Life after Brexit: Operationalising the Belfast/Good Friday Agreement's Principle of Consent

C.R.G. Murray and Aoife O'Donoghue[*]

Key Words

Brexit – Belfast/Good Friday Agreement – Principle of Consent – Unification of Ireland

Abstract

Brexit has energised discussions upon Irish (re)unification, with even Theresa May recognising that the threat of a no-deal Brexit heightens the possibility of the break up of the UK. The increasingly prominent discussion of a so-called "border poll", however, risks disguising the difficulties inherent in arranging such a vote. If no effort is made, in advance, to explore the processes by which a united Ireland could be brought about, then the peoples of Ireland and Northern Ireland risk being bounced into a choice without a reasonable opportunity to make an informed decision. The Good Friday/Belfast Agreement has been said to provide 'a clear mechanism through which a united Ireland may be achieved'. Judges, however, have emphasised its 'intensely political' nature and the multiple possible readings that its terms support. Deliberations upon (re)unifying Ireland raise questions of domestic law under the two jurisdictions on the island of Ireland, European Union law, the European Convention on Human Rights and aspects of general international law. These legal considerations are but one element of planning for an exercise of consent, taking their place alongside political, social and economic considerations. This paper reflects upon the extent to which the incorporation of the Good Friday/Belfast Agreement in the law of Ireland and Northern Ireland enables the functioning of its principle of consent or shrouds it in mystery.

[*] Reader, Newcastle University (UK) and Professor, Durham University (UK). Our thanks to Anthony Carty (University of Beijing), Oran Doyle (Trinity College Dublin), Daithí Mac Síthigh (Queen's University Belfast), Kathryn McNeilly (Queen's University Belfast), John Morison (Queen's University Belfast) and Rory O'Connell (Ulster University) for their encouragement and comments upon earlier drafts of this article. Any errors remain our own.

Introduction

The 29 March 2019 was supposed to be "Brexit day", but then so, in their turn, were 11 April and 31 October. The difficulties of successive UK Prime Ministers, Theresa May and Boris Johnson, in securing parliamentary support for their versions of a Withdrawal Agreement with the European Union (EU), have in large part related to how those deals impact upon Northern Ireland. Anxieties over the impact of these proposals, and of the possibility that the UK might leave the EU without a deal, have in their turn reshaped and reenergised debate over Northern Ireland's constitutional status under the terms of the Good Friday/Belfast Agreement (GFA).[1]

Taking the opportunity provided by the first of these anti-climactic "Brexit days", the former President of Ireland Mary McAleese ruminated upon the steps which might need to be taken ahead of a referendum on Northern Ireland's constitutional future:

> Long before any future referendum goes live, we need to do what Brexit has abjectly failed to do – that is to delve deeply and objectively and in a considered way into all the many issues raised by a possible ending of partition, from fears over identity, to governance and representation from flags, emblems to the islands' relationship with the United Kingdom, from economics to esoterics.[2]

Such suggestions have prompted ire amongst some Unionists. One commentator describes the debate as a form of 'political harassment',[3] and the Democratic Unionist Party's (DUP's) leader in Westminster, Nigel Dodds, has fulminated, without providing any specific basis, that 'people who call for a border poll are clearly in breach of the Belfast Agreement'.[4] For all of these complaints, even Theresa May voiced her concerns that a no-deal Brexit would herald 'changes to everyday life in Northern Ireland that would put the future of our Union at risk'.[5] After her proposed Agreement

[1] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland (with annexes) (1998) 2114 UNTS 473.

[2] M. McAleese, Dublin City University Brexit Institute Speech (29 March 2019) p.5 available at https://www.dcu.ie/news/news/2019/Mar/Mary-McAleese-addresses-DCU-Brexit-Institute.shtml (last accessed 25 October 2019).

[3] G. Gudgin, 'Stop harassing unionists about a united Ireland' *Irish Times* (25 August 2017).

[4] A. Madden, 'Calls for border poll "breach" Good Friday Agreement and we're not "molly coddled," says DUP after Johnson meeting' *Belfast Telegraph* (31 July 2019).

[5] T. May, HC Deb., vol.652, col.827 (14 January 2019). See also *In re McCord* [2019] NICA 49, [96] (Morgan LCJ).

with the EU faltered, and particularly following Boris Johnson's thwarted 'do or die'[6] pledges to leave the EU with or without a deal on 31 October 2019, discussion over reunification became increasingly urgent.[7]

The choreography of a vote on reunification is, however, a more complex proposition than is generally recognised.[8] Although the GFA has been said to provide 'a clear mechanism through which a united Ireland may be achieved',[9] its provisions on changing Northern Ireland's constitutional status are, in important respects, ambiguous. In 1998 this issue was effectively set to one side in favour of the immediate task of establishing functioning power-sharing arrangements.[10] As a result, the GFA provides 'an incomplete (and misunderstood) framework',[11] without any *travaux préparatoires* to aid its interpretation.[12] When required to interpret the GFA, judges have frequently blanched at its 'intensely political' nature and the multiple readings that its terms support.[13] It might therefore provide an unstable basis for a reunification

[6] R. Mason and P. Walker, 'Brexit: Johnson says Britain will leave EU on 31 October "do or die"' *The Guardian* (25 June 2019).

[7] The details of May and Johnson's respective draft Withdrawal Agreements are beyond the scope of this article, beyond some analysis of how they have been justified in light of the principle of consent; Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (25 November 2018) and Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (19 October 2019).

[8] These challenges received academic attention at the time of the 1998 settlement; see, in particular, C. Bell and K. Cavanaugh, '"Constructive Ambiguity" or Internal Self-Determination? Self-Determination, Group Accommodation, and the Belfast Agreement' (1998) 22 *Fordham International Law Journal* 1345, 1356. For more recent analyses focused on the process of a vote on (re)unification, see C. Harvey and M. Bassett, *The future of our shared island: a paper on the logistical and legal questions surrounding referendums on Irish unity* (Constitutional Conversations Group, 2019) available at https://ukandeu.ac.uk/wp-content/uploads/2019/02/Our-Shared-Island-A-Paper-on-Unity.pdf (last accessed 25 October 2019) and A. Whysall, *A Northern Ireland Border Poll* (UCL Constitution Unit, 2019) available at https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland (last accessed 25 October 2019).

[9] D. Byrne SC, 'An Irish View of the Northern Ireland Peace Agreement: The Interaction of Law and Politics' (1998) 22 *Fordham ILJ* 1206, 1218. See also C. Campbell, F. Ní Aoláin and C. Harvey, 'The frontiers of legal analysis: Reframing the transition in Northern Ireland' (2003) 66 *MLR* 317, 320.

