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Let ‘the People’ Decide: Reflections on Constitutional Change and ‘Concurrent Consent’¹

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ABSTRACT

The aim of this article is to examine the intensifying conversation about constitutional change on the island of Ireland. Discussions are prioritising the need for adequate planning and have therefore entered a new phase that is much more detailed. Myths are being interrogated and hard questions raised

¹ Read responses to this paper by Jennifer Kavanagh, *Irish Studies in International Affairs* (ARINS) 32 (2) (2021), <https://doi.org/10.3318/isia.2021.32b.39>; and by Colm O’Cinneide, <https://doi.org/10.3318/isia.2021.32b.40>

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about all aspects of the process. The objective here is to explore the reasons why this is the case and analyse the existing framework, with a particular focus on the requirement for ‘concurrent consent’. The argument aligns with those calling for extensive advance preparation to ensure people are aware of the consequences. That is not to insist on unrealistic conditions as a prerequisite, it is to ensure that what follows the referendums concerns primarily the implementation of known proposals.

INTRODUCTION

The growing interest in the prospects for constitutional change on the island of Ireland is remarkable. The proliferation of initiatives and new projects is evidence of a more sustained and detailed focus on the practicalities involved. What this collective effort is unearthing are the complexities and tensions, as this moves from a general to a more specific interrogation of questions of process and substance. Rather than view this exclusively as a spin-off from the periodic bouts of anxiety about the future of the Union, it is perhaps better seen as part of a much more determined post-Brexit desire to shift attention to the constitutional future of the island of Ireland. That is not to discount the dynamics of ‘these islands’, but the need for preparedness on ‘this island’ is being more widely understood and recognised. There is increasing acceptance that whatever view is taken of the outcome, this island needs to be better prepared for all future constitutional eventualities. One possible future looms large at present: the possibility of a united Ireland. This article concentrates on aspects of the process that will precede the votes; the main concern is not with the eventual shape that a united Ireland will take, although it is notable that discussion around that is becoming more intense.²

Much of the debate on Northern Ireland pivots on notions of consent and its various meanings. This is unsurprising in a region where constitutional status rests on majority support, and where a model of power-sharing government is in place. It is not difficult to understand why Brexit has caused problems and injected renewed vigour into a debate that had begun to fade

² See, for example, the following political contributions: Neale Richmond, TD, *Towards a new Ireland* <https://www.fine Gael.ie/app/uploads/2021/04/Towards-a-new-ireland-Neale-Richmond-2021.pdf>; Jim O’Callaghan, TD, *The political, economic and legal consequences of Irish reunification*, https://jimocallaghan.com/wp-content/uploads/2021/03/Jim_Speech_Irish_reunification_.pdf.

from view. Brexit was achieved against the wishes of a majority of those voting in the 2016 referendum in the region. One jurisdiction on the island of Ireland is outside the European Union (EU) and the other is inside it. Even though Northern Ireland has secured a novel ‘special arrangement’, in the form of the Ireland/Northern Ireland Protocol, this remains a striking outcome given the history of the peace process. That brings a unique and particular ‘island of Ireland’ context to the conversation.

This has altered the nature of the debate about the constitutional future at a time when the political dynamics of Northern Ireland, and the island, are changing. The last number of years have seen increasing calls for planning for referendums on constitutional change.³ There are now a range of voices in civil society, universities, and across the political parties, who recognise the need to do the required thinking in advance. This means that the conversations are becoming much more intense and detailed, with a significant expansion in available material, often stretching well beyond traditional formats. Complex and difficult questions will arise and will need to be debated and resolved. The aim here is to examine the context, framework, and generic themes in the debate. What will adequate preparation for the referendums on the island of Ireland look like and what will they involve?

WHY ARE PEOPLE TALKING ABOUT REUNIFICATION?

There are many contexts that could be examined to explain the acceleration of interest in Irish reunification. Before reflecting on the framework for the

³ For example, Ireland’s Future, *Advancing the Conversation: The Way Forward* (28 January 2021); and Ireland’s Future, *A Principled Framework for Change* (3 December 2020). These papers can be accessed here: <https://irelandsfuture.com/publications/>. See also, Brendan O’Leary, ‘Getting ready: the need to prepare for a referendum on reunification’ *Irish Studies in International Affairs: ARINS* 32 (2), 1–38: 1; Colin Harvey and Mark Bassett, *The EU and Irish Unity: Planning and Preparing for Constitutional Change in Ireland* (2019) <https://www.guengl.eu/issues/publications/the-eu-irish-unity/>; Colin Harvey, ‘Imagining a new Ireland’ *Fortnight* 50 479 (September 2020), 5–7; Colin Harvey, ‘Taking the future of our shared island seriously: a growing conversation’ (2020) <https://thedetail.tv/articles/taking-the-future-of-our-shared-island-seriously>; Colin Harvey, ‘Preparing for a return to the EU: unity as our way back?’ <https://eamonnmallie.com/2019/09/preparing-for-a-return-to-the-eu-unity-as-our-way-back-by-professor-colin-harvey/>; Colin Harvey, ‘A united Ireland: a hard border fix that dare not speak its name’ (2019) <https://www.rte.ie/brainstorm/2019/0124/1025317-a-united-ireland-a-hard-border-fix-that-dare-not-speak-its-name/>; Colin Harvey, ‘A new conversation about a united Ireland could be a win for all’ (2019) <https://www.rte.ie/brainstorm/2019/0327/1038871-a-new-conversation-about-a-united-ireland-could-be-a-win-for-all/>; Colin Harvey, ‘Sharing the island: a way forward?’ (2019) <https://eamonnmallie.com/2019/06/sharing-the-island-a-way-forward-by-professor-colin-harvey/>; Colin Harvey, ‘A unity referendum is not a silly idea’ (2017) <http://qppl.qub.ac.uk/irish-unity-referendum/>.

process, it is worth considering why this debate has intensified so rapidly. One glaring starting point is Brexit, the societal dynamics set in motion, and the opportunities thus presented for advocates of change. It would be surprising and odd if attention did not turn to alternatives to the current constitutional arrangements. The main themes have been rehearsed at extraordinary length. A majority of those voting in Northern Ireland voted against Brexit, but it proceeded as the democratic outcome of a UK-wide referendum.⁴ Scotland found itself in a similar position, with an even more significant percentage voting against.⁵ Two constituent parts of the UK disagreed with the changes being proposed, but this did not alter what followed. No amount of citing the UK-wide nature of the exercise was likely to assuage two distinctive jurisdictions that enjoyed substantial devolved power, one of which held a referendum on independence in 2014, while the other is a post-conflict society with a complex system of power-sharing government.

