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# The Good Friday Agreement and a United Ireland

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## ABSTRACT

The bedrock of the Good Friday Agreement is an intricately interwoven and balanced set of principles, understandings and commitments regarding the constitutional status of Northern Ireland. However, although its section on constitutional issues is of profound historic importance, little of it was freshly negotiated in the 1996–98 Multi-Party Talks. It was not a major topic in the negotiations. In the debate about the possibility of a united Ireland, the Agreement is a key point of reference, as will be outlined in this article. While its treatment of the process of possible future unification deals with some essential points, many issues are not addressed. For the most part, this could

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not have been otherwise. However, partly because of the way the Agreement was negotiated, there are unnecessary gaps, notably as regards the role of the Irish government in relation to a referendum in Northern Ireland, and how the requirement of concurrent consent to a united Ireland in both parts of the island should be met.

## INTRODUCTION

The Good Friday Agreement (also known as the Belfast Agreement) of 10 April 1998 marked a profound change in the politics of Northern Ireland and of Ireland, in the constitutional doctrines of Ireland and of the United Kingdom, and in British-Irish relations. The bedrock of the Agreement was an intricately interwoven and balanced set of principles, understandings and commitments regarding the constitutional status of Northern Ireland and the manner in which that status could change, and a united Ireland be established. The Irish Constitution and relevant British legislation were amended correspondingly.

In the growing debate about the possibility of a united Ireland, the Agreement is a key point of reference. This article looks first at the sources of its treatment of constitutional issues. It concludes that, while the constitutional part of the Agreement is of great importance, little of it was freshly negotiated in the 1996–98 Multi-Party Talks. Second, the article looks at what the Agreement says or implies about a future process of unification. It concludes that, while some essential points are clearly defined, most are mentioned only in passing, or not at all, leaving a great deal unsettled.<sup>1</sup>

## THE NEGOTIATIONS

There were several reasons for the lack of focus on constitutional issues in the talks in 1996–98, and the resultant gaps in the text.

First, in the years leading up to the talks, the British and Irish governments had, in the Joint (Downing Street) Declaration of 1993, and A New Framework for Agreement of 1995 (hereafter Joint Framework Document),

<sup>1</sup> Over many years I have greatly enjoyed and benefited from discussions with friends and former colleagues, in particular David Cooney and Tim O'Connor and the late Dermot Gallagher. This article was completed in late October 2020.

set out a sophisticated common view of constitutional principles. In turn, these documents to some extent built upon elements of earlier agreements and legislation, and developments in political and public opinion.

Second, none of the main parties sought to challenge the position of the two governments. A major objective of the Ulster Unionist Party was the abolition of Articles 2 and 3 of the Irish Constitution, but it paid little or no attention to the broader treatment of constitutional issues.<sup>2</sup> The SDLP and the Alliance Party strongly supported the Joint Declaration and the Framework Documents. A fundamental aspect of the new intergovernmental approach—its treatment of self-determination—ran contrary to Sinn Féin orthodoxy, but the party essentially elected to avoid the issue.

Third, how a united Ireland as provided for in the Agreement might eventually need to be established in practice was a far from immediate issue. In 1998 the prospect that a majority might in the foreseeable future favour a united Ireland seemed remote. In the 1997 Westminster election the lead held by unionist parties over nationalist had fallen from 23% in 1983 (54%–31%) to 11% (51%–40%).<sup>3</sup> But this was still a very solid advantage, even without taking into account the largely pro-Union views of the Alliance Party, and there was scepticism about the strength of pro-unity feeling among moderate nationalists.

Fourth, the final negotiations, which saw seriously hard bargaining on the main issues really only begin on Holy Week itself, did not involve an orderly process of discussion, agreement and textual consolidation. As in many other negotiations, the closer to an endpoint they came, and the higher the level at which they were conducted, the more chaotic they became, and the thicker the fog of war.<sup>4</sup> Several other issues absorbed the attention of the negotiators, notably the nature of Northern Irish and north/south institutions, decommissioning and prisoner release. Looking back later, one well-informed journalist could observe that ‘the scale of the philosophical recasting of Irish nationalism

<sup>2</sup> And notwithstanding the importance to it of Articles 2 and 3, the leader of the UUP did not feel particularly concerned that he only saw the Irish government’s proposed new text late in the negotiations: ‘It wasn’t something that bothered me because I think my view was that the Irish knew this was something they were going to have to change, and that for us it was an absolute irreducible requirement that there was that change’: David Trimble quoted in Frank Millar, *David Trimble: the price of peace* (Dublin, 2004), 111.

<sup>3</sup> Figures taken from Brendan O’Leary, *A treatise on Northern Ireland: consociation and confederalism. From antagonism to accommodation?* (III Vols. Vol. III, Oxford, 2019).

<sup>4</sup> ‘It was not a question at any point of a neatly integrated text being carefully scrutinised from A to Z, but rather a question of different bits which emerged [at] different moments’—Interview with Rory Montgomery in Graham Spencer, *Inside account, volume II: the Irish government and peace in Northern Ireland from the Good Friday Agreement to the fall of power sharing* (Manchester, 2019), 21.

was breath-taking in its ambition.’<sup>5</sup> However, experience of negotiations also demonstrates that what turn out to be the most important aspects of a deal are not always those that have absorbed most energy.

In the final week, constitutional issues were therefore of minor significance. Relatively low-ranking UUP representatives met Irish Attorney General David Byrne in Dublin on 6 April, and raised no objections to the revised Articles 2 and 3, as a higher-level figure, Jeffrey Donaldson, discovered when he met Byrne in Castle Buildings on 9 April.<sup>6</sup> Authoritative accounts of the final days of the negotiations by leading British and Irish participants make no reference at all to constitutional issues.<sup>7</sup>

### THE AGREEMENT’S CONSTITUTIONAL ISSUES SECTION

The Good Friday Agreement has two separate but closely linked parts: an agreement reached in the Multi-Party Talks between the British and Irish governments and the eight participating political parties (‘the Multi-Party Agreement’), and an agreement between the British and Irish governments. The former Agreement is one of the annexes to the latter. The principal constitutional issues language appears in both. However, the British-Irish Agreement is in this regard in effect the ‘parent’ text. The title of the British-Irish Agreement, ‘Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland’ is noteworthy in itself, in that this was the first time that each government was prepared to sign a single version of an agreement using the full official names of the other state.<sup>8</sup> This was possible because the two governments had been able to achieve full consensus on constitutional issues.

