland as to the appropriate voting age which would form a component of determining what voting age was in the public interest in relation to a border poll.’

²⁸ Para 67.

The unqualified nature of the discretion in paragraph 1 is noted, with an emphasis on ‘honesty’ and the ‘public interest’.²⁹ What is the ‘public interest’ for these purposes? The Court indicates that again the British-Irish Agreement is an aid to interpretation, and here the concept of ‘rigorous impartiality’, and the provisions on the right of self-determination, are held to be of value. So, a decision to trigger a poll under this paragraph should be guided by the ‘public interest’ and informed as above.

Paragraph 2 is different. This places a *duty* on the Secretary of State, and the key question here includes the relevant circumstances when this will arise. What evidence, for example, might lead him/her to reach this conclusion? Again, the Court viewed this as a ‘political judgment’ and ‘not a simple empirical judgment driven solely by opinion poll evidence’.³⁰ So, what might be taken into account in forming this political judgment?

The judgment depends on what are the prevailing circumstances at any given time. For instance a likely outcome may involve an evaluation as to whether there are other factors which will impact on voting intentions crossing traditional party or perceived religious lines and if so as to their impact. Instances of such factors are changes in social attitudes North and South, relative economic prosperity North and South, the taxation structures North and South, the outcome of Brexit and the nature of future trading relations between both parts of Ireland which in turn depends on any agreement between the United Kingdom and the European Union.³¹

This case pivoted on questions about what the British Government is *legally* compelled to do; this is distinctive from the discussion about what would be wise in political and policy terms. Although much is left to the Secretary of State, it will be essential that sufficient consensus is constructed around this process. In particular, the sense that the ‘Westminster effect’ will need to be countered as much as possible by prior agreement and dialogue with the Irish Government, political parties and civil society.

This will be another moment in the UK when popular sovereignty and parliamentary supremacy meet again, in the context of votes on the island of Ireland. The indication from recent referendums is that there is little chance of the ‘losing side’ abandoning its position, and every suggestion that attempts might be made to achieve existing objectives during the implementation process. This is likely to become challenging if there is a vote for reunification, when the role of Westminster may become significant again. That may, for example, suggest the need for discussion, and even endorsement, of the terms by the Westminster Parliament prior to the referendums being held.³² As with the debates over the implementation of Brexit, much will depend on the precise political dynamics, and whether the British Government is able and willing to deliver what has been agreed. If there is a vote to retain the Union with Britain there will be at least a seven-year delay before another one. This may become complicated if it is particularly close in Northern Ireland. Although there has been much debate over a slim victory for advocates of reunification, there has been less consideration of the impact if it is the other way around.

Changing the Irish Constitution

²⁹ Paras 68-71.

³⁰ Para 80. ‘It is also not a simple judgment based purely on perceived religion.’

³¹ Para 80.

³² Thanks to Professor Colm O’Cinneide for noting this option.

The 1998 Agreement also included proposed changes to the Irish Constitution.³³ These provided that the state could consent to be bound by the British-Irish Agreement, and included constitutional amendments. As is required in Ireland, a referendum was held (concurrent referendums on 22 May 1998) to approve these changes.³⁴ The key elements are the new versions of articles 2 and 3, and for the purposes of this chapter, article 3.1 in particular:

It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

This provides constitutional recognition of the ‘firm will of the Irish nation’ to achieve, through peaceful means, the unity of people and territory, as well as endorsement of the principle of consent.³⁵ Although the language is new the sense of an ‘imperative’ remains. There is a well-established process for holding constitutional referendums in Ireland, with voting rights already clear.³⁶ A Bill that includes the proposed amendment must be introduced and passed before it is put to a referendum. It is likely, for example, that a Referendum Commission will be established for purposes of providing clarity and raising awareness.³⁷ This will also raise questions about North-South co-operation between the respective commissions. If the proposal is approved by the people it is then signed into law by the President. The process is therefore already known, and that includes who is entitled to vote.³⁸ If this route is followed, and the votes are held concurrently, then this approach would again mean the detailed arrangements must be worked out in advance.