The challenge on the island of Ireland was particularly problematic. Northern Ireland is now outside of the EU, with many experiencing this as the symbolic repartition of Ireland. This has been mitigated, to some extent, by the adoption of the Protocol, as part of the Withdrawal Agreement, with the clear objective of protecting the Agreement, avoiding a hard border on the island of Ireland, and ensuring continuing north-south cooperation.⁶ But the Protocol has caused its own problems, with unionism/loyalism expressing profound unease with its implications and placing the demise of this legal instrument at the centre of its current political strategy.

References to the possibility of Irish reunification featured frequently during the Brexit debates, particularly when people were considering the implications of a 'no deal' outcome. At times it sounded like the deployment of rhetorical reference to constitutional change as an implied threat. Although it has been wrongly suggested that the Protocol puts Northern Ireland on a pathway towards a united Ireland, it is arguable that the principal motivating

⁴ European Union Referendum Act 2015 s 1(4) and (5). The question in the referendum was: 'Should the United Kingdom remain a member of the European Union or leave the European Union?' with the options being Remain or Leave, with provision for a Welsh language version of the question, s 1(6). For analysis of the implications for Northern Ireland see John Doyle and Eileen Connolly, 'Brexit and the Northern Ireland question' in Federico Fabbrini (ed), *The law and politics of Brexit* (Oxford, 2017), 139.

⁵ For the referendum results see Electoral Commission, 'Results and Turnout at the EU referendum', <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>.

⁶ Article 1(3): 'This Protocol sets out arrangements necessary to address the unique circumstances on the island of Ireland, to maintain the necessary conditions for continued North-South cooperation, to avoid a hard border and to protect the 1998 Agreement in all its dimensions.'

factor was in fact the precise opposite. The agenda of the Irish government was plainly not the achievement of constitutional change by stealth, and despite recent interventions⁷ it retains its overall reticence about this constitutional conversation. Any emergence of a 'hard border' on the island would have immediately placed referendums at the centre of the public debate. The Protocol is therefore best viewed as an exercise in further constitutional avoidance;⁸ the formal status of Northern Ireland within the UK remains unchanged.⁹ The 'special arrangement' is in place, at least in part, because the Irish government in particular had no wish to confront the logical corollary of the imposition of a 'hard border' on this island.

The pressure that emerged from the British government and unionist parties for democratic input into the operation of the Protocol ended with a consent mechanism designed to give the Northern Ireland Assembly a say over the continuation of the alignment provisions.¹⁰ These will be voted on by the Assembly in 2024, and if voted down (on a simple majority basis), a process commences to find a way to avoid the consequences the Protocol is there to prevent. This will once again raise an intriguing question: if the Assembly has this input, why should the people of Northern Ireland be denied a vote on the opportunity of return to the EU? Although there appears to be a reluctance to raise this option, it still looks like a fair question to ask; it will likely frame aspects of the debate in 2024 given the emerging political dynamics across the island. It remains puzzling that one obvious way to address the 'hard border' concern is not more openly acknowledged.

Another context to note is the general constitutional turbulence within the UK, also linked to Brexit.¹¹ This is most marked in the Scottish context, where there is significant evidence to suggest that the current constitutional arrangements may be entering their final phase. The notion that the UK is drawing to an end is regularly mooted, raising questions about what comes

⁷ See, for example, 'Speech from Tánaiste Leo Varadkar at the opening of the 2021 Fine Gael Ard Fheis', <https://www.finegaele.ie/speech-of-the-tanaiste-leo-varadkar-at-the-opening-of-the-2021-fine-gael-ard-fheis/>.

⁸ I use the term 'constitutional avoidance' here and elsewhere to refer to the tendency to ignore, neglect or displace the implications of the constitutional provisions of the Agreement that address reunification. In a jurisdiction where people opted for 'Remain', the fact that there is an automatic EU return option is notable and merits more scrutiny.

⁹ Article 1(1): 'This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.'

¹⁰ Article 18. And the relevant 'alignment provisions' are Articles 5–10.

¹¹ See Colm O'Cinneide, *The UK's post-Brexit 'constitutional unsettlement'* *VerfBlog* (2021), <https://verfassungsblog.de/the-uks-post-brexit-constitutional-unsettlement/>.

next.¹² Different things are often meant by this. For some this is about new constitutional configurations within the present Union, while others see this as the start of the emergence of a very different outcome, with ‘these islands’ constituted in the future by alternative arrangements, including a reunified Ireland. Much of this is not novel, and existential debates about the UK have been around for some time, but the intensity of recent years is new. What once seemed romantic and aspirational now appears realistic and feasible, with planning and preparation on a sustained and serious footing.

The overall context for the discussion, and the core premise of this article and related work, is that referendums on constitutional change are likely in the coming years. One focus will be on the possible outcomes, but concentrated effort on providing more clarity and certainty on the overarching process is also wise. This is particularly the case in Northern Ireland where conducting a referendum will present significant challenges at all stages. It will be essential that the process is managed responsibly by both governments and that international assistance is sought, where this is deemed necessary and appropriate. Prior and inclusive civic engagement across the island will also be essential. A starting point will be ensuring that the parameters are known and agreed well in advance, so that work can be done on developing concrete proposals. Constructing a process that is deemed fair and legitimate by both sides will require detailed thought and skilful management.