The British-Irish Agreement begins by saying that ‘The British and Irish Governments...[preamble]...have agreed as follows...’ and then in Article 1 sets out six statements or commitments made jointly. In Article 3 it states that the Agreement replaces the Anglo-Irish Agreement of 1985. Article 4

<sup>5</sup> Deaglán De Bréadún, *The far side of revenge: making peace in Northern Ireland* (Dublin, 2001), 147.

<sup>6</sup> Interview with David Byrne in Spencer, *Inside accounts*, 124–51.

<sup>7</sup> Jonathan Powell, *Great hatred, little room* (London, 2008), 87–107; David Donoghue in Mary E. Daly (ed.), *Brokering the Good Friday Agreement: the untold story* (Dublin, 2019) 161–2.

<sup>8</sup> The title of the Irish text of the Anglo-Irish Agreement referred to ‘Ireland’ and ‘the United Kingdom’, the British text to ‘the Republic of Ireland’ and ‘the United Kingdom of Great Britain and Northern Ireland’. In the body of each of the two Agreements the governments are referred to as the British and/or Irish Government.

makes the entry into force of the Agreement dependent on the enactment of relevant British constitutional legislation and on approval by referendum of proposed changes to Articles 2 and 3 of the Irish Constitution, as well as on the establishment of the agreed Northern Ireland, north/south and east/west institutions.

For its part, the Multi-Party Agreement says that ‘The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will [the six statements or commitments made in Article 1 of the British-Irish Agreement.]’ It also says that the participants ‘note’ the undertakings given by the two governments in relation to the Irish Constitution and British legislation relating to the constitutional status of Northern Ireland.

These formulations underline that the constitutional issues part of the Agreement is of a somewhat different character from the rest: in a formal sense the commitments made were for the governments alone, though they enjoyed the support of the other participants.

However, and perhaps rather oddly, it is in the Multi-Party Agreement, not in the British-Irish Agreement, that the full texts of the proposed changes to the Irish Constitution and to British legislation are set out.<sup>9</sup>

Article 1 of the British-Irish Agreement said that the two governments:

- (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;
- (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

<sup>9</sup> The rather convoluted and overlapping texts arose primarily from the fact that the focus of the Irish government was on the Multi-Party Agreement and on the language of the new Articles 2 and 3, including the novel arrangements for their entry into force. The British-Irish Agreement was concocted very hastily at the end of the negotiations. One member of the Irish delegation had to travel to Dublin overnight to collect the treaty paper on which the Agreement was printed and signed—the British were better prepared. Where necessary I refer specifically either to the Irish constitution or the Northern Ireland Act 1998, but otherwise the Good Friday Agreement comprehends all of the constitutional elements.

- 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;
- (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;
  - (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;
  - (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;
  - (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.

The concepts forming the basis of this article of the British-Irish Agreement, and nearly all of the language, mostly came from the Joint Framework Document of 1995, which in turn was based on the Joint Declaration of 1993. However, on this occasion, rather than setting out the separate positions of the two governments in sequential paragraphs, the Agreement melded the different elements into a single text.<sup>10</sup>

The most radical constitutional innovation of the Agreement was the placing of the consent principle in the framework of self-determination, as newly defined. The language used in Articles 1.i and ii had no precedent in the Anglo-Irish Agreement: however, it had already been used in the Joint Declaration and the Joint Framework Document. The new emphasis on self-determination stemmed from the efforts made from the late 1980s onwards by John Hume and by the Irish government to persuade the IRA to cease violence by holding open the prospect of ambitious all-party talks in which Sinn Féin could participate. Sinn Féin continued to maintain that the General Election of 1918, which had demonstrated an all-island majority for independence, was the sole exercise of genuine self-determination by the Irish people, and had been thwarted by the British government's imposition of partition in 1920. Therefore, finding a way to address the issue of self-determination was crucial in developing a basis for talks in which Sinn Féin would participate. While from a general nationalist perspective this approach was intellectually compelling; it was the need to encourage republicans to change course that was paramount.

As Seán O'Huiginn<sup>11</sup> has put it, 'John Hume's creative treatment of self-determination...cast the reality in terms more compatible with republican doctrines, by treating the consent principle as a subset of the principle of self-determination, rather than as a denial of it'. This 'creative treatment' was enshrined in Article 1.ii, which recognised the right of the Irish people to self-determination, but also that this right to bring about a united Ireland could be exercised only on the basis of consent north and south; for the avoidance of doubt, this required the agreement and consent of a majority of the people of Northern Ireland. A further novel element of the Agreement, stemming from the principle of self-determination as defined in it, was the explicit

<sup>10</sup> A logical approach, but not one that was discussed at political level, being left to drafters.

<sup>11</sup> Daly (ed.), *Brokering the Good Friday Agreement*, 118. O'Huiginn was the most senior department of foreign affairs official working on Northern Ireland from 1991–97.



requirement for the concurrent consent of the people of the south to a united Ireland.

The two governments also, as strongly urged by John Hume,<sup>12</sup> agreed to hold referendums north and south on the Agreement—in effect, an act of self-determination setting out the future rules of the game. This was widely seen as conferring a particular authority and legitimacy on the Agreement.

The UUP, with its attention turned elsewhere, did not contest the existence of ‘people of Ireland as a whole’ with the right to self-determination—a concept they might have been expected to find difficult. Instead they highlighted the changes to Articles 2 and 3 and the copper-fastening of the principle of consent—which is, however, in reality arguably no more robust in the Agreement than previously.