The current Irish Constitution anticipates reunification in several places, including the Preamble and article 3. Article 15.2.2 provides that law may be made for the ‘creation or recognition of subordinate legislatures and for the powers and functions of these legislatures’.³⁹ This opens space, for example, for the recognition by law of a legislature in Northern Ireland, and thus a form of devolution of power within the state. It would be possible for a substantial amount of continuity, particularly if this is framed by a desire to retain most of the key features of the 1998 Agreement. But that will also herald changes to ensure that the Irish Constitution fully respects guarantees on matters of rights, identity and culture in particular. For example, those who wish to identify and be accepted as British only will need to be formally accommodated within the new constitutional arrangements. There is, again, merit in ensuring that this is clarified in advance and would form part of the case being made for mutual respect in a reunified Ireland. This is likely to be the central debate in Ireland: to what extent should

³³ Constitutional Issues, Annex B.

³⁴ See Nineteenth Amendment of the Constitution Act, 1998.

³⁵ See Richard Humphreys above n 10, 189.

³⁶ See the Constitution of Ireland articles 46 and 47.

³⁷ See Referendum Acts 1998 and 2001. It is worth noting that the Irish Government has committed to the establishment of an Electoral Commission, see Theresa Reidy and David Farrell, ‘Government needs to act on promise of electoral commission’, <https://www.irishtimes.com/opinion/government-needs-to-act-on-promise-of-electoral-commission-1.4325920>.

³⁸ A matter that raises its own questions. British citizens resident in Ireland (if they are not also Irish citizens) will not be entitled to vote in this referendum.

³⁹ Oran Doyle has noted that this refers only to legislatures, see Doyle above n 1.

Irish reunification be transformative? Should the existing constitution be amended or is a more fundamental conversation required on a ‘new constitution’?⁴⁰

Where Next?

What is the way forward for this discussion? The proliferation of interest suggests that this is a debate with traction, and one that is being propelled forward by the unpredictable political dynamics that Brexit has unleashed. Although discussions about constitutional change in Ireland are not new, the UK’s departure from the EU in such a contentious way opens up novel dimensions. One jurisdiction is out of the EU, the other is in, and so any future discussion of Irish reunification will embrace the implications. This means that EU institutions and member states will also have an interest in the outcome, simply because it will have consequences for them. In considering what might happen next two themes are noted here: intergovernmental co-operation/civic dialogue; and the question of continuity/transformation.

The Role of Intergovernmental Co-operation and Civic Dialogue

Although there is a focus on the role of Secretary of State in the process of triggering a ‘border poll’, this flows from an agreement that was itself based on cross-party and intergovernmental dialogue. It was also endorsed on the island of Ireland, and it is a document that underlines that the right of self-determination belongs to the people of the island. In practice these referendums will likely be preceded by intergovernmental dialogue and agreement, in a process that may have similarities to that which resulted in the 1998 Agreement. Various suggestions have emerged around the preparations that are required, particularly from those who are open advocates for constitutional change in Ireland. One idea is the creation of an all-island Citizens’ Assembly to discuss and debate the options.⁴¹ Other proposals include government-level preparation⁴² as well as work within the Oireachtas.⁴³ The institutions of the 1998 Agreement

⁴⁰ See, for example, the suggestion from An Taoiseach Leo Varadkar that a ‘new constitution’ would be required: <https://www.irishtimes.com/news/politics/a-united-ireland-would-be-a-different-state-leo-varadkar-warns-1.3978985>.

⁴¹ See, for example, the proposal by Ireland’s Future for the establishment of a Citizens’ Assembly, ‘A new Ireland? 1,000 leading people call on Varadkar to lead change’ <https://www.irishtimes.com/news/ireland/irish-news/a-new-ireland-1-000-leading-people-call-on-varadkar-to-lead-change-1.4071063>.

⁴² See Brendan O’Leary, *A Treatise on Northern Ireland, Volume III: Consociation and Confederation - From Antagonism to Accommodation?* (2019, OUP) xvi: ‘A new ministry for Irish national reunification and reconciliation would not be premature. Its first planning agenda should include a long constitutional convention to address the new institutional configurations, territorial order, and protections of minority rights that would be required to make a success of reunification, and how Northerners could participate in the remaking of the island.’ Also, Colin Harvey, ‘Taking the future of our shared island seriously: a growing conversation’ (2020) <https://www.thedetail.tv/articles/taking-the-future-of-our-shared-island-seriously>: ‘Those who take their responsibilities within the Irish state seriously will know that Ireland cannot stand by and watch this unfold without extensive preparation. This island is heading towards these referendums.’ Although keen to separate the discussions from any explicit constitutional change agenda, there would appear to be growing recognition in Ireland of the need for planning. See, for example, the reference to a Shared Island Unit in the Programme for Government <https://static.rasset.ie/documents/news/2020/06/programmeforgovernment-june2020-final.pdf>. The change of language from ‘United Island’ in an initial draft to ‘Shared Island’ Unit may, however, be instructive.