WHAT DOES THE EXISTING FRAMEWORK TELL US?

The Good Friday Agreement

Both the UK and Ireland exist in global, regional and domestic normative environments that will influence how these referendums, and any constitutional transition, are advanced. However, it is the Agreement that will dominate the discussions for all practical purposes, with competing claims over what it requires. The framework for the process is reasonably well established, but its

¹² See, for example, Mark Drakeford, the First Minister of Wales: ‘I think we are in trouble. To quote another Conservative Member of the Senedd, David Melding, what we have to do is recognise that the Union, as it is, is over. We have to create a new Union.’ Welsh Affairs Committee, Oral Evidence, 4 March 2021, <https://committees.parliament.uk/oralevidence/1824/pdf/>; Colum Eastwood, SDLP Leader: ‘I believe the union is ending but I don’t say that through thoughtless triumphalism. I understand that our scarred history places a solemn duty on all of us to conduct the coming conversation with patience, generosity and compassion.’ ‘The United Kingdom is coming to an end’, see: <https://www.derryjournal.com/news/politics/united-kingdom-coming-end-eastwood-3082170> (1 January 2021).

precise meaning will be subject to debate, including how this relates to referendum processes in both states.¹³ What is clear from the language used is that the focus is on popular sovereignty, and not necessarily on political institutions. It is striking how often ‘the people’ is deployed as a concept within the language of the current framework. But who are ‘the people’ for these purposes, how inclusively drawn will they really be, and what tensions might emerge?

The principle of consent and the right to self-determination vest authority in ‘people’, and it is hard to read, for example, the language of ‘concurrent consent’ as anything other than a direct reference to a joint exercise in popular sovereignty across the island. This also sheds light on the prohibition on any ‘external impediment’ that might stand in the way of the exercise of this right and the implementation of the outcome. The Agreement has core elements of British constitutionalism in its sights but has always, as a legal instrument, lacked the critical bite to do much about that.

There is a strong emphasis in the Agreement on equal treatment of the main constitutional positions, and although elements of this are yet to be fully reflected in domestic law, policy and practice in the UK, the concept will pose challenges for the British government and Westminster parliament.

The process is therefore set out in the Agreement, anchored as it is in international law (the British-Irish Agreement, a bilateral treaty), and given effect in the domestic constitutional legal orders of both states.¹⁴ Although there will be much scope for creativity and imagination, this is not, and cannot be, an entirely ‘blank page’ conversation. There are legal and political limits on what is possible and desirable. The British and Irish constitutional contexts differ, and these will be referendum processes that are distinctive given the differing jurisdictional contexts. But because the Agreement is the connecting factor, its normative qualities, and its formidable political legitimacy on the island of Ireland, and beyond, will in reality determine what happens. There is a political constitutionalism surrounding all of this that will offer forms of constraint that function beyond the purely legal and doctrinal. It would be hard to imagine any aspect of the process departing from the explicit provisions of

¹³ For analysis, see Colin Murray and Aoife O’Donoghue, ‘Life after Brexit: operationalising the Belfast/Good Friday Agreement’s principle of consent’, *Dublin University Law Journal* 42 (2019), 147–89. See also, Rory Montgomery, ‘What the Belfast Agreement says about a Border poll’, *Irish Times*, 8 May 2021.

¹⁴ The arguments around the approach to the British-Irish Agreement are thus framed by the Vienna Convention on the Law of Treaties 1969, including Article 31 (1): ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

the Agreement, even if this will, at times, provoke challenging questions for all sides. Those areas not explicitly covered will have to be addressed with a plausible and convincing Agreement-based rationale, drawing on the lessons learned thus far in the peace process.

Much of the current debate on process therefore flows from the text of the Agreement, and the discussion is likely to revolve around what it requires, so it is worth reflecting on the precise language used in the text. The Agreement contains a complex formula for addressing competing claims around self-determination and binds both governments as a matter of international law.¹⁵ Often neglected is the fact that this is as much about the rule of law as it is about honouring purely political agreements.

First, the constitutional status of Northern Ireland rests on the wishes of a majority of its people, and that fact is recognised and accepted by both governments.¹⁶ It is not located in any political institution, but in a choice to be made by the people of Northern Ireland in line with the self-determination mechanism in the Agreement.

Second, the right of self-determination belongs to the ‘people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment’.¹⁷ It is clear that the right resides again with ‘the people’ of the island, and the ‘northern lock’ is hardwired in, with recognition that these are two jurisdictions that must consent. Read in political and historical context, the reference to ‘external impediment’ is primarily addressed to the Westminster parliament.¹⁸

Third, this right will be exercised ‘on the basis of consent, freely and concurrently given’.¹⁹ A good faith reading of this language, viewed in the context of the Agreement, suggests that people should be permitted to vote at the same time on essentially the same basis, with due regard for the distinctiveness of the separate systems.²⁰ Consent will not be

¹⁵ Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland, *Irish Treaty Series* 2000 No 18, done at Belfast 10 April 1998, entered into force 2 December 1999.

¹⁶ Article 1(i) and Article 1(iii).

¹⁷ Article 1(ii).

¹⁸ See Colin Harvey and Mark Bassett, ‘Further responses to the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement’, 16 February 2021, https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_the_implementation_of_the_good_friday_agreement/submissions/2021/2021-02-16_correspondence-professor-colin-harvey-lecturer-school-of-law-queen-s-university-belfast_ga.pdf.

¹⁹ Article 1(ii).