The issue was more problematic for Sinn Féin, as had emerged in the work of the Forum for Peace and Reconciliation.<sup>13</sup> A committee of the Forum, including Sinn Féin, negotiated a paper called *Paths to a Political Settlement: Realities, Principles and Requirements*. It noted that ‘There is not full agreement about how the principles of self-determination and consent should be exercised.’ However, ‘the approach reflected in the agreed position of the two Governments on this crucial matter is of particular importance.’ This position ‘has been accepted by the majority—though not all—of the political parties, North and South, representing a large majority of the people of Ireland as a whole.’ Sinn Féin was prepared to sign up to this description of where matters stood. However, it balked at agreeing that if a political agreement ‘were democratically ratified North and South, then the result of that ratification process will represent a valid and legitimate exercise by the people of Ireland as a whole of their right to self-determination.’ The Forum thus failed to achieve full consensus.<sup>14</sup>

That the consent of a majority of the people of Northern Ireland was required for a change in its status had originally been provided for in the Northern Ireland Constitution Act, 1973 (as described in detail below). Formal

<sup>12</sup> As confirmed by Bertie Ahern on RTÉ News, 3 August 2020.

<sup>13</sup> The Forum was established by the Irish government in October 1994 in fulfilment of a commitment given in the Joint Declaration. It was chaired by Judge Catherine McGuinness. Its principal political purpose was to create a post-ceasefire space for dialogue between Sinn Féin and other political parties (Alliance took part, but not the unionist parties).

<sup>14</sup> A complete draft of the report was released by the chairperson on 2 February 1996. The intention was to hold a public session on it on 16 February; but the work of the Forum was suspended when the IRA broke its ceasefire on 9 February with the Canary Wharf bombing.

acceptance by the Irish government of the principle of consent came later in the Sunningdale Agreement in 1973. It stated that ‘The people of the Republic,<sup>15</sup> together with a minority in Northern Ireland as represented by the SDLP delegation, continued to uphold the aspiration towards a united Ireland. The only unity they wanted to see was a unity established by consent.’ The Irish government ‘fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status.’

Article 1 of the Anglo-Irish Agreement said that the two governments:

- ‘(a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;
- (b) recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland.’

In its treatment of consent, the Good Friday Agreement followed the Joint Declaration and the Joint Framework Document in stating that ‘it would be wrong’ to change the status of Northern Ireland without the consent of a majority of its people. However, it went an important step further in recognising ‘the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status’ and, further, that the current status of Northern Ireland was based on the freely exercised and legitimate wish of a majority. Therefore the Irish government, without being required to offer a view on the original partition of Ireland, or on the subsequent history of Northern Ireland, thereby accepted that Northern Ireland was, on the basis of the consent principle, legitimately a part of the UK.

The Agreement is entirely clear that a change in the status of Northern Ireland requires the consent of a majority of the people of Northern Ireland. In this it follows British legislation since 1973 and previous intergovernmental statements and agreements. It has been argued by some, most fully and eloquently by Séamus Mallon in his memoirs,<sup>16</sup> that ‘The only way we can

<sup>15</sup> The term ‘Republic’ was sedulously avoided in the Anglo-Irish and Good Friday Agreements.

<sup>16</sup> Séamus Mallon with Andy Pollak, *A shared home place* (Dublin, 2019), chapter 13.

have peace in Ireland as a whole is when a significant number of people in *both* Northern communities give their consent to a constitutional settlement, along with the people of the South'. Mallon also points to the fact that the parallel consent of unionists and nationalists is the key principle underlying the functioning of the Agreement's institutions. He accepts that measuring an acceptable level of unionist support for a united Ireland would be difficult, but concludes that

I believe it is time to move—both myself and the nationalist community in both jurisdictions—towards a realisation that we have two options: one is to hold a premature Border Poll and, in the event of a narrow vote for unity, face into the risk of another period of instability and violence; the other is to move towards an agreed Ireland in a slow, progressive way, and maybe leave the end product to a future time.'

The counter-arguments have been strongly made, including on a number of occasions by Professor Colin Harvey. He has said that

Altering the GFA [Good Friday Agreement] in order to accommodate a new weighted majority rule would be a mistake...While there are genuine concerns about how unionism/loyalism would respond to a vote for constitutional change, and legitimate questions about how that community will be accommodated in a new Ireland, the response of nationalism/republicanism should also be factored into the assessment. Changing the rules at this point would be disastrous...and undermine a faith in the promises of the Agreement that is already being tested to the limit. The worry is that this becomes a new form of 'unionist veto' that, among other things, does not recognise parity of esteem between the different constitutional preferences...The introduction of a minimum requirement could be criticised as anti-democratic, inconsistent with the express terms of the Agreement, and it would suggest that the exercise was being illegitimately prejudged in favour of one option. Contemplate, for example, the practical implications for N. Ireland if there was a 55% vote in favour of reunification that did not result in that outcome. It is doubtful the region could

function within the current constitutional arrangements in the aftermath of such a result.<sup>17</sup>

A forceful case in similar terms has also been made by Richard Humphreys.<sup>18</sup>

Leaving aside for the purposes of this paper the merits of the substantive arguments, to change the threshold for a successful vote in favour of a united Ireland would unquestionably require amendment of the Good Friday Agreement. I am not aware that the option of a super-majority was ever canvassed during the negotiations, and felt able to assure some Sinn Féin representatives during the final night that by definition a majority was a simple majority and so no qualification was required.<sup>19</sup> There can be no doubt that this is the position under the Agreement (binding under international law) and in the Northern Ireland Act of 1998.

For the sake of argument, however, it could be suggested that the requirement for a simple majority for Irish unity in a Northern Ireland referendum conflicts with the emphasis in mainstream nationalist thinking, from the New Ireland Forum onwards, on the need for reconciliation and agreement between unionism and nationalism as the basis for a new Ireland, and the need for those who favour a united Ireland to persuade those who do not. The Joint Declaration, the fullest expression of the philosophy underlying the peace process, said that

the Taoiseach, on behalf of the Irish Government, considers that the lessons of Irish history, and especially of Northern Ireland, show that stability and well-being will not be found under any political system which is refused allegiance or rejected on grounds of identity by a significant minority of those governed by it.