[10] As Colin Harvey argued at the time, '[w]hether it all works will depend … to a significant extent on how the Assembly operates'; C. Harvey, 'Legality and Legitimacy: The New Assembly in Context' (1999) 22 *Fordham ILJ* 1389, 1414. See also R. Bourke, *Peace in Ireland: The War of Ideas* (Pimlico, 2003) p.3 and J. Todd, 'Nationalism, Republicanism and the Good Friday Agreement', in J. Ruane and J. Todd (eds), *After the Good Friday Agreement: Analysing Political Change in Northern Ireland* (UCD Press, 1999) pp.49-70.

[11] Whysall, n.8, p.5.

[12] See A. Morgan, *The Belfast Agreement: A Practical Legal Analysis* (The Belfast Press, 2000) para.1.27.

[13] See *Re Northern Ireland Human Rights Commission* [2002] NI 236 (UKHL), [66] (Lord Hobhouse) and *Doherty v Governor of Portlaoise Prison* [2002] 2 IR 252 (IESC), 254 (Keane CJ). In other cases, judges have actively avoided discussion of those ambiguities; *Secretary of State for the Home Department v De Souza* (2019) EA/06667/2016 (UKUT), [39].

process when the legitimacy of any referendum's outcome is likely to be challenged, and especially in light of the possibility of unrest if such complaints gain traction.[14]

This article assesses how the GFA's principle of consent can be operationalised. In the first substantive section we consider the exercise of direct democracy required by the GFA's terms against the backdrop of the conduct of the Brexit referendum and the process of extricating the UK from the EU. The second section proceeds to unpack the underlying rules and principles of international law, and constitutional law, which are engaged by (re)unification; self-determination, constituent power, democracy, human rights and state succession. We assess how these principles could be used to flesh out opaque aspects of the GFA's provisions on changing Northern Ireland's constitutional status. Building on these foundations, the third section offers three distinct models for changing Northern Ireland's status which can be accommodated within Ireland and Northern Ireland's existing legal frameworks. We evaluate the extent to which each of these models allow for civic engagement within the process of constitutional change. For the Social Democratic and Labour Party's (SDLP's) leader, Colum Eastwood, there is a 'special place in hell' for those who push for a change in Northern Ireland's constitutional status without a plan.[15] Forward planning, however, will count for little unless a process is constructed which gives these peoples genuine opportunities to debate the constitution of a unified polity, without the assumptions of policy makers closing down the choices at issue. The peoples of Ireland and Northern Ireland must not find themselves bounced into making such a decision by the vicissitudes of Brexit.

The Brexit Backdrop

The Great Disruption

Prior to the Brexit debate the inter-relationships between Ireland, Northern Ireland and Great Britain appeared more settled than at any point since partition. The lattice work of cross-border institutions established under the GFA ensured that Northern Ireland's relationship with Ireland was deeper than might ordinarily be expected, even for two

[14] See Whysall, n.8, p.14.
[15] J. Bell, 'Special place in hell for those calling for border poll with no united Ireland plan, says SDLP's Eastwood' *Belfast Telegraph* (23 February 2019).

neighbouring EU members.[16] Northern Ireland's constitutional status as part of the UK was generally accepted, with the first provision of GFA's British-Irish Agreement outlining that this status could be only be changed in the future with the consent of a majority of Northern Ireland's people.[17] These terms were developed from a formula established in the Northern Ireland Constitution Act 1973.[18] At the time of the Agreement there seemed to be no pressing need to probe the meaning of these terms, because there was no evidence of majority support for a united Ireland.[19] The principle of consent has, however, since become a staple feature of debates over Northern Ireland's governance, even being invoked to justify the convoluted arrangements by which the Northern Ireland Assembly would agree to the application of EU Single Market rules in Northern Ireland after Brexit under Boris Johnson's draft Withdrawal Agreement.[20] Despite such claims, the UK Supreme Court maintains that the principle applies only to the question of Northern Ireland's status as part of the UK.[21]

Debates surrounding potential reform of the UK's Human Rights Act 1998, however, first demonstrated that pressure for UK-wide constitutional change might have little-understood consequences for Northern Ireland's governance arrangements.[22] The outcome of the 2016 Brexit referendum dwarfed and sidelined the "British Bill of Rights" debate, re-animating debates about Northern Ireland's governance arrangements, and the degree to which its rules covering customs, product regulations, rights and beyond, should align with Ireland or Great Britain. The Brexit referendum also raised questions about how a vote on such a complex issue should be conducted so as to enable voters to make an informed decision. Referendums which contemplate fundamental and far-reaching governance impose

[16] See E. Tannam, 'Intergovernmental and cross-border civil service cooperation: The Good Friday Agreement and Brexit' (2018) 17 *Ethnopolitics* 243.

[17] GFA, n.1, Constitutional Issues, para.1. The implications of these provisions will be discussed below, but for an overview which contextualises these provisions, see R. Mac Ginty, R. Wilford, L. Dowds and G. Robinson, Consenting Adults: The principle of consent and Northern Ireland's constitutional future' (2001) 36 *Government and Opposition* 472.

[18] Northern Ireland Constitution Act 1973, s.1 (UK). A 'constitutional guarantee' based upon the will of the majority of the people of Northern Ireland was a departure from a previous formulation under the Ireland Act 1949, s.1(2) (UK), which required the Northern Ireland Parliament to assent to changes in Northern Ireland's constitutional status.

[19] See Whysall, n.8, p.1.

[20] 'The principle of consent is … at the heart of the arrangements'; B. Johnson, HC Deb., vol.666, col.826 (22 October 2019).

[21] See *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61, [135].

[22] A. O'Donoghue and B. Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66 *NILQ* 93, 98-101.

an awesome burden upon the people; to co-opt Edmund Burke, 'the whole constitution must be viewed together; and it must be compared with the actual state of the people, and the circumstances of the time'.[23]

That the uncertainty surrounding Brexit's impact upon day-to-day lives and livelihoods in Northern Ireland has reopened Northern Ireland's "constitutional question" should come as little surprise; economics has long influenced the lego-political framework applicable to the Atlantic Isles. The 1800 Acts of Union not only fused the islands' governance arrangements, they explicitly created a customs union.[24] Decades later, the repeal of the Corn Laws had a disproportionate impact on Ireland during the 1845-49 Famine.[25] Substantial changes to land tenancy and ownership provided the prelude to efforts by Irish Nationalists to achieve Home Rule in the 1880s.[26] In 1914, the worst slums in Europe were in Dublin, with 36 percent of accommodation being one-room tenements.[27] In contrast, Belfast had become Ireland's largest city and the hub of its shipbuilding and linen industries (alongside its own extensive slums).[28] On partition, two thirds of the island's manufacturing production were located in the six counties of Northern Ireland.[29] The economy of the twenty-six counties of the Saorstát Éireann/Irish Free State, by contrast, amounted to a classic post-colonial hybrid, organised around the export of raw materials and agricultural produce, with little capacity to produce high-value products.[30]

A 1956 Northern Ireland Government pamphlet emphasised the economic case for partition, stressing that any effort towards unification would be 'industrial suicide'

---

[23] E. Burke, 'To the Chairman of the Buckinghamshire Meeting – 12 April 1780', in H.C. Mansfield (ed), *Selected Letters of Edmund Burke* (University of Chicago Press, 1984) p.243.