²⁰ Mark Bassett and Colin Harvey, *The Future of Our Shared Island: A Paper on the Logistical and Legal Questions Surrounding Referendums on Irish Unity* (February 2019) https://pureadmin.qub.ac.uk/ws/portalfiles/portal/165227852/Our_Shared_Island_A_Paper_on_Unity_CCG_2019.pdf.

concurrent if the votes are held at different times, and this reading is in full accordance with the ordinary meaning of this term informed by the context. The right of self-determination for the people of the island is therefore constrained with a requirement for concurrent consent in both jurisdictions. The implication is that the focus should therefore be on advance planning in anticipation of those votes, with what follows the referendums an exercise in implementing the successful proposal. The relevant draft clauses and Articles were included in the Agreement and endorsed in concurrent referendums (22 May 1998), with the provisions then (largely) enacted in the Northern Ireland Act 1998²¹ and in amendments to Bunreacht na hÉireann.²²

Fourth, if people opt for a united Ireland on the basis set out in the Agreement, there is 'a binding obligation on both Governments to introduce and support in their respective parliaments legislation to give effect to that wish'.²³ Both governments are bound, as a matter of international law, to implement the outcome, but again this will be taken forward within the domestic legal contexts of both states with their own constitutional arrangements. There is no guarantee that what any British government proposes will be accepted in its entirety by the Westminster parliament. That includes, for example, the terms agreed between both governments, on which the Agreement has little to say beyond a number of future-facing guarantees. There is good reason to consider the role that the Westminster parliament will play in the event that both jurisdictions on the island of Ireland opt for change. The doctrine of parliamentary supremacy retains its grip, and there may be tensions over the details of any transfer of sovereignty. Thought could usefully be given to solutions that might attempt to give the existing international obligations more practical meaning.

Fifth, there is a broadly based obligation of 'rigorous impartiality' on the 'sovereign government' that encompasses respect for rights and 'parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities'.²⁴ This applies now to the British government and, if unamended, will apply to the Irish government in the future; it hints at the sorts of guarantees that must be carried forward into new arrangements.

²¹ Section 1 and Schedule 1.

²² Article 29(7) and Articles 2 and 3.

²³ Article 1(iv).

²⁴ Article 1(v).

This links also to the birth right guarantee,²⁵ which provides that the people of Northern Ireland²⁶ have a right:

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.²⁷

This is an obligation that both governments have undertaken in perpetuity. The matter of the grant of British citizenship is for the British government and parliament, as is the form it might take. Although it is a binding international obligation, it is vulnerable, as noted above, to the wishes of a future Westminster parliament and will depend on the continuing willingness to grant citizenship to those who will be born in a united Ireland. The questions that are raised by this are likely to be eased by the further consolidation of the Common Travel Area arrangements, additional enhancement of east-west relationships, and changes that will be required to Irish domestic law, policy and practice to ensure compliance with the Agreement.

Valuing flexibility

The Northern Ireland Act 1998 gave effect in domestic law in the UK to aspects of the Agreement, with the relevant provisions relating to self-determination contained in section 1 and schedule 1. The questions raised by these provisions were addressed by the Northern Ireland Court of Appeal in the *McCord* case.²⁸ Is the secretary of state under a legal duty to produce a policy outlining how he will approach the relevant legislative provisions? The short answer is ‘no’, and it is plain just how much flexibility the

²⁵ Article 1(vi).

²⁶ Which is defined for these specific purposes as follows in 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.”

²⁷ Article 1(vi).

²⁸ *McCord’s Application* [2020] NICA 23. On appeal from the first instance judgment of Sir Paul Girvan, *McCord’s Application* [2018] NIQB 106. Permission to appeal to the Supreme Court was refused.

secretary of state enjoys within the established British constitutional and public law framework.

The case highlights the basis of this process in the Agreement, the political nature of the judgement in its democratic setting,²⁹ the 'value of flexibility', and also suggests, unhelpfully (in my view), a tension between the 'value of participation' within the power-sharing institutions and the self-determination provisions. On the powers of the secretary of state, on matters such as the question to be asked and eligibility to vote, the breadth of the provisions is emphasised, but the following is notable:

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.³⁰

As this process develops, and given it is likely to be contested at every step, this will gain in significance. What does it mean for the powers to be exercised in a way that respects these principles?

The judgment provides a useful reminder that there are two distinctive elements to the role of the secretary of state in triggering the referendum in Northern Ireland. There is a general discretion to hold a poll at any time, which must be exercised honestly and based on a political judgement of whether this would be in the public interest.³¹ There needs to be wider awareness of this component of the legislation, which does not rely on evidence or information about current constitutional preferences. However unlikely it may seem, providing he/she acts in the way outlined in the Court of Appeal judgment, this step can be taken.³² It is a discretionary power that the secretary of state could decide to exercise, even in the absence of evidence that it 'appears likely' a majority of people will vote for a united Ireland. Might the secretary of state decide that it would be worth resolving

²⁹ *McCord's Application*, Stephens LJ at para 63: 'To our minds this emphasises the essentially political and democratic decisions to be made under paragraphs 1 and 2. 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.'

³⁰ Para 67.

³¹ Paras 70–71.

³² Para 72.

the constitutional question for now in the wider public interest, as a way to end ongoing contention?

Understandably, the focus is often on the *duty* to take this step. Much of the public debate revolves solely around opinion polling and current evidence of constitutional preferences. In what circumstances might the secretary of state be compelled to start the referendum process? The test centres on an ‘essentially political judgement’³³ by the secretary of state of ‘the prevailing circumstances at any given time’ and the relevant provision ‘is silent as to the sources of information which the respondent might rely upon’.³⁴ Again here, the court noted that he/she must act honestly and reiterated the place of the rigorous impartiality obligation and the nature of the right to self-determination.³⁵

The Court of Appeal judgment re-affirms that the commencement of the process is essentially a matter for the secretary of state and the Westminster parliament. But the emphasis on rigorous impartiality, the fact that the right belongs to the people of the island of Ireland, and the reality that this will take place within existing constitutional and public law contexts, should not be neglected. There will be domestic and international legal constraints on the secretary of state, but because of the nature of the UK’s constitutional legal order it is the former that will prove decisive. For example, what will respect for rigorous impartiality require in the approach to the referendum process, and what questions does this raise for the existing framework in the UK? When the Court of Appeal indicates that this right belongs to the people of the island of Ireland, what will this require of the secretary of state in precise (public law) terms? Will international input be necessary, and might bilateral mechanisms be needed to reassure those who will be mistrustful of the role of the British government and established UK institutions? These questions will be teased out politically and legally even further in the years ahead as planning for the concurrent referendums grapples with what is required and desirable.