Further:

The Taoiseach...considers that the future of the island depends on the nature of the relationship between the two main traditions

<sup>17</sup> Colin Harvey and Mark Bassett, *The EU and Irish unity: planning and preparing for constitutional change in Ireland* (Brussels, 2019), 15–16.

<sup>18</sup> Richard Humphreys, *Beyond the border: the Good Friday Agreement and Irish Unity after Brexit* (Dublin, 2018), 84–97.

<sup>19</sup> Spencer, *Inside account*, 17.

that inhabit it. Every effort must be made to build a new sense of trust between those communities.

Moreover:

Both Governments accept that Irish unity would be achieved only by those who favour this outcome persuading those who do not, peacefully and without coercion or violence.

At the same time, the Joint Declaration, like the Framework Document and the Agreement itself, was clear on how the principle of consent would be operationalised and, as outlined earlier, the legal position is incontrovertible. The apparent contradiction can perhaps best be explained by the sense in the 1980s and '90s that a majority in favour of a united Ireland would in practice only be achieved by the presence within it of a reasonably substantial group of unionists, which would demonstrate that persuasion and reconciliation had to some degree been successful. In any event, this remains a speculative and academic argument.

The binding obligation in Article 1.iv, on both governments to give effect to agreement on a united Ireland, by introducing and supporting in their respective parliaments' legislation to give effect to that wish, is a boiling down to its essentials of lengthier language in the Joint Declaration and Joint Framework Document on the commitments of the British government. In the Joint Framework Document there is a statement which follows from and largely repeats language from the Joint Declaration:

The British Government...reiterate that they have no selfish strategic or economic interest in Northern Ireland...<sup>20</sup> The British Government will discharge their responsibilities in a way which does not prejudice the freedom of the people of Northern Ireland to determine, by peaceful and democratic means, its future constitutional status...This new approach for Northern Ireland, based on the continuing willingness to accept the will of a majority of

<sup>20</sup> A formulation originally used by Secretary of State Peter Brooke in November 1990, definitively repudiating the argument set out in a Working Party report to the Cabinet before the Ireland Act, 1949, that it was of 'first-class strategic importance...that the North should continue to be part of His Majesty's dominions', and indeed that it seemed 'unlikely that Great Britain would ever be able to agree to [the secession of Northern Ireland] even if the people of Northern Ireland desired it.'

the people there, will be enshrined in British constitutional legislation embodying the principles and commitments in the Joint Declaration and this Framework Document...’.

However, as far back as Sunningdale the British government<sup>21</sup> had said that ‘If in the future the majority of the people of Northern Ireland should indicate a wish to become part of a United Ireland, the British Government would support that wish.’ The Anglo-Irish Agreement contained a declaration by the two governments ‘that, if in the future the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish.’

The guarantee in Article 1.v that, whether in Northern Ireland or in a united Ireland ‘the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality...and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination...and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities’ is self-explanatory and uncontested, though there is debate about whether in practice the British Government has since 1998 lived fully up to its obligations. Nearly all the language was taken unchanged from the Joint Framework Document, though what had been a commitment from the British government alone in regard to the governance of Northern Ireland was turned into a joint commitment by both governments to apply in the two possible scenarios. This is the only part of the Agreement that refers to the rules that should apply in a united Ireland.

A novel constitutional element of the Agreement was the recognition by the two governments in Article 1.vi of ‘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 language was not derived from the Joint Declaration or the Joint Framework Document, but from the Final Paper of the Forum for Peace and Reconciliation, which in paragraph 7 of its ‘Principles and Requirements’ section called on

<sup>21</sup> Indeed, Secretary of State Whitelaw said something similar in the House of Commons in March 1973.

the two governments ‘to ensure that, in regard to the people of Northern Ireland...constitutional changes...should be such as not to diminish in any way their existing citizenship rights and their birthright to be accepted as being British or Irish—or both—as appropriate and desired.’

This provision is regularly cited in public discussion and has been the basis for legislation and litigation. However, it was not subject to significant consideration. It was drafted and inserted at mid-ranking official level, and was not challenged thereafter. Its inclusion derived more from a sense of its potential symbolic and political value than from any assessment of its legal implications.

### BRITISH LEGISLATION AND A NORTHERN IRELAND REFERENDUM

Draft material for incorporation in British constitutional legislation, as promised in Article 1.iv of the Agreement, was annexed to the Multi-Party Agreement. In style it was considerably terser than the main text, but it fulfilled the British government’s commitment. It was included unchanged in the Northern Ireland Act, 1998.<sup>22</sup>

The Northern Ireland Act provides that:

**1(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.**

The requirement for Northern Ireland’s consent to any change in its status was first provided for in the Ireland Act, 1949. Its main purpose was to provide that though the newly declared Republic of Ireland had ceased to be ‘part of His Majesty’s dominions’ it would not be treated as a foreign country.<sup>23</sup>

However, as the long title of the Act stated, its purpose was also to ‘declare and affirm the constitutional position and territorial integrity of Northern Ireland’. It declared that Northern Ireland remained part of the United Kingdom and of the Commonwealth and that ‘in no event will Northern Ireland or any

<sup>22</sup> It too was drafted at mid-level and was the subject of little discussion.

<sup>23</sup> A provision the consequences of which have benefited Irish people in the UK ever since, including in the Brexit context.

part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland'.

Arguably, this provision was in effect a logical development of the provisions of the Government of Ireland Act and the Anglo-Irish Treaty, whereby the parliament of Northern Ireland had the right to opt out of the Council of Ireland and the Irish Free State (albeit with the prospect of change through the Boundary Commission). It was, however, greeted with disappointment and anger in the Republic and by nationalists in Northern Ireland, as copper-fastening a 'unionist veto'.