[24] An Act for the Union of Great Britain and Ireland 1800 40 Geo. 3 c.38, Union with Ireland Act 1800 39 & 40 Geo. 3 c. 67, Article VI.

[25] See K. O'Rourke, 'The repeal of the Corn Laws and Irish emigration' (1994) 31 *Explorations in Economic History* 120.

[26] Assignment and Sub-Letting of Land Act 1826, Landlord and Tenant Law Amendment Act, Ireland 1860, Landlord and Tenant (Ireland) Act, 1870, Land Law (Ireland) Act 1881 44 & 45 Vict. c. 49, Purchase of Land (Ireland) Act 1885 48 & 49 Vict. c.7, Irish Land Act 1887 50 & 51 Vict. c. 33, Land (Purchase) Act 1903 3 Edw. 7 c. 37 and the Labourers (Ireland) Act 1906 6 Edw. 7 c.37. See also C. O'Grady and G. Owens, *Ireland Before and After the Famine: Explorations in Economic History, 1800-1925* (Routledge, 1992).

[27] J. Prunty, *Dublin Slums, 1800-1925: A Study in Urban Geography* (Irish Academic Press, 1998).

[28] See A. Bielenberg, *Ireland and the Industrial Revolution; The Impact of the Industrial Revolution on Irish Industry, 1801-1922* (Routledge, 2009), A. Bielenberg and P. Solar, 'The Irish Cotton Industry between the Industrial Revolution and Partition' (2007) 34 *Irish Economic and Social History* 1, and E. O'Malley, 'The Decline of Irish industry in the Nineteenth Century' (1981) 13 *The Economic and Social Review* 21.

[29] A. Bielenberg, *Industrial Growth in Ireland; c. 1790-1910* (PhD Thesis, LSE) p.89.

[30] See J. Bradley, 'The History of Economic Development in Ireland, North and South' in A. Heath, R. Breen and C.T. Whelan (eds), *Ireland North and South: Perspectives from Social Science* (OUP, 1999) 35, p.39.

for Northern Ireland.[31] The following year, future Irish Supreme Court Judge Donal Barrington emphasised the need to tackle economic divergences on the island as part of efforts towards (re)unification, lamenting that Ireland's policy makers 'never fully faced the danger that Partition might be permanent'.[32] In the decades after the end of the Second World War, however, Northern Ireland's traditional industries began to falter.[33] By the late 1960s, Thomas Whitaker, the influential Secretary of the Ireland's Department of Finance, recognised that ending partition would require Ireland to replace the £90 million subsidy which London then provided to Northern Ireland, and that Ireland must therefore 'achieve a good "marriage settlement", in the form of a tapering off over a long period of present British subsidisation'.[34] The economic realities of partition remain pressing. London's subvention to Northern Ireland is now some £9 billion a year, and the gap in GDP between Ireland and Northern Ireland is wider than between the two Germanys on reunification in 1989.[35] It would, however, be simplistic to present the subvention as shifting immediately onto Ireland with the end of partition. Transition arrangements would inevitably be part of any "marriage settlement", providing a window for economic integration which would potentially remedy some of the dislocations which necessitate the current level of subsidisation.[36]

Discussion of the subvention must also be set against the increasing economic integration brought about by the GFA settlement and EU membership, which have combined to diminish the significance of the border for business and have contributed to generating an 'all-island economy'.[37] Nor has this integration been purely economic.

---

[31] W.B. Maginess, 'The Right to Dissent – Making Democracy Work', in Northern Ireland Government, *Why the Border Must Be: The Northern Ireland Case in Brief* (HMSO, 1956) p.5.

[32] D. Barrington, 'United Ireland' (1957) 46 *Studies: An Irish Quarterly Review* 379, 379.

[33] See R. Rowthorn, 'Northern Ireland: An Economy in Crisis' (1981) 5 *Cambridge Journal of Economics* 1, 3-8. Northern Ireland's Finance Minister acknowledged the weaknesses in the economy in official dealings with the UK Treasury, only for officials to make scornful comments on the need for Northern Ireland to walk 'the path of financial rectitude'; UK National Archives (UKNA) Handwritten note by Sir Edward Compton (Third Secretary to the Treasury) (6 November 1956).

[34] Irish National Archives File 2001/8/1, T.K. Whitaker 'A Note on North-South Border Policy' (11 November 1968) p.2.

[35] See J. FitzGerald and E. Morgenroth, *The Northern Ireland Economy: Problems and Prospects* (TCD, 2019) pp.33-37 available at https://www.tcd.ie/Economics/TEP/2019/tep0619.pdf (last accessed 25 October 2019) and the Joint Oireachtas Committee on the Implementation of the Good Friday Agreement, *Brexit and the Future of Ireland Uniting Ireland and Its People in Peace and Prosperity* (August 2017) p.309.

[36] See S. McGuinness and A. Bergin, *The Political Economy of a Northern Ireland Border Poll* (IZA Institute, 2019) pp.22-23 available at https://www.esri.ie/system/files/publications/OPEA173.pdf (last accessed 25 October 2019).

[37] *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the*

For nearly a century, the distinct ethos of Ireland's two polities reflected the clash of nationalisms at work on the island. At the height of the Northern Ireland conflict, episodes like the rejection of the introduction of divorce in Ireland in 1986 were treated by some commentators as evidencing the fundamental incompatibility of the two polities.[38] Since then, however, three decades of far-ranging constitutional change have gripped Ireland and Northern Ireland. The GFA, in particular, connected rights protections across the Irish border.[39] Most recently, the amendments to the Northern Ireland (Executive Formation) Act 2019 regarding marriage equality and reproductive rights have contributed to the increasing alignment of the protections of fundamental rights on either side of the border.[40] It can therefore come as little surprise that the border's current "invisibility" for most private day-to-day purposes has become such a significant feature of the Brexit debate.[41]

Contrasting Constitutional Cultures

Referendums have long been treated differently in Ireland and the UK. Their use in the UK has been sporadic and formally subordinate to the operation of parliamentary sovereignty.[42] By contrast, referendums are the only method by which to effect constitutional change in Ireland. Ireland has therefore held repeated referendums on the same or similar topics, voting on different aspects of the law of abortion, for example, six times since the early 1980s.[43] The contrast in these systemic approaches to referendums is reflected in how they are organised. Before the referendum on the Thirty-sixth Amendment to the Irish Constitution, for example, a Citizens' Assembly[44]

European Union, TF50 (2017) 19, para.47-48. See also T. Connelly, *Brexit and Ireland: The Dangers, the Opportunities, and the Inside Story of the Irish Response* (2nd ed, Penguin, 2018) p.101.