³³ Para 80: ‘The political judgment as to the likely outcome of a border poll is not a simple empirical judgment driven solely by opinion poll evidence. It is also not a simple judgment based purely on perceived religion. The judgment depends on what are the prevailing circumstances at any given time.’ The case unearthed evidence about the thinking of the British government and Northern Ireland Office, and this author has been seeking further information directly from the secretary of state, see for example *Irish Times*, 13 January 2021, ‘British government declines to set out criteria for a Border poll’.

³⁴ Paras 79 and 80.

³⁵ Para 82.

WHAT ARE THE MAIN QUESTIONS AROUND THE CONCURRENT REFERENDUMS?

The aim in this section is to consider the referendum processes with reference to main themes only, and the further questions that are raised.³⁶ This is a contribution to an ongoing debate around how these referendums will be handled. Although this will all be assisted by civic engagement and academic studies, both governments have a significant role in framing the procedural parameters, guided in particular by what the Agreement requires. The starting point here is that the British and Irish governments must soon deal openly with the implications of managing this process in a tangible way through the existing mechanisms of cooperation and recognised means of mapping out agreed next steps. The relative absence of clarity and the current level of uncertainty are contributing to instability. The nervousness that surrounds both governments on this topic is misplaced and appears increasingly odd measured against, for example, the scale of civic dialogue and scholarly engagement. There are welcome and tentative signs that this may be changing.

Mainstreaming the constitutional conversation

What to some may seem obvious is not so straightforward to others. Although, as noted, the process is embedded within the Agreement, and is part of the constitutional orders of both states, establishing the legitimacy of the conversation can still be problematic. There is work to be done, even now, in ensuring that this is a mainstream aspect of constitutional debate across these islands, with recent evidence suggesting that this is slowly becoming the case. This goes beyond simply being permitted to talk about the questions in the open and in the abstract; if this is to become a serious planning exercise, it must form part of research programmes at all relevant levels, and it is an effort that governments must engage with. It has proven more difficult than it should be to gain acceptance for what is a core

³⁶ These matters have been examined in exhaustive detail by the UCL Working Group on Unification Referendums on the Island of Ireland, see: <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland>. As noted in the Group's Final Report, a wide range of academics and others have engaged in these reflections (p 48): 'Academics including Eilish Rooney have formed the Constitutional Conversations Group...In a paper for that group, Bassett and Harvey (2019) explored many of the procedural questions that we examine here, notably including the franchise in any referendums, the wording of the referendum question, and the referendum threshold.' These questions are also being addressed by the ARINS Project, see <https://www.ria.ie/arins>.

constitutional compromise contained within the Agreement. This has not been helped by the tendency to label the debate as ‘divisive’. It is essential, if these islands are going to be ready for the anticipated referendums, that the work is undertaken in a rigorous and coordinated way in advance. There is mounting evidence that this is accepted and is being addressed, particularly by universities and civil society.

The matter of coordination then becomes relevant, as the ad hoc and sporadic nature of the existing work proliferates. This suggests that a mapping exercise might be of value in anticipation of enhanced cooperation in order to be clear on the work that has been completed and what still needs to be clarified.³⁷ This reinforces the point that in order to enhance the legitimacy of this conversation even further both governments must become more centrally and openly involved. For example, the calls for the creation of an all-island Citizens’ Assembly, an Oireachtas Joint Committee, and the appointment of a dedicated minister in the Irish government all make good sense. The British political system could also do much more. The neglect of these matters at Westminster, including by relevant committees, remains striking.

UK constitutionalism and framing Northern Ireland

There is a continuing problem with the framing of the discussion in debates on UK constitutionalism in particular. The arrival of the Agreement should have injected a measure of novelty into standard accounts of British constitutionalism, but that never happened to the extent that might have been anticipated.³⁸ This is a peace and political agreement that has helped to bring an end to violent conflict, and which gained overwhelming support on the island of Ireland. But the absorption of Northern Ireland’s complex power-sharing arrangements into standard accounts of constitutional law and politics in the UK is often problematic, with practical implications. The Agreement should have had a more decisive impact, and this failure meant that many in Britain were ill-prepared for the central role the Agreement played in the Brexit negotiations. If there is going to be adequate planning for the referendum process, then there needs to be a deeper appreciation of the

³⁷ See, for example, proposals made to the Northern Ireland Assembly Committee for the Executive Office by Mark Bassett and Colin Harvey, 28 April 2021 available here: <http://data.niassembly.gov.uk/HansardXml/committee-26135.pdf>.

³⁸ Although the ‘constitutional’ nature of the arrangements did gain significant recognition in *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32.

nature of the Agreement and subsequent agreements, as well as a willingness to accord the associated normative commitments more domestic legal standing and practical significance.

There is an additional concern. The referendum in Northern Ireland will be taken forward via Westminster, and it is an open question how trusted an internal process will be. At key stages of the peace process there was a need for external intervention and assistance. There is considerable merit in building in international oversight to ensure that all communities are reassured and that all stages are subject to careful monitoring and assessment. This is something that could, for example, be addressed in a Joint Declaration by both governments, or a related agreement, setting out agreed parameters.