The next legislative development was the enactment of the Northern Ireland Constitution Act, 1973. It abolished the Parliament of Northern Ireland (prorogued the previous year) and provided a legislative basis for an Assembly, a power-sharing executive and co-operation with the south. As regards the status of Northern Ireland, the requirement that no change could occur without the consent of the now defunct Parliament was replaced by a requirement for 'the consent of the majority of the people of Northern Ireland'.

**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 put in place on the British side the commitment made in the British-Irish Agreement that both governments would give effect to a vote in favour of a united Ireland. It added a sensible requirement that the proposals to be put to Parliament following a successful referendum should be agreed between the two governments. It did not, however, address the necessity under the Agreement that the concurrent consent of the south was required.

**2. The Government of Ireland Act 1920 is repealed; and this Act shall have effect notwithstanding any other previous enactment.**

The repeal of the Government of Ireland Act, which provided for the partition of Ireland, and reserved the powers of the British Parliament to legislate for



Northern Ireland, was a long-standing nationalist objective. Unionists argued that it was meaningless as the Act had been superseded by later legislation, and the consent principle was repeated in the 1998 Act.

### **Schedule 1**

- 1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.**
- 2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 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.**
- 3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.**
- 4. [The order directing the holding of a poll should make provision 'as to the persons entitled to vote...the question or questions to be asked...and the conduct of the poll...']**

This Schedule was modelled on Schedule 1 to the Northern Ireland Constitution Act, 1973, but with one major difference. The unqualified power of the secretary of state for Northern Ireland to direct the holding of a poll remained unchanged. However, there was now a duty on him to hold one if it appeared likely to him that there would be a majority vote for a united Ireland.

The other change was that the minimum interval between polls was reduced from ten to seven years. The 1973 Schedule had said that a poll could not be held before 9 March 1983, and that further polls could only be held at intervals of at least ten years. The significance of the date of 9 March 1983 was that on 8 March 1973 a plebiscite had been held to ascertain the views of the people of Northern Ireland on its future status.<sup>24</sup>

<sup>24</sup> See David Torrance, *'Taking the border out of politics': the Northern Ireland referendum of March 1973* (London, 2019). The secretary of state, William Whitelaw, optimistically said that the British government's aim was 'to take the border out of the day-to-day political scene.'

## THE IRISH CONSTITUTION

### Article 2

**It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.**

### Article 3

- 1. 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.**
- 2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island.**

The commitment by the Irish government to replace the existing Articles 2 and 3 of the constitution was the highest-profile constitutional element of the Agreement.

The Anglo-Irish Treaty had offered Northern Ireland the option of entering the new Irish Free State—an option which was of course not taken up. The constitution of the Free State was silent on the questions of territory and

unity, and the Boundary Commission provided for in the Treaty did not result in any repartition.

By declaring in Article 2 that ‘The national territory consists of the whole island of Ireland, its islands and territorial seas’, and by reserving in Article 3 ‘the right of the Parliament and Government established by this to exercise jurisdiction over the whole of that territory’, the 1937 Constitution did not *de jure* formally acknowledge the partition of the island or the existence of Northern Ireland. It did of course provide that ‘Pending the reintegration of the national territory...’ the state’s jurisdiction was *de facto* confined to the twenty-six counties of the former Irish Free State. It did not address the question of how ‘re-integration’ might be achieved.

Articles 2 and 3 remained unaltered until their replacement in 1998. The possibility of their amendment was considered at various points well before that, however. As early as 1967, an informal Oireachtas committee on the constitution recommended the replacement, as part of a major re-draft of the document as a whole, of the existing Article 3 by:

3.1. The Irish nation hereby proclaims its firm will that its territory be reunited in harmony and brotherly affection between all Irishmen.

3.2. The laws enacted by the Parliament established by this Constitution shall, until the achievement of the nation’s unity shall otherwise require, have the like area and extent of application as the laws of the Parliament which existed prior to the adoption of this Constitution. Provision may be made by law to give extra-territorial effect to such laws.

No change to Article 2, and thus to the definition of the national territory, was proposed. Nothing came of the proposal. However, in spirit as well as in aspects of its substance, the proposed new language would have marked a significant change, and it to some degree anticipated the amendments made in 1998. It made clear the wish for unity to be in ‘harmony and brotherly affection between all Irishmen’, and it dropped the reference to the formal right of the state to legislate for the whole island. While in no way specific about how unity might be achieved, the conciliatory tone reflected developments in the 1960s, exemplified by the 1966 and 1967 meetings of Seán Lemass and Jack Lynch with Terence O’Neill. Indeed, Lemass, after resigning

as taoiseach, became a member of the committee, on which he served alongside other very substantial figures including its chairman, George Colley (Minister for Industry and Commerce and later Minister for Finance), three future Ministers for Foreign affairs (James Dooge, Michael O’Kennedy and David Andrews), and a future Chief Justice (T.F. O’Higgins).

In 1984 Garret FitzGerald privately proposed to Margaret Thatcher that a very ambitious Anglo-Irish Agreement would allow his government to hold a referendum to replace Articles 2 and 3. This idea was not pursued.<sup>25</sup>

The question came to the fore when two UUP politicians, Christopher and Michael McGimpsey, challenged the constitutionality of the Anglo-Irish Agreement in the Irish courts. In March 1990 the Supreme Court<sup>26</sup> held that it was not unconstitutional, and that in so far as the Anglo-Irish Agreement provided a means whereby the re-integration of the national territory might be achieved by a process of consultation and discussion, it would never be inconsistent with the constitution, which was expressly devoted to peace and co-operation in international relations.

However, two aspects of the judgement were particularly striking. First, that the re-integration of the national territory was a ‘constitutional imperative’. Second, that the recognition by the Anglo-Irish Agreement of the *de facto* situation in Northern Ireland while expressly disclaiming any abandonment of the claim to the re-integration of the national territory was not inconsistent with Articles 2 and 3 of the constitution and there was no question of Ireland being estopped in international law from asserting that claim.

This judgement had the political effect of making the replacement of Articles 2 and 3 a major unionist objective in the Brooke/Mayhew talks of 1991–2, and of the talks leading to the Agreement.