⁴³ For example, the Sinn Féin election manifesto in 2020 proposed a Joint Oireachtas Committee on Irish Unity https://www.sinnfein.ie/files/2020/SF_GE2020_Manifesto.pdf. Note that the Joint Committee on the Implementation of the Good Friday Agreement published a report in 2017 on *Brexit and the Future of Ireland: Uniting Ireland & Its People in Peace & Prosperity* https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_the_implementation_of_the_good_friday_agreement/reports/2017/2017-08-02_brexit-and-the-future-of-ireland-uniting-ireland-and-its-people-in-peace-and-prosperity_en.pdf.

also offer a forum for dialogue, including the North-South Ministerial Council and the British-Irish Intergovernmental Conference, and the mechanisms of the EU-UK Withdrawal Agreement could be a vehicle for conversations that involve the EU.

This is now where the debate must move. There has always been a need to normalise this aspect of the 1998 Agreement, and thus avoid the unhelpful tendency to view it as divisive or contentious. In a significant sense, it is the constitutional ground on which the entire edifice of post-1998 politics in Northern Ireland stands. The better way forward is to work on the required planning and preparation so that the process is managed effectively, and there is as much clarity as is possible on what people are voting for or against. This need not mean that everything is comprehensively resolved in advance, but it would be irresponsible to conduct ‘in principle’ referendums on the island of Ireland on the simple question of a united Ireland or maintaining the Union with Britain.

The challenging aspect to this notion of advance preparation will be what happens if key participants are unwilling to engage before these votes take place? Might the British Government, for example, decide not to clarify what commitments it will undertake in the event of a vote for change? How likely is it that unionists will take part in these constitutional conversations? That is why intergovernmental co-operation and civic dialogue based on mutual respect will be central to any such process. However hard it may be to achieve, there must be clarity in advance from both states on what the outcome will mean.

Continuity, Transformation and a ‘New Ireland’

A tension rests at the core of the discussion about possible Irish reunification, and the nature of what will emerge. Because so much attention is often focused on the process leading to the referendums taking place, there is a tendency to neglect how likely it is that people will agree about what happens next. Even where political and civic participants might share the desire for a ‘new Ireland’, there will be differing views about what that will mean. On one reading, the ‘logic’ of the 1998 Agreement is to defuse the ‘existential’ nature of the choice by focusing on relationships, principles and values that will in all likelihood continue. This, however, may lead to friction for those who view this as a transformative conversation, with much more radical implications for the sort of ‘new Ireland’ that should emerge. Will this be, for example, a unitary state or a federal or confederal model, and what will the substantive content of any approach that is adopted be?⁴⁴ Will there be a new constitution or will the existing arrangements be amended? To what extent will obligations on human rights and equality be respected and how will identities be accommodated?⁴⁵ Any assumption that those supportive of Irish reunification will share a common manifesto may be optimistic, and will again complicate attempts to provide clarity in advance. That is why civic initiatives and dialogue will assume such a significant role in giving shape to the proposals.

Conclusion

The 1998 Agreement deals with a dispute over ethno-national identity by leaving the decision on self-determination to the ‘people’ of the island of Ireland through a process of concurrent consent, while also giving the British Government a key role. It means that the constitutional status of Northern Ireland rests on the ‘principle of consent’. As a matter of international law, votes for Irish reunification are intended to create a binding obligation on both governments to

⁴⁴ See the options noted in the New Ireland Forum Report 1984 <https://cain.ulster.ac.uk/issues/politics/nifr.htm>. Also, Brendan O’Leary above n 41, 312-324.

⁴⁵ See Colin Harvey’s contribution to the IACL-AIDC *Symposium on Constitutional Dimensions of Irish Unification* (2020) above n 1.

give effect to this wish. In the British context this will again open up the relationship between popular sovereignty and parliamentary supremacy, as this desire and outcome works its way through the Westminster and Whitehall systems. For Ireland there will be fundamental choices to confront about the nature of what emerges, how it is structured and what accommodations are made for the new arrangement. Successive Irish governments have worked hard to keep the challenges of Northern Ireland detached and removed from the Irish state. The separation of the island, and the emergence of two jurisdictions, permitted both to side-step uncomfortable questions. Partition remains an extended exercise in constitutional avoidance; a position that looks increasingly difficult to maintain.