The right to self-determination/principle of consent

The right rests with the people of the island of Ireland, with the principle of consent woven into the process. As noted above, a good faith reading of the text of the Agreement, viewed in context, suggests simultaneous referendums.³⁹ The outcome will be settled on a 50%+1 vote in each jurisdiction. It is notable again that all elements of this right, including the 'northern lock' on the process, are anchored in notions of popular sovereignty; the right is not located in any institution. If this is to be undertaken in a way that respects the nature of the right, and the obligation of rigorous impartiality, then voters must be well informed in advance of the referendums about the practical consequences of either outcome. The proposals on both sides must therefore be as clear as possible before any vote is held. In addition to civic initiatives to assist the planning work, that will again require both governments to provide details of the implications of a vote either way.

This approach is countered by suggestions that key participants may not be willing to engage in this level of detail before the referendums. In this line of thought, it is not realistic to expect the British government and unionist parties, in particular, to engage in prior negotiation. The suggestion is that this will only happen after referendums that signal a desire for constitutional change. The problem with this thinking is that it is informed by assumptions about a communal veto either before or after the referendum process and is shaped by a privileging of elite-level negotiation. It also, in my view, absolves the British government of its responsibility to be rigorously impartial before

³⁹ See Ireland's Future, *Advancing the Conversation*, above note 3.

the referendums. An approach that truly respected the Agreement would see both governments spelling out, in significant detail, the consequences of a vote for a united Ireland and the precise dimensions of the managed transition. If the Agreement is to be honoured, then the British government cannot simply withhold such information from voters, and a communal hierarchy should not be erected to impede progress. Concurrent consent, north and south, is required and whatever pathway is found must respect principles of civic engagement and the unquestionable emphasis on popular sovereignty that runs through the current framework.

The ‘negotiation narrative’ seems to combine with the idea that there might even be two referendums in Northern Ireland. One ‘in principle’ vote followed by another ‘confirmatory vote’ on whatever is then agreed. The challenge that this idea faces is that it minimises any pressure on detailed advance work, arguably neglects what the Agreement requires of the British government, assumes British-Irish discussions cannot happen before the vote, and—from one perspective—hands opponents of constitutional change two chances to impede progress. While it is apparent that concurrent consent must result in Irish reunification, and therefore the injection of a novel ‘confirmatory vote’ cannot prevent this, it will simply incentivise elite-level advance disengagement and may make the task of those advocating change more difficult. Those campaigning in a referendum for change would do so without many deliverable details, which may only emerge after subsequent elite negotiation. That places one side at a considerable disadvantage from the beginning. The better approach is to consider the exercise of the right as part of an ‘implementation process’ based on known proposals that have been discussed during a referendum campaign and that have emerged from extensive all-island civic dialogue as well as political engagement. It should be recalled that many of the protective guarantees that will shape a united Ireland are already contained within the Agreement and in other binding obligations.

This is not to imply that referendums can be deferred indefinitely until everything is resolved in advance, as that would be unreasonable, unrealistic, and legally problematic. It is simply to suggest that proper preparation should be incentivised, and there must be a recognition that any new arrangements put in place for a united Ireland will themselves be subject to ongoing dialogue, discussion, debate, and possible revision. The better framework for this process, which respects the intrinsic nature of the right, is the implementation of the preferred outcome following concurrent referendums rather than the idea of subsequent elite-level negotiation, in particular. There is a real risk

of projecting current endemic dysfunction into what should be a constitutional conversation about a genuinely new and united Ireland.

Managing the process in Northern Ireland

The starting point will be governed by the Northern Ireland Act 1998, read in the light of the Agreement, and any agreements that have been reached by, for example, both governments prior to the vote being held. The existing or amended rules on referendums in the UK will determine core elements of the process, and it is worth noting that these are subject to ongoing discussion and debate.⁴⁰ Although as a matter of orthodox constitutional law the Westminster parliament could in theory legislate for alternative arrangements or substantially modify the approach anticipated in the Agreement, as a matter of constitutional politics this is unlikely, and it would be a fundamental breach of existing obligations. It would also lead to widespread international condemnation, as well as creating further difficulties in the EU-UK relationship. Whether parliament opts to reform the existing generic legislation for referendums is, however, another matter, and is an issue that should be monitored by those on the island of Ireland concerned about the potential implications for the exercise of the right to self-determination.

The process will formally be triggered by the secretary of state, and the implications of the *McCord* judgment have been discussed above. In reality it will not solely be in his/her hands, all the branches of government will be involved, including the Westminster parliament and perhaps the judiciary. Why? Because aspects of this process may end up in the courtroom. In fact, that is very likely. Also, the proposals will have to be approved by parliament. In Northern Ireland, the referendum will therefore be structured and take place within the established British constitutional tradition informed by the provisions of the Agreement and Northern Ireland Act 1998 and the law relating to referendums. As noted, the secretary of state and the Westminster parliament are central to the process, and much will depend on what they decide. It is notable, for example, that the current approach will rely on secondary legislation using the affirmative procedure at Westminster.⁴¹ Is this an appropriate way forward for such a significant

⁴⁰ See Political Parties, Elections and Referendums Act 2000. And for discussion of reform see Report of the Independent Commission on Referendums, <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/independent-commission-referendums> (2018) and UCL Working Group above note 36.

⁴¹ Northern Ireland Act 1998 s 96(2).

process? Is the existing legislation and framework a sufficient basis for a constitutional exercise of this magnitude? Again, as argued throughout this article, while there may be a temptation now to revisit aspects of what was agreed in 1998, this should be strongly resisted. The relevant sections of the Act largely mirror what was endorsed in the Agreement, and for reasons already noted, that is the approach that must be followed. The chances of legal challenges to the process are high, so there will be a focus, for example, on what has been taken into account by the secretary of state, the content of the proposals around voting, the question and other aspects of the process. Some of the principles noted in *McCord* will also feature in any litigation. The nature of the right and the obligation of rigorous impartiality will therefore be significant, and there will be an acute and heightened awareness of anything that appears to give either side an unjustifiable and unfair advantage. Considerable advance thought will need to be given by the secretary of state and others to design an approach that respects existing obligations and enjoys the confidence and legitimacy of participants. As noted, intergovernmental dialogue and discussion will also assist, as will forms of international oversight.