In the Brooke/Mayhew talks, the Irish government did not accept the demand for an unconditional pledge to remove the territorial claim. ‘Irish ministers were aware that in the nature of things, any future package would contain mostly elements of compromise that unionists would find wanting when judged against the gold standard of the old Stormont. Changing the Irish constitution was a rare prospect of unalloyed gain for them, and it made no sense to devalue it in the foothills of negotiation.’<sup>27</sup>

<sup>25</sup> Garret FitzGerald, *All in a life: an autobiography* (Dublin, 1991), 461.

<sup>26</sup> Gerard Hogan, Gerry White, David Kenny, Rachel Walsh, *Kelly: The Irish Constitution* (5th edn, Dublin, 2018), 84–85.

<sup>27</sup> Seán O’Huiginn in Daly, *Brokering the Good Friday Agreement*, 118–19.

In the Joint Declaration it was confirmed that, ‘in the event of an overall settlement, the Irish Government will, as part of a balanced constitutional accommodation, put forward and support proposals for change in the Irish Constitution which would fully reflect the principle of consent in Northern Ireland’.

The Joint Framework Document added that the Irish Government would introduce and support proposals for change in the Irish Constitution to implement the commitments in the Joint Declaration. These ‘changes in the Irish Constitution...will demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted’.

In the end, the UUP did not have to fight hard for satisfactory new Articles 2 and 3 (as set out above under ‘The Irish Constitution’), though extensive work on successive drafts was required of the Irish government.<sup>28</sup> General nationalist reaction was strongly positive, as demonstrated by the 94% majority in the south in the May 1998 referendum in favour of changing the Constitution.<sup>29</sup>

The new Article 2 replaced the concept of ‘the national territory’ with an attempt to define the nation by reference to its people.<sup>30</sup>

Article 3.1 set out a strong and inclusive aspiration to the unity of the Irish people and recognised that a united Ireland could only be brought about peacefully and democratically with the support of majorities both north and south. In a modified form it restated the extent of the state’s jurisdiction.

Article 3.2 allowed for the creation of north/south bodies with executive powers.

## THE GOOD FRIDAY AGREEMENT AND THE PROCESS OF IRISH UNIFICATION

This part of the paper sets out where the Agreement offers clarity or, failing that, guidance, on the process by which a united Ireland might be achieved.

<sup>28</sup> Primarily, in the present author’s recollection, Martin Mansergh (advisor to the taoiseach) and James Hamilton, Director General of the Attorney General’s Office.

<sup>29</sup> Séamus Mallon told the story of a meeting in south Armagh where, on hearing Articles 2 and 3 read out, strong opposition was expressed to changing them, before it was revealed that the text was that of the new versions (present author’s recollection).

<sup>30</sup> Though it might appear that the nation does not include those who reject their entitlement to be part of it. Hogan, Whyte, Kenny, Walsh, *Kelly: The Irish Constitution*, 85.

It concludes that it is in fact silent about many more issues than it covers, leaving those issues to future discussion, negotiation and decision. In many instances, this makes sense. It would have been presumptuous and pointless to try to settle issues that it was clear would not need to be addressed in detail for many years and in what would be a quite different political context. However, there are two main points where greater internal consistency would have been achievable and would be of great value today. This was a result of the lack of attention paid to constitutional issues in the talks.

While below I go through various elements sequentially, in reality they are interconnected. The fundamental issue underlying them all is how, in conformity with the law and respecting democratic imperatives, the unification process could be organised so as to maximise the subsequent chances of a stable and peaceful united Ireland. This united Ireland would be one which the largest possible number of citizens—in particular those from the unionist community, as well as those who do not align themselves with either major community—feel to be their ‘shared home’, if not immediately then over time. In the shorter term, what would best achieve unionist engagement with the process? Unionist participation and buy-in would be essential for shaping a united Ireland of the sort envisaged by the Agreement, and in particular for identifying how their rights and identity might best be protected. But at the same time, it seems unlikely that their political leaders would engage in discussion if any doubt remained about the outcome of a Northern Ireland vote. And even after a vote in favour of a united Ireland many might be tempted to seek to derail or delay the process by refusing to participate.

On this occasion, I confine myself for the most part to setting out the questions which might in due course need to be resolved, without offering answers, though I do make some comments. A great deal of detailed thought and discussion will be required.<sup>31</sup>

### *A Northern Ireland poll*

As described earlier, the Northern Ireland Act of 1998 confirmed the existing right of the secretary of state to direct the holding of a poll in Northern Ireland on a united Ireland, and created a new obligation to do so ‘if at any

<sup>31</sup> Oran Doyle and David Kenny offer a brilliant analysis of the legal and constitutional issues and discuss possible models of how to schedule and organise referendums, in *Models of Irish unification processes* (21 February 2020). SSRN: <https://ssrn.com/abstract=3552375> or <http://dx.doi.org/10.2139/ssrn.3552375> (23 October 2020).

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 become part of a united Ireland'. A poll could, however, only be held every seven years.

As explained earlier, in this case a majority is a simple majority of those voting. While clear as far as it goes, this provision has rightly been described as 'stark and minimal'.<sup>32</sup> Numerous points are left open.

How would the secretary of state come to a judgement as to the likelihood of a majority in favour of a united Ireland?

Options which have been mentioned include an opinion poll or series of opinion polls; a Catholic majority in a census; the election of a nationalist majority in the Assembly or Westminster elections (perhaps more precisely, of a majority representing parties which had explicitly endorsed a poll); or an indicative majority vote in the Assembly. If the Assembly were not functioning normally, but its term had not elapsed, the requirement could be for a majority of Members of the Legislative Assembly to have been elected on a clear manifesto commitment to support a referendum. If the Assembly were suspended, the nature of the Westminster electoral system makes a majority of MPs an unreliable threshold. In these circumstances, it might be preferable for the requirement to be that in the most recent elections a majority had voted for candidates with a clear manifesto commitment to support a referendum. It could be considered whether a percentage below but close to 50% might also be sufficient.