[38] See T. Hadden and K. Boyle, 'Hopes and Fears for Hillsborough' (1986) 75 *Studies: An Irish Quarterly Review* 384, 386-387.

[39] GFA, n.1, Rights, Safeguards and Equality of Opportunity, para.9. See C. Harvey, 'Building Bridges – Protecting Human Rights in Northern Ireland' (2001) 1 *HRLRev* 243, 252.

[40] Northern Ireland (Executive Formation) Act 2019, ss.8-9 (UK). See P. Walker and R. Carroll, 'MPs vote to extend abortion and same-sex marriage rights to Northern Ireland' *The Guardian* (9 July 2019).

[41] S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press, 2018) pp.90-91.

[42] Unless the UK Parliament has specified the steps which will follow a referendum outcome in law, it is advisory in nature; see *Miller*, n.21, [121]. See also S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP, 2012) pp.25-26.

[43] F. de Londras and M. Enright, *Repealing the 8th* (Policy Press, 2018) pp.3-5.

[44] Final Report on the Eighth Amendment of the Constitution of the Citizens' Assembly, available at https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Final-Report-on-the-Eighth-Amendment-of-the-Constitution/ (last accessed 25 October 2019).

and an Oireachtas Committee[45] both undertook extensive discussions and deliberations on abortion and the Irish Government produced draft Heads of Bill.[46] Other significant referendums in Ireland have been preceded by Constitutional Conventions. In the UK, by contrast, the consultative nature of most referendums is reflected in a more laissez-faire approach to referendum preparation, as exemplified by the Brexit referendum.[47] The debates which preceded the 2016 referendum, for example, barely touched upon the potential implications for Northern Ireland which would come to dominate the Brexit process.[48] Prime Minister David Cameron's decision to prevent civil servants planning for a pro-Brexit outcome contributed to general uncertainty both before and after the vote.[49] This divergent practice complicates the planning of concurrent votes which propose uniting Ireland, before we even start to unpack the principles at issue in such referendums.

The principles applicable to changes in statehood

The process of exchanging one governance order for another engages both international law and the relevant domestic constitutional contexts. Concepts such as constituent power, the right to self-determination and democracy will underpin any decision-making processes regarding (re)unification. These principles are not synonymous; while they may work together, they are not substitutes for each other.[50] Constituent power operates during the determination of the form and content of a governance order, the right to self-determination is recognised in international law as the right of a people to choose statehood and government, and democracy requires the operation of universal suffrage in the making of governance decisions and/or in

[45] Joint Oireachtas Committee on the Eighth Amendment of the Constitution available at https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/Joint-Oireachtas-Committee-on-the-Eighth-Amendment-of-the-Constitution-/ (last accessed 25 October 2019).

[46] General Scheme of A Bill to Regulate Termination of Pregnancy, 27 March 2018, Department of Health (Ireland), available at https://health.gov.ie/wp-content/uploads/2018/03/General-Scheme-for-Publication.pdf (last accessed 25 October 2019).

[47] See A. Weale, *The Will of the People: A Modern Myth* (Polity 2018) pp.115-116. The 1998 referendums relating to the GFA do, however, illustrate how quickly both polities can organise referendums where circumstances demand.

[48] There was no attempt, for example, to reach an agreement with Ireland as to the implications of Brexit for the GFA ahead of the referendum, comparable to the declaration which preceded Ireland's 2004 referendum on the twenty-seventh amendment of the Constitution of Ireland; see de Mars, et al., n.41, p.147.

[49] Foreign Affairs Committee (UK House of Commons), *Implications of Leaving the EU for the UK's Role in the World* (19 July 2016) HC 431, pp.9-11.

[50] See G. Duke, 'European Constitutionalism and Constituent Power' (2019) 44 *ELRev* 50, 66.

the periodic choice of the representatives who will do so. The emphasis that these principles place upon the voice of the peoples within Ireland and Northern Ireland potentially challenge political actors' and commentators' assumptions about how questions surrounding Northern Ireland's constitutional status should be answered.

Constituent Power

Constituent power holders choose the form and substantive character of the system by which they are governed. Constituent power provides the legitimating basis for constitutional governance orders, and is closely aligned with popular sovereignty. The contrast between parliamentary and popular sovereignty and the impact on governance cultures in the two polities thus requires consideration.[51] Constituent power is tied to the grant of constituted power, providing the essential source of governmental authority.[52] Stephen Tierney argues that constituent power is 'the unbridled, democratic power of the sovereign people, every moment reinvented anew … wherein fundamental constitutional norms … are elevated beyond the reach of the temporal majorities'.[53] Constituent power is thus essential to the creation of constitutions. Although constituent power holders will not all agree upon where constituted power should rest or how constitutionalism operates, the constitutional order will determine how such competing political interests are managed.

Although the identity of constituent power holders is often taken for granted, radical changes such as the merger of two polities necessarily redefine constituent actors. In a process to decide whether there should be a united Ireland, there are two existing groups of constituent power holders.[54] The people of Ireland, who have adopted the Irish Constitution, hold popular sovereignty and exercise their constituent power by choosing the holders of constituted power and through making alterations to that Constitution. In Ireland, a referendum on (re)unification therefore involves these existing constituent power holders agreeing to the creation of a new group based upon the territory of the whole island of Ireland. The concurrent referendum in Northern Ireland instead concerns the people of Northern Ireland extinguishing their constituent

[51] See M. Loughlin, *Idea of Public Law* (OUP, 2003) p.99.
[52] See, on affected interest, R.A. Dahl, *After the Revolution?* (Yale University Press, 1970) pp.64-67.
[53] S. Tierney, 'Sovereignty', in E.A. Christodoulidis and S. Tierney, *Public Law and Politics: The Scope and Limits of Constitutionalism* (Ashgate, 2008) p.15.
[54] See Tierney, n.42, pp.241-259.

power within the UK and choosing to join with the people of Ireland. A favourable outcome would also alter the operation of constituent power within the UK (shrinking that country's pool of constituent power holders).

Assuming that the referendums favour (re)unification, further questions will arise as to the relationship between the new group of constituent power holders on the island of Ireland and the Irish Constitution, and the relationship which some of this group will maintain with the UK (for example, through retained UK citizenship). If it is 'inherent in a constitution in the full sense of the term that it goes back to an act taken by or at least attributed to the people',[55] such a radical redefinition of the demos must bring with it a reconsideration of Ireland's constitutional order. At what point would it be necessary for this new group of constituent power holders to exercise their popular sovereignty in confirming the existing Irish Constitution, or adopting a new or an adapted Constitution? Very different questions arise, however, if the outcomes of the two referendums do not align; for example, if Ireland votes against reunification and Northern Ireland votes in favour.