The Electoral Commission has a significant role in the UK, including with respect to referendums, and there has been an intensifying debate on referendum processes in general, connected to their increasing use and the lessons learned.⁴² The Commission's role includes giving direction on the nature of the question being asked, core aspects of the campaign, and the provision of guidance and relevant information, among other things.⁴³ Although there has been positive comment on the role and impact of the Commission, given the contested context for this process, questions will arise about its work and its composition. Is it likely to be regarded as legitimate and trustworthy by all communities in Northern Ireland, for example? The dynamics of Northern Ireland will test the adequacy of the current framework for referendums in the UK, with the detailed work of the Scottish parliament being of relevance in any future assessment and in ongoing reflections. However, no other UK jurisdiction matches the

⁴² On referendums see Report of the Independent Commission on Referendums above note 36; House of Lords Constitution Committee, *Referendums in the United Kingdom*, (2009/10, Twelfth Report) <https://publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/9902.htm>.

⁴³ For further information see: <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/what-we-do-referendums>. See the approach adopted in the Referendums (Scotland) Act 2020. Also note the work of the Electoral Office for Northern Ireland: <https://www.eoni.org.uk/Home>.

complexity of managing a referendum process in a post-conflict society such as Northern Ireland, and it is likely to benefit considerably from jointly agreed international oversight of the process. In many important ways it is simply unhelpful to view Northern Ireland through a purely internal UK devolution lens, and the text of the Agreement itself suggests that such an approach to the exercise of this right is inappropriate.

The scale, depth, and extent of the difficulties facing the referendum process in Northern Ireland require detailed and extensive advance planning and reflection. In my view, this casts serious doubt on any suggestion that there could be an ‘in principle’ referendum held on the constitutional question in the abstract. There is a real risk that such an approach will incentivise disengagement and neglect what the Agreement requires of the British government if it is to participate in a rigorously impartial way.

Both governments must be involved at an early stage in framing what follows. This will not simply be just another ‘internal UK referendum’, so any process will have to respect the Agreement’s provisions but also acknowledge its basic relational logic and the transitional post-conflict setting. Because of the pivotal nature of what will happen in Northern Ireland in particular, and the risks involved, extensive front-loading is required in a way that stands a chance of securing the trust of all communities. No process designed by humans will ever be perfect, and circumstances may overtake the most conscientious planners, but there is no excuse for avoiding doing the required homework first.

The referendum process in Ireland

The Irish legal system has a well-established tradition of constitutional referendums. This is unsurprising, as that is the way *Bunreacht na hÉireann* is amended.⁴⁴ The Irish Constitution can be amended by a simple majority of those eligible to vote in a referendum.⁴⁵ The proposal for amendment commences as a Bill in the Dáil and must pass both Houses of the Oireachtas.⁴⁶ The Referendum Commission established to manage the process has vital awareness raising and public education roles. However, this position will

⁴⁴ Articles 46–47. See also Referendum Act 1994 and the work of the Referendum Commission, <https://www.refcom.ie/>.

⁴⁵ Article 47.1.

⁴⁶ It cannot contain any other proposal, Article 46.4.

change as Ireland moves towards reform, with the promised creation of an Electoral Commission with roles including oversight and information sharing.⁴⁷ This new Commission, when operational, will therefore be the body that manages the process in Ireland. There are plainly opportunities for Ireland to learn from comparative experience in relation to such institutions, including the recent debates that have been happening in the UK and elsewhere around the regulation of referendum campaigns.⁴⁸ By the time the concurrent referendums are held, both the UK and Ireland will have electoral commissions, with further reform of the existing frameworks also likely to have taken place.

While aspects of the process in Ireland are settled, the challenging questions will include what precisely people are voting for. A model based on significant advance planning suggests that it would not simply be a vote for or against a united Ireland, but on a detailed proposal that might even embrace a new constitution.⁴⁹ There is considerable merit in ensuring that any such suggestions are fully informed by inclusive deliberative engagement across the island of Ireland.⁵⁰

Who will be eligible to vote?

Who ‘the people’ will be in Northern Ireland for voting purposes remains subject to debate.⁵¹ Will the approach simply follow an existing franchise or will there be recognition of the unique nature of the process, its impact on everyone in Northern Ireland, and therefore a more imaginative approach? What has been notable in Scotland, for example, is the extension of the franchise in recent years, with a strong focus on inclusion.⁵² Given the implications of this referendum for everyone there is a case for ensuring the franchise is as inclusive as possible; there is a long history, for example, of designing bespoke solutions for the region. If it does follow one of the existing approaches to elections in Northern Ireland, this will raise serious questions about whether those are currently adequate, and also why a ‘special

⁴⁷ *Programme for Government: Our Shared Future* 2020, 120, <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>. See also, ‘Ministers O’Brien and Noonan publish the General Scheme of the Electoral Reform Bill’ <https://www.gov.ie/en/press-release/0dfe8-ministers-obrien-and-noonan-publish-the-general-scheme-of-the-electoral-reform-bill/>.

⁴⁸ See above note 40.

⁴⁹ See further Bassett and Harvey above note 3.

⁵⁰ As proposed by, for example, Ireland’s Future above note 3.

⁵¹ See Christopher McCrudden, Oran Doyle and David Kenny, ‘The Franchise in Irish Unification Referendums’, *Irish Studies in International Affairs: ARINS* 32 (2) (2021), 183–213.

⁵² See, for example, the Referendums (Scotland) Act 2020 s 4.

arrangement' is not possible given the unique circumstances of the region.⁵³ If the franchise for Assembly elections is selected, then advance thought should be given to making that more inclusive in ways that reflect trends elsewhere in the UK, for example.