It is also conceivable that a nationalist party that wished for a united Ireland might also believe that the time was not yet right for a poll to be held. The most reasonable approach would involve taking all available evidence into account, without the mechanical application of pre-determined criteria.

It was therefore reassuring that in April 2020, confirming an earlier judgement of the High Court, the Northern Ireland Court of Appeal<sup>33</sup> rejected an attempt to oblige specific criteria to be set out, ruling that the exercise of the secretary of state's powers would involve political judgement in the context of differing and unpredictable circumstances, and would require a flexible response. If the secretary of state were in practice felt to be ignoring clear

<sup>32</sup> Alan Whysall, *A Northern Ireland border poll* (London, 2019). This paper offers a very useful analysis of the issues, and I have drawn from it. Mr Whysall is part of a group organised by the Constitution Unit, University College London, which is preparing a fuller report.

<sup>33</sup> A press release issued by the Judicial Communications Office on 27 April 2020 summarises the Court of Appeal's ruling.

evidence of the likelihood of a pro-united Ireland majority, no doubt the courts would be obliged to review the matter.

The timing of a poll would also remain to be determined. This would depend very much on the sequencing of the various steps of a process. In all circumstances, ample time would presumably be allowed for an extensive public debate. The date could surely not be postponed for a lengthy period if the intention were to use the poll as a trigger for subsequent negotiations. However, it has also been suggested that a 3–5 year timeframe could be appropriate if the intention were to hold detailed and substantive negotiations *before* a single poll, and a referendum in the south.<sup>34</sup> Other issues to be determined would include the franchise, the terms of the question to be asked, and the role of the Electoral Commission, including the possible allocation of public money to designated campaigners.

Each of these matters is, legally, at the sole discretion of the secretary of state. But no doubt there would be intensive and ongoing consultation with the Northern Ireland political parties and other interests in Northern Ireland. It would probably be unreasonable to expect consensus even on the procedural aspects of such a deeply contentious and divisive issue, but every effort would need to be made to find such common ground as might exist. Whether it occurred by accident or design, the absence of detail on these issues is on balance positive.

However, it is remarkable (and illustrative of the lack of detailed thought given to the matter by any participant in the negotiations) that no role is given to the Irish government before a referendum has been held. Under the Agreement the people of the republic must also give their consent, freely and concurrently with the people of Northern Ireland, to a united Ireland. The result of a decision to bring about a united Ireland would, to put it mildly, have seismic consequences for the south as well as the north. The Irish government would be a central, if not the central, player in the subsequent process. One has to conclude that in practice, while the legal power to call a Northern Ireland poll, and to decide on related issues, rests with the secretary of state, politically the decision would be one for the two governments together. It would have been very desirable had this been spelled out and legally underpinned.

<sup>34</sup> Doyle and Kenny, *Unification processes*, 27–28.



### *Consent of the south*

The other major lacuna in the Good Friday Agreement itself relates to the question of southern consent. The Irish Constitution supplements the British-Irish Agreement by stipulating that a united Ireland be achieved 'with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.'

Neither it nor the Good Friday Agreement therefore refers explicitly to a referendum in the south; however, it is surely politically impossible that one would not be held, or to envisage an interpretation of 'democratically expressed' which would not require one. In any event, any changes to the constitution, however major or minor, and *a fortiori* of course a new constitution, would require a referendum in due course. While it might, hypothetically, be legally possible for a united Ireland to be brought about without any change in the constitution, as was the case with German reunification, it is surely inconceivable that such changes would not be required.<sup>35</sup>

The Good Friday Agreement does not elaborate on when exactly the 'concurrent' consent of a majority in the south would need to be obtained. The Agreement itself was approved in simultaneous referendums north and south. This precedent perhaps best corresponds to the meaning of 'concurrently' as understood at the time of the Agreement.

However, it has also been argued that 'concurrently' suggests that 'the two referenda must occur under the same set of political conditions, such that there is no reason to suspect that the consent given under one would have lapsed before the other consent is given.'<sup>36</sup> This would open up the possibility of a southern referendum some time, but not too long, after a referendum in the north<sup>37</sup>. If a northern majority voted for a united Ireland, southern voters would be clear as to the vital nature of their choice. If a northern majority voted against a united Ireland, then it would scarcely be useful to proceed with a referendum in the south.

The view might be taken that if there were unanimity, or an overwhelming majority, in the Dáil in favour of a united Ireland this would be a sufficiently robust democratic expression of public support in the south, even if there were a referendum in Northern Ireland. There would then only be an eventual

<sup>35</sup> One legal author sees a strong case for a totally new constitution, even if technically some modifications to Bunreacht na hÉireann would suffice—Humphreys, *Beyond the border*, 206.

<sup>36</sup> Doyle and Kenny, *Irish unification processes*, 18.

<sup>37</sup> To date, all national referendums on Ireland have been on proposals to amend the constitution. Nothing would prevent the Oireachtas from legislating to hold a vote on another question without constitutional effect—what might be called a plebiscite. But, irrespective of terminology, the political substance would be similar.

referendum on a specific proposal for amendment of the Constitution or for a new Constitution, which would have arisen from a process of consultation and negotiation. Would such a referendum however suffice on its own as a demonstration of consent, or would a first vote on the principle of a united Ireland be required earlier? The Courts would no doubt be required to decide on the legal arguments. Politically, however, it would surely be preferable for negotiations of such magnitude to be held on the basis of the symmetrical grant of consent by majorities both north and south.

Another option, as mentioned above, is to delay any vote, north or south, until after the conclusion of detailed negotiations on the legal and constitutional changes a united Ireland would require.

There are many other highly complex and sensitive issues which it would not have been possible or reasonable for the Agreement to determine. I mention some of them below.

### *Preparing for referendums*

I assume for these purposes a decision to proceed in three stages: referendums north and south, negotiations, a Constitutional referendum. The political parties and civil society would undoubtedly engage vigorously and passionately in a campaign leading up to the referendum. However, the Agreement is silent on the roles of the two governments in explaining to the public the consequences of a vote. It would seem essential for them at a minimum to define in advance the process to follow votes in favour of a united Ireland.