Self-determination

Whereas Ireland, alongside much of the world, was excluded from self-determination's first international legal iteration, through the implementation of US President Woodrow Wilson's Fourteen Point Plan at the Versailles Peace Conference, this principle now forms part of customary international law.[56] The right to self-determination is also a core feature of the UN Charter.[57] The content, extent and current status of the right, however, remain deeply contested.[58] Generally, there is agreement as to the

[55] D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *ELJ* 282, 289.

[56] F.M. Carroll, 'The American Commission on Irish Independence and the Paris Peace Conference of 1919' (1985) 2 *Irish Studies in International Affairs* 103 and J.B. Duff, 'The Versailles Treaty and the Irish-Americans' (1968) 55 *The Journal of American History* 582. Colonies of other Allied powers, such as Vietnam, were also excluded from the Conference in the same manner as the Irish delegation and made similar efforts to petition it.

[57] UN General Assembly Resolution 1514, 'Declaration on the Granting of Independence to Colonial Territories and Peoples', 14 December 1960, A/RES/1514(XV). See also UN General Assembly Resolution 2625, Declaration on Friendly Relations', 24 October 1970, A/RES/25/2625, *Western Sahara (Advisory Opinion*) [1975] ICJ Rep 12, *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403. For commentary, see S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (OUP, 1996) p.41.

[58] For an overview of the academic debate, see the contributions within D. French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP, 2013).

application of self-determination in the decolonisation process, but whether it extends to the formation of new states for minority, ethnic, national or regional groups remains contested.[59] Self-determination can be divided into several categories; internal self-determination, which could cover the current devolved settlement in Northern Ireland, and external self-determination, the most recent example of which is the creation of South Sudan.[60] It can further be divided into remedial, colonial and secessionary forms, although even these categories are disputed.[61]

When Austen Morgan asserts that the GFA's treatment of self-determination is 'legally incoherent', he assumes that international law requires it to be manifested in a specific form.[62] The central issue for him is whether the people of the island of Ireland constitutes a group under the requirements of international law; 'If they do, they have fulfilled one condition for an unqualified right; if they do not, they have no right'.[63] International law, however, primarily addresses the existence of the right to self-determination, and accepts that this right may be operationalised in specific instances by agreement amongst the relevant parties.[64] Writing even before the GFA was concluded, Gerry Simpson recognised that in instances like this 'international law has abdicated the field, accepting the series of experimental, ad hoc domestic arrangements with little international oversight'.[65] Despite Morgan's complaints, international law thus accommodates the GFA's iteration of self-determination, forestalling any debate as to whether its operation in the Northern Ireland context would be secessionary, colonial or remedial.[66] The GFA, moreover, recognises the

[59] As to whether Northern Ireland comes under the categorisation of colony in international law, see A. Carty, *Was Ireland Conquered: International Law and the Irish Question* (Pluto Press, 1996) pp.155-159.

[60] See J. Summers, 'The Internal and External Aspects of Self-Determination Reconsidered' in D. French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (CUP, 2013) 229 and J. Waldron, 'Two Conceptions of Self-Determination' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP, 2010) 397, pp.397-398.

[61] A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP, 2003) 206 and G. Binder, 'The Case for Self-Determination' in R. McCorquodale (ed), *Self-Determination in International Law* (Ashgate, 2000) 141.

[62] Morgan, n.12, para.9.31.

[63] ibid., para.9.32.

[64] International law imposes stricter obligations where independence from situations of colonialism are at issue; See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*, (25 February 2019) ICJ, para.157-158.

[65] G. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford JIL* 255, 258.

[66] Likewise, the doctrine of *uti possidetis juris* – which forestalls changes to existing borders – does not apply as both the UK and Ireland have agreed to potential boundary changes. Further, there would not be a question as to whether the exercise of self-determination was by lawful means; see UN Security Council Resolution 541,

self-determination claims of 'the people of the island of Ireland alone'.[67] Although its subsequent terms reveal that this group includes distinct peoples of Northern Ireland and Ireland, the implication is that any interference with these processes, or actions not taken in good faith, by the UK government, would be in breach of international law. This good-faith obligation was foreshadowed during the unification of the Germanies.[68] Under the 1945 Berlin Declaration the Allied Powers had 'supreme authority with respect to German',[69] seemingly permitting outside interference in the settlement of self-determination. And yet, under the 1990 Treaty on Final Settlement, these countries terminated their rights and responsibilities, recognising that they were bound to accept Germany's exercise of self-determination.[70]

The GFA recognises Northern Ireland's right to self-determination, establishes that this right is manifested in power-sharing institutions which possess (when operating) a level of autonomy within the UK, and sets the terms for potential change. It therefore 'addresses one of the very problems created by the international law of self-determination – the perpetuation of two irreconcilable self-determination claims that both have validity'.[71] Under international law, even when a referendum favours secession, this does not necessarily give rise to independence as of right,[72] but rather opens up discussions on a range of settlement options, including enhanced autonomy.[73] However, under the GFA, the UK made a binding commitment to accept secession as the outcome of a referendum which supports changing Northern Ireland's constitutional status.[74] In another exercise of self-determination, Ireland reserves the possible incorporation of Northern Ireland to determination through its domestic structures. Byrne argues that in the 1998 referendums the majority in Ireland and Northern Ireland accepted that, in terms of politics, of morality, and of international

Turkish Republic of Northern Cyprus, 18 November 1983 and UN Security Council Resolution 216, *Southern Rhodesia*, 12 November 1965.

[67] GFA, n.1, Constitutional Issues, para.1(ii).

[68] J.A. Frowein, 'The Reunification of Germany' (1992) 86 *AJIL* 151, 152.

[69] *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic*, 5 June 1945, 68 UNTS 189. This treaty also detailed the relevant international boundaries.

[70] *Treaty on the Final Settlement with Respect to Germany* 1990 (1990) 29 ILM 1187.

[71] Bell and Cavanaugh, n.8, 1361.

[72] J. Vidmar, 'The Scottish Independence Referendum in an International Context' (2013) 51 *Can YBIL* 259, 259.

[73] *Reference re Secession of Quebec* [1998] 2 SCR 217, [91] (Can).

[74] Vidmar, n.72, 263.

law, unity could only occur through concurrent consent.[75] Such claims can be read alongside the Irish Supreme Court's assertion that the people's will expressed in a referendum outcome 'is sacrosanct and if freely given, cannot be interfered with. The decision is theirs and theirs alone'.[76] The 'people of Northern Ireland' and 'people of Ireland' were accepted as peoples by both the UK and Irish Governments even before GFA,[77] and the 1998 referendums legitimate that approach. Even if these arrangements are far from a perfect fit within international law, the GFA provides the *lex specialis* operating in this context.[78]

Democracy

Democracy is a notoriously difficult concept to define,[79] but is nonetheless prominent in the 1998 settlement. Much as the Brexit referendum outcome is significant in being an exercise of democracy, the GFA's legitimacy rests upon exercises of democracy. Voters in Northern Ireland affirmed the GFA, the electorate in Ireland voted on its implications and democracy provides the basis on which its self-determination provisions can be exercised. Democracy is also at the core of how Ireland describes itself in its Constitution,[80] and the Representation of the People Act 1983 affirms the importance of democratic elections within the UK's constitutional order.

Thin accounts of democracy locate the concept in the expression of majority will through referendums and elections, but thicker accounts encompass freedom of expression, association and press, access to education and information, universal suffrage and a lack of undue influence from economic, religious or other unaccountable groups and freedom from subjugation.[81] Thick democracy is less concerned with certainty and conformity than with tackling social exclusion within democratic the process. As Carole Pateman argues, assumptions that universal suffrage leads to the full political emancipation and participation of women – and by analogy groups including the Traveller Community, immigrants, the LGBTQ

[75] Byrne, n.9, 1220.
[76] *Hanafin v Minister for the Environment* [1996] 2 IR 321 (IESC), 425 (Hamilton CJ).
[77] R. McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right to Self-Determination' (1995) 66 *BYIL* 283, 296.
[78] ibid., 297-298.
[79] R.A. Dahl, *On Democracy* (Yale University Press, 2000) pp.2-5.
[80] Constitution of Ireland, Article 5.
[81] Dahl, n.79, p.100.

community and those with disabilities – have long been proved to be incorrect.[82] These groups have long been marginalised within political debate in Ireland and Northern Ireland.[83] In Northern Ireland in particular, consociationalism arguably continues to entrench one set of identities over all others within devolved politics.[84] A commitment to 'parity of esteem' across society in Northern Ireland, which runs deeper than that provided by a "two communities" approach, requires that the choices opened to voters by the reunification process not be dominated by the demands of extreme voices, to the exclusion of already marginalised groups.[85]

Exchanging governance orders under international law

Successor States

Changing circumstances including decolonisation, merger, secession, the creation or dissolution of a federation, or, potentially, climate change, can contribute to the creation of a new state or states and the invocation of the law of state succession. These rules settle questions of continuing membership of international organisations, responsibility for sovereign debt and other broader responsibilities.[86] Ireland's historic relationship with the UK has long been a trap for the unwary, as illustrated by one of the UK Government's official documents on the consequences of Scottish independence ahead of the 2014 referendum. Having described Ireland as a 'colony' prior to the Act of Union, the authors declared that 'Scottish and English writers unite in seeing the incorporation of Ireland not as the creation of a new state but as an accretion without any consequences in international law'.[87] Setting aside the offhand

[82] C. Pateman, *The Disorder of Women Democracy, Feminism, and Political Theory* (Stanford University Press, 1990) p.17.
[83] See L. Connolly, *The Irish Women's Movement: From Revolution to Devolution* (Macmillan/Palgrave, 2003); M. Gilmartin, C. McGing and K. Browne, 'Feminist and Gender Geographies in Ireland' (2019) 25 *Gender, Place & Culture* (forthcoming) and Northern Ireland Human Rights Commission, "*Out of Sight, Out of Mind": Travellers' Accommodation in NI* (March 2018) available at http://www.nihrc.org/publication/detail/out-of-sight-out-of-mind-travellers-accommodation-in-ni-executive-summary (last accessed 25 October 2019).
[84] See A. Little, *Democracy and Northern Ireland: Beyond the Liberal Paradigm?* (Springer, 2004) pp.152-163.
[85] GFA, n.1, Constitutional Issues, para.1(v). See R. Houghton, 'Commentary on *McGimpsey v Ireland*' in A. O'Donoghue, M. Enright and J. McCandless, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart, 2017) 221, p.228.
[86] For an overview, see J. Crawford, *The Creation of States in International Law* (2nd ed, OUP, 2006) pp.667-672.
[87] See A. Boyle and J. Crawford, 'Opinion: Referendum on the Independence of Scotland – International Law Aspects' in Annex 2 *Scotland Analysis: Devolution and the Implications of Scottish Independence* (12 Feb 2013)

recognition of Ireland's colonisation in an opinion issued by the UK Government (and the consequences for Northern Ireland in international law which would potentially persist if this account is accurate[88]), if Northern Ireland and Ireland were to become one state, two reconstituted states would result, which we can for the purposes of this article call Éire/Ireland and Great Britain (the name applied to the polity created following the enactment of the 1706 and 1707 Acts of Union).[89] The UK has, of course, been reconstituted on multiple occasions, most recently when the United Kingdom of Great Britain and Ireland fractured, resulting in the United Kingdom of Great Britain and Northern Ireland and the creation of the Saorstát Éireann/Irish Free State.[90] Both states, it must be recognised, would be free to adopt new names.[91]

Several outcomes are possible in such circumstances. When Czechoslovakia split the Czech Republic and Slovakia became "clean slates". The end of the Union of Soviet Socialist Republics (USSR) led to one continuing state, the Russian Federation, alongside several new states.[92] The re-emergence of the Baltic States as part of that process provides further examples which could be applicable to Irish unification.[93] The break-up of Yugoslavia, however, demonstrates the complications which result when there is no agreement as to whether emergent polities are new or continuing states.[94] The long-running dispute on North Macedonia's name, and the continued disputed status of Kosovo, demonstrate the particularly long tail of Yugoslavia's dissolution.[95] Unification creates particular complications, as demonstrated in the creation of

---

para.36, available from https://www.gov.uk/government/publications/scotland-analysis-devolution-and-the-implications-of-scottish-independence (last accessed 25 October 2019). See also Carty, n.59, p.75.

[88] UN General Assembly Resolution 1514, n.57. See also A. Maguire, 'Contemporary anti-colonial self-determination claims and the decolonisation of international law' (2013) 22 *Griffith LR* 238.

[89] An Act for a Union of the Two Kingdoms of England and Scotland 1706, c. 11 and the Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England 1707, c. 7.

[90] See N. Davies, *Vanished Kingdoms: The History of Half-Forgotten Europe* (Penguin, 2011) p.635. Saorstát Éireann was a Dominion under UK law, but even prior to the *Articles of Agreement for a Treaty between Great Britain and Ireland* (6 Dec 1921) it had attempted to establish itself as an independent state under international law; see A. O'Donoghue, 'The Inimitable Form of Irish Neutrality: From the Birth of the State to World War II' (2008) 30 *Dublin ULJ* 259, 268-271.

[91] There is the example of North Macedonia, but it is a *sui generis* case; F. Messineo, 'Maps of Ephemeral Empires: The ICJ and the Macedonian Name Dispute' (2012) 1 *Cambridge J. Int'l & Comp. L.* 169.

[92] See R. Mullerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 *ICLQ* 473 and M. Craven, 'The Problem of State Succession and Identity of States under International Law' (1998) 9 *EJIL* 142.

[93] M. Koskenniemi, 'The present state of research carried out by the English-speaking section of the Centre for Studies and Research of the Hague Academy of International Law' in M. Koskenniemi (ed), *State Succession: Codification Tested Against the Facts* (Brill, 1996) 89, p.127.

[94] *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279 para.25 and 54-91. See also *Gabcikovo-Nagymoros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

[95] See *The Prespa Agreement* (17 June 2018).

Germany and Italy in the Nineteenth Century and the unification of the two Germanies and Vietnams in the Twentieth Century.[96] States often settle such issues via treaty; for instance, the Treaty of St. Germain tackled the creation of new states emerging from the Austro-Hungarian Empire.[97] In reality, each instance is *sui generis*.

One ongoing linguistic skirmish concerns whether the unification or reunification of Ireland is at issue, a debate which is as old as partition and which the GFA's terms side-step. The Chairman of the Boundary Commission, established after partition, exercised his mandate on the basis that Northern Ireland had, prior to Ireland's independence, already been 'established and defined' by the Government of Ireland Act 1920.[98] On this account Ireland, as encompassing the sum of the island, has never existed as a state, thereby preventing the use of reunification. By contrast, Irish case law suggests that, under Article 11-12 of the 1921 Anglo-Irish Treaty, the territorial jurisdiction of Saorstát Éireann encompassed the entire island, even if these terms only applied in practical effect for a day before Northern Ireland's then Parliament took steps to withdraw from the provisions applicable to Ireland as a whole.[99] Such an act of withdrawal had to take place to stop the terms of the 1921 Treaty applying to Northern Ireland; for example, the terms of the Treaty envisaged that Belfast Lough would be one of the UK's Treaty Ports in Ireland if Northern Ireland did not withdraw.[100] Reunification may therefore be a better term, but because the 1998 changes to Articles 2 and 3 of the Irish Constitution removed the territorial claim to the whole island, the distinction between these terms makes little legal difference.

The Vienna Convention on State Succession 1978 is generally reflective of customary international law.[101] In broad terms, under Article 34 the original or continuing state(s) is presumed to maintain its obligations and rights under international law. The position of other parties, in particular countries which have

[96] *Agreement with Respect to the Unification of Germany* (1991) 30 ILM 457. See Frowein, n.68, 157-159.
[97] *Treaty of Saint-Germain-en-Laye* (1919) UKTS 11 (Cmd. 400).
[98] Carty, n.59, p.142.
[99] *In re Logue* [1933] 67 ILTR 253. See T. Mohr, 'Law and the Foundation of the Irish State on 6 December 1922' (2018) 59 *Irish Jurist* 31.
[100] *Articles of Agreement for a Treaty between Great Britain and Ireland* (6 Dec 1921) Article 7 and Annex. Reunification of Ireland would not result in the Treaty-Port provision for Belfast becoming operative; the Anglo-Irish Trade Agreement 1938 (Irish Treaty Series) which ended the Trade War between the states also repudiated the provision of the 1921 Treaty covering the Treaty Ports.
[101] *Vienna Convention on Succession of States in respect of Treaties* (1978) 1996 UNTS 3 and *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, 7 April 1983, (1983) 24 ILM 306. Debate persists over the character of 'newly independent states' formed during decolonisation; see A. Sarvarian, 'Codifying the Law of State Succession: A Futile Endeavour?' (2016) *27 EJIL* 789, 791-793.

treaties with the state(s) in question, is also relevant. In the event of Irish reunification, both Ireland and Great Britain would likely be continuing states, if that is what both choose. The definition of statehood under international law sustains this analysis; although changes of population and territory are involved, these would not be of such significance as to question their status as continuing states.[102] As such, they would have to come to a bilateral agreement concerning responsibilities for sovereign debt and state pensions, amongst other issues. Their new boundaries would also change the nature of claims regarding territorial seas and access to natural resources under the UN Convention on the Law of the Sea.[103] In terms of human rights, regardless of whether the emerging polities are new, successor or continuing states, state and international organisational practice generate ongoing obligations.[104] International law requires that the rights, responsibilities and obligations of all states be fulfilled, regardless of whether their successor states are new or continuing.[105]

The status of continuing state is nonetheless important, in that it resolves difficulties which Irish reunification might otherwise create in terms of Ireland and Great Britain's memberships of international and supranational organisations. Ireland, indeed, has already indicated that it would want to be considered a continuing state in these circumstances. In the aftermath of the Brexit referendum, the Irish Government negotiated with the EU that the example of German reunification would apply in the event of a vote for unification under the terms of the GFA.[106] The European Council accepted that, 'in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union'.[107] This puts a united Ireland in a very different position to Scotland if the latter voted for independence after Brexit. Whereas in such circumstances Scotland would have to undertake the EU accession

[102] *Montevideo Convention on the Rights and Duties of States* (1933) 165 LNTS 20, Article 1. For examples of state practice, see Boyle and Crawford, n.87, para.53-92.
[103] *Convention on the Law of the Sea* (1982) 1833 UNTS 397.
[104] *Genocide (Bosnia v Yugoslavia) (Provisional Measures)* [1993] ICJ Rep 325. See W. Jenks, 'State Succession in Respect of Law-Making Treaties' (1952) 29 *BYIL* 105, 142, M.T. Kamminga, 'State succession in respect of Human Rights Treaties' (1996) 7 *EJIL* 469 and A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is there a case for Automaticity' (2003) 14 *EJIL* 141.
[105] This is particularly significant in light of the continuing nature of some of the GFA's rights provisions, see text accompanying n.172 below.
[106] P.E. Quint, *The Imperfect Union: Constitutional Structures of German Unification* (Princeton University Press, 2012) p.247.
[107] European Council, *Minutes of Special meeting of the European Council (Art.50) held on 29 April 2017* (23 June 2017). Available at http://data.consilium.europa.eu/doc/document/XT-20010–2017-INIT/en/pdf (last accessed 25 October 2019). See also Joint Report, n.37, para.44.

process as a new Member State,[108] Ireland can absorb the territory of Northern Ireland, even if that territory will become external to the EU after Brexit, without calling into question Ireland's status as a continuing EU Member State. For the EU, reunification amounts to a 'reshaping the borders of the State'.[109]

Beyond the EU, reunification could prompt a reconsideration of Ireland's relationship with other international organisations. Ireland would, for example, be able to apply to the Commonwealth as part of the reunification process. Indeed, Richard Humphreys has promoted this idea as a bridge-building precursor to any reunification process.[110] For Great Britain, continuing-state status is particularly important in the context of the UK's current permanent seat on the UN Security Council. Given the acceptance of the Russian Federation as the continuing state after the break-up of the USSR, it is unlikely that the reunification of Ireland would result in a contest of Great Britain's position on the UN Security Council.[111] In short, if both new entities seek to be treated as continuing states, this intention is unlikely to be contestable.

International Dispute Settlement

Should the UK or Ireland fail to fulfil the GFA's terms (for instance, by the UK refusing to allow the people of Northern Ireland "freely exercise" their choice over its constitutional status, or declining to implement the outcome of any such referendum) there is limited scope for either state to institute action under international law. Although it is an international treaty, and such a breach would amount to an Internationally Wrongful Acts, there is no dispute settlement clause in GFA.[112]

The International Court of Justice (ICJ) would not have jurisdiction over the GFA, even though both states have made declarations of compulsory jurisdiction as

[108] Treaty on European Union (Consolidated version) (2016) OJ C 202, Article 49.
[109] C. Harvey and M. Bassett, *The EU and Irish Unity: Planning and Preparing for Constitutional Change in Ireland* (European Left / Nordic Green Left (GUE / NGL) Group of the European Parliament, 2019) p.24.
[110] R. Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity After Brexit* (Merrion Press, 2018) p.224.
[111] Y.Z. Blum, 'Russia Takes Over the Soviet Union's Seat at the United Nations' (1992) 3 *EJIL* 354. Upon independence British India also continued to sit within the UN as India.
[112] UN General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), GA Resolution A/56/10. Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 25 October 2019).

each also included qualifications to that jurisdiction.[113] Ireland's is the most relevant, in that it specifically excludes disputes that arise between it and the UK with regard to Northern Ireland. The UK's declaration, which states that 'any dispute with the government of any other country which is or has been a Member of the Commonwealth', may also exclude jurisdiction. It might be argued that Ireland was never a member of the modern Commonwealth, having left just before the 1949 London Declaration and that this clause does not therefore apply.[114] Even so, the Irish declaration renders the point moot. Both states could mutually agree to accept *ad hoc* ICJ jurisdiction, or establish a stand-alone dispute panel, but would be under no obligation to do so. An alternative approach, following the success of Mauritius' campaign over the Chagos Islands, would be for the aggrieved state to petition the UN General Assembly to instruct the ICJ to issue an Advisory Opinion on the GFA's application.[115] The context might facilitate such an effort to drum up international support, but the UK Government's vociferous response to the ICJ's issuing of the *Chagos Archipelago* Opinion (as an intrusion upon a bilateral dispute), and refusal to abide by its terms, foreshadow the likely outcomes of any such effort.[116] This channels challenges into domestic processes of judicial review, which will be discussed below.

Exchanging Governance Orders under Domestic Constitutional Law

The UK

A Border Poll

The continuing use of "border poll" to describe a referendum on Northern Ireland's constitutional status as part of the UK is remarkable, given that the term was conjured up by Edward Heath's administration in 1972 in its unsuccessful attempt to put the constitutional question to rest.[117] At the time, the Northern Ireland Secretary refused

[113] Both states' declarations are available at www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last accessed 25 October 2019).
[114] London Declaration (26 April 1949) lists the UK, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon (Sri Lanka) as members. Available at http://thecommonwealth.org/sites/default/files/history-items/documents/London%20Declaration%20of%201949.pdf (last accessed 25 October 2019).
[115] *Chagos Archipelago*, n.64.
[116] See A. Duncan (FCO Minister of State) HC Deb., vol.655, col.144-145 (26 February 2019).
[117] Northern Ireland (Border Poll) Act 1972 (UK) and The Northern Ireland (Border Poll) Order 1973 (SI 97/1973) (UK).

to explain the distinction between a border poll and a referendum or plebiscite (and the terms were used interchangeably in internal papers).[118] From inception to poll took less than six months, with expediency being prioritised over meaningful constitutional debate.[119] The resultant nationalist boycott of the 1973 vote undermined the credibility of an exercise which was intended to provide a platform for the Sunningdale negotiations over power sharing.[120] And yet, even though constitutional language is so often hotly contested in Northern Ireland, the term continues to be widely employed.[121]

Under the Northern Ireland Act 1998, which incorporates the GFA's principle of consent into UK domestic law, the Secretary of State is responsible for instituting such a vote.[122] UK legislation rarely allocates public powers and duties to specific cabinet ministers, the concept of the Secretary of State being sufficiently general to allow for reorganisations of government departments without necessitating wholesale reform of the statute book.[123] In this instance, the Secretary of State for Northern Ireland would nonetheless be the directly responsible minister.[124] The Secretary of State is given the general discretionary power to institute what the Act continues to refer to as 'a poll' on Northern Ireland's status as part of the UK.[125] This power, however, becomes a duty (the legislation requires that the minister 'shall' do so) in circumstances when it appears 'likely' to him/her that a majority of Northern Ireland's electorate would support a united Ireland.[126] This duty is, however, contingent then upon the minister's 'political assessment of public opinion'.[127] The legislation does not specify how this assessment should be conducted, with election results in Northern Ireland or opinion polling

[118] W. Whitelaw, HC Deb., vol.846, col.1089 (21 November 1972).
[119] The files preserved in the UK National Archives attest to the imperative of wrapping up the exercise as quickly as possible; see UKNA File CJ 4/290, Letter from William Whitelaw (Northern Ireland Secretary) to Edward Heath (Prime Minister) (5 December 1972) p.1.
[120] It was, as such, a false start for the Sunningdale process, and has been treated by historians as little more than an effort to 'reassure Unionists'; T. Hennessey, *The First Northern Ireland Peace Process: Power-Sharing, Sunningdale and the IRA Ceasefires 1972-76* (Palgrave, 2015) p.76.
[121] See Harvey and Bassett, n.109, p.4 and p.8.
[122] Northern Ireland Act 1998, Sch.1, para.1 (UK).
[123] See R. Masterman and C. Murray, *Constitutional and Administrative Law* (Pearson, 2018) p.270.
[124] The 1973 border poll illustrates the benefits of this flexibility; such were the time constraints upon getting the necessary statutory instrument in place that civil servants insisted that if the Secretary of State for Northern Ireland was not available to sign off on it immediately, any Secretary of State would do; UKNA File CJ 4/469, Letter from T.R. Erskine (Legal Adviser's Branch, Home Office) to J.T. Williams (Northern Ireland Office) (24 January 1973) p.1.
[125] Northern Ireland Act 1998, Sch.1, para.1 (UK).
[126] ibid., para.2.
[127] Morgan, n.12, para.10.22.

providing possible measures of public opinion.[128] Questions regarding this 'political assessment' have become increasingly regular amidst the Brexit saga, receiving a near-standardised response; '[i]t remains the Northern Ireland Secretary's view that the majority of the people of Northern Ireland continue to support the current political settlement and that the circumstances requiring a border poll are not satisfied'.[129]

Even though the wording of the Act places considerable weight upon a personal appraisal of public opinion, the Northern Ireland Secretary's judgement over whether the conditions for a referendum have been fulfilled could still be subject to judicial review. As judges have noted in cases relating to the 1998 settlement, the decision is clearly one of high policy, in which the courts would ordinary permit a decision maker exercising her 'political judgment' considerable leeway.[130] Then again, the GFA's requirement that the UK Government display 'rigorous impartiality' in