In Ireland, the position is already established: Irish citizens who are 18 or over and registered to vote.⁵⁴ The practical impact is that, without reform in Ireland, eligibility to vote will differ in both jurisdictions. The right to self-determination belongs to the 'people' of the island of Ireland but that term, if the current approach is followed, will have quite different jurisdictional meanings in each referendum. Therefore, the reality may be a long way from the inclusive language. The fairness of that position will be rightly questioned before the votes, but it will become unsustainable afterwards if the Irish state is to fulfil its obligations under the Agreement to ensure mutual respect and parity of esteem. In a united Ireland, the franchise for constitutional referendums could not be restricted in such a way if the Agreement is to be respected.

What will the question be?

The primary textual influence on the wording of the question asked in Northern Ireland will be, once again, the Agreement.⁵⁵ As indicated elsewhere, it would be hard to depart from the explicit language used there for legal and political reasons. It is also notable that although there is often negative reference to binary options, it is difficult to see how a basic and singular question can be avoided. The language of the Agreement might suggest a question as basic as: 'Do you support a united Ireland?'⁵⁶ There are only two options available: maintenance of the Union or a united Ireland. Repartition and an independent Northern Ireland are, for example, not relevant options for the purposes of the Agreement.

The position in Ireland, in terms of the question, should in principle be more straightforward, given the current and established approach. The complexity, as noted, will relate to what is in fact being proposed. Will the existing

⁵³ See information available here: <https://www.electoralcommission.org.uk/i-am-a/voter/which-elections-can-i-vote>.

⁵⁴ Article 47.3: 'Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at a Referendum.'

⁵⁵ See further Bassett and Harvey above note 3 pages 15–17.

⁵⁶ Such a wording presents the only available change option mandated in the Agreement. The question could, of course, also take other forms, including a remain or leave option.

Irish Constitution be updated to reflect the requirements of the Agreement, or will it be replaced? It is at least possible that the question posed may include reference to a proposed new constitution. One of the more intriguing aspects of the debate is how quickly many interventions have moved in this direction. The risk in such an approach, which must be considered, is that this level of detail might invite selective disapproval. Someone who, for example, might support a united Ireland as an overall goal could vote against it on the basis of an unappealing aspect of a proposed new constitution.⁵⁷ There is also the difficulty of ensuring that pro-Union perspectives on the island are heard and inform the design phase. Civic and political unionism will, quite understandably, be concentrating on making a robust case for the Union, so there will be delicate, patient, and careful work required to ensure proposals for a united Ireland are well informed. Even though there might be widespread agreement on the need for advance planning, there are still questions around how much specificity is feasible and desirable. The legitimate concerns around advance design efforts do not displace the necessity for an evidence-based decision-making process. It remains essential that people on the island of Ireland are clear about what they are voting for or against and what the next steps will be.

Concurrent consent and measuring the outcome

As indicated, the process will be taken forward via concurrent referendums on the island of Ireland, ideally held at the same time and on largely the same basis. It is essential, if the Agreement is to be respected, that concurrent consent is for or against the same basic proposals. The emphasis in this article is on the necessity for detailed advance planning where the implications are clear, informed not only by both governments and political parties, but by deliberative engagement. As noted above, this is not simply because it would be a 'good thing', but also because, in my view, it is embedded in the constitutional logic of the Agreement. If, for example, the British government is to approach this in a spirit of rigorous impartiality it cannot withhold significant advance details from the process, and no mechanisms should be introduced that would incentivise disengagement.

The measurement of the outcome is one of the more straightforward questions: it will be determined on a simple majority of those voting (50%+1) in

⁵⁷ Thanks to an anonymous reviewer for underlining this valuable point.

each jurisdiction. Some concern has been expressed about this, but it is the logical and required outcome of the existing approach and the application of the Agreement and its core principles. No other way forward is permissible or desirable; there must be equal treatment of both constitutional positions. The anxieties expressed around possible change can be addressed by other means; for example, in the scale and extent of advance planning and in the substantive content of the guarantees provided in the event of constitutional change. Attempts to change the voting rules are misguided and are the wrong target for attention.

Both governments will need to be clear from the start that opting out or boycotting the process will not impact on the outcome or on ensuring that the referendums proceed. That must apply equally and uniformly to all sides. Any other approach would simply encourage attempts to subvert the process.

CONCLUSION

Brexit and the changing electoral politics of the island of Ireland have placed the constitutional conversation centre stage in a much more focused way. There is widespread acceptance of the need for proper planning and preparation for the possibility of a change in the constitutional status of Northern Ireland. The discussions have a practical intensity that is novel. Much of it, but not all of it, is a result of Brexit, the form it has taken in the UK, the way it has been handled, and the well-founded belief that the island of Ireland is heading towards potential constitutional change. The emphasis in the debate is on responsible management. Despite the caricatures, and strength of feeling, the fact that the dominant mode of engagement is around planning remains striking and commendable.

The aim of this article is to offer reflections and set out views on the way forward based on work over many years. As is clear, this must be framed by the Agreement, and the suggestion here is that anything that departs from a convincing good faith reading of the text should be rejected. Where gaps exist a plausible Agreement-based rationale must be found that is anchored solidly in the relevant provisions. This approach will be challenging for both sides in this constitutional debate, and the occasional lack of precision in the language of the Agreement is part of the dilemma.

It follows that for all practical purposes the homework must be concluded in advance of the votes, with the successful outcome implemented in the

proposed way. How much detail is provided before the referendums is subject to ongoing debate, with respect to what is required, desirable and possible. This will be an exercise in popular sovereignty undertaken on the island of Ireland, and the implications of that framing must be followed through, before and after. Both governments have a responsibility to work closely together to map out next steps, with the possibility of international actors having an oversight role. The emphasis throughout this article is on engagement in advance so that when the day arrives, and people across the island vote, everyone will know what they are voting for or against, and the consequences of their choice. That does not mean that ideal conditions must be in place first or that everything will be static and settled. A united Ireland, like any democratic state, will remain work in progress. But the people of Ireland, north and south, should be accorded an evidence-based and informed choice anchored in an accurate picture of present realities on this shared island and what their vote will mean.