Even more important, however, would be for the public, both north and south, to be as well-informed as possible<sup>38</sup> on the very many issues, of very different kinds—constitutional, political, financial, economic, administrative, social, cultural, symbolic—which would need to be addressed in the establishment of a united Ireland.<sup>39</sup> Ideally, all concerned—the governments and all political parties north and south—could agree at least on a list of such issues. That might well not be achievable, given the probability that unionists would not see it as being to their tactical advantage.

In that case, a particular onus would rest on the Irish government to develop and communicate a clear and comprehensive approach in advance of referendums. It would need to work out how it would do so (by itself, with

<sup>38</sup> Many have observed the negative consequences of a lack of clarity ahead of the 2016 Brexit referendum in the UK.

<sup>39</sup> While there is an understandable focus on constitutional and institutional issues, there are many other questions which would be of at least equal importance to the public.

other parties in the Dáil, citizens' assemblies, a forum such as in 1983–84 and 1994–96). It would also need to decide how detailed and prescriptive it would seek to be, given not least that many questions could only be answered through comprehensive negotiations after referendums, and with the involvement of the people of Northern Ireland, in particular non-nationalists. But at the minimum, some sort of annotated agenda would seem to be required, with more substantive analysis and options provided if and where possible (for instance, on economic and fiscal matters).

### *After a decision on a united Ireland*

As mentioned above, it would be highly desirable for the proposed process which would follow votes in both parts of the island in favour of a united Ireland to have been set out by the two governments before them. This process would, however, need to be open to amendment after discussion with unionist parties if they had not engaged beforehand.

Several issues would need to be settled, at least in broad terms, before a new process could begin.

First, what should the end-product of negotiations ideally be? Several elements might form part of an overall package: a new British-Irish Agreement, to replace that of 1998; changes to or replacement of the Irish constitution; the repeal or amendment of the Northern Ireland Act; a decision on if and for how long the existing Northern Ireland and north/south institutions should be maintained; agreement on essential future legislation; agreement on key policies not requiring a legislative basis; and political commitments.

Second, who should participate in the negotiations? The Irish and British governments, evidently. But would it be possible for the Northern Ireland executive to take part in a coherent way? If not, would there be criteria to determine which Northern Ireland parties could take part? How about opposition parties in the south? What role would civil society play?

Third, the structure and organisation of negotiations: should there be a single plenary forum but with issue-based sub-strands? What would the rules of procedure be? Would there be external involvement, as in the 1996–98 talks?

Fourth, would there be a timeframe for completion of negotiations, or for a set of stages in them?

Fifth, how would it be determined that agreement had been reached? What would happen if some or all unionist representatives failed to join a consensus?

Sixth, how would an agreement be ratified? Change to the Irish constitution would require a referendum. Presumably a way would need to be found

to allow British and Irish citizens living in Northern Ireland to participate in the amendment or adoption of a constitution which would shortly be theirs. What if a majority in Northern Ireland voted against these changes? Or a majority on the island as a whole?

Seventh, should Northern Ireland voters alone be allowed to make a final choice about the continuation of devolution to Northern Ireland institutions?<sup>40</sup> If there were not broad consensus among parties representing the people of Northern Ireland, it would seem appropriate for the people to make the final choice, assuming that the options available were compatible with the overall constitutional order. This would create a further complication in an already complex process, but the question is of fundamental importance, constitutionally, practically and politically, in particular to the people of Northern Ireland.

Finally, the Northern Ireland Act requires the British government to bring proposals agreed with the Irish government to parliament. What parts of a complicated package as sketched out above would require British legislation will require careful thought in due course. It is of course assumed in the legislation, as throughout this paper, that the two governments would indeed reach agreement.

### *The nature of a united Ireland*

After agreeing on the principles underpinning the constitutional status of Northern Ireland, and how it might be changed, the Good Friday Agreement is almost entirely concerned with arrangements within the current context. In Article 1.v of the constitutional issues section it does, however, make clear that whether, as currently, a part of the United Kingdom, or in future a part of a united Ireland, Northern Ireland should be governed in accordance with the same principles: 'full respect for, and equality of, civil, political, social and cultural rights...freedom from discrimination...and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities.'

One assumes that these principles would indeed continue to apply in a united Ireland, and would be included either verbatim or in a similar form in a new constitution.

However, it would be for the framers of a new agreement, and of new constitutional and legislative provisions, to decide how far these or any of the

<sup>40</sup> I do not share the widespread view that the current institutions would necessarily be more or less automatically rolled over.

elements of the 1998 Agreement should be carried forward into a new era, and for the people to endorse this choice. In particular, what the Good Friday Agreement says about institutional arrangements is in no way binding for the future, should the choice be made to proceed otherwise.

## CONCLUSION

The Good Friday Agreement opened the way to a new era for Northern Ireland, for the island of Ireland, and for British-Irish relations. The breadth of the changes stemming from it was remarkable, and, despite the vicissitudes it has suffered since the triumphant day of its approval by the people on 22 May 1998, its essentials remain robust and largely uncontested, even if not always fully understood. But, while they looked to the future, its constitutional provisions were also about resolving the disputes of the past. In finding the path to common ground the Agreement drew on the earlier work of many others, and the two governments' distillation of that work was mostly undisputed and unchanged in the 1996–98 talks.

Likewise, while it did set out the fundamental principles of how a united Ireland would be achieved—peacefully, democratically, and through the consent of north and south—other than in establishing the legal framework for a Northern Ireland referendum it left the major questions unresolved and for another day. In most cases this was inevitable and appropriate. But it would have been very helpful had it better joined up the northern and southern halves of the equation. This is not to take away from the magnitude of the Good Friday Agreement or criticise those who conceived of and negotiated it. But it is a long way from being a complete guide to future decisions. That will be for a new generation of politicians and officials to work out.

Read a response to this article by Oran Doyle,  
'Configuring Irish Unification Processes',  
<https://doi.org/10.3318/ISIA.2021.32b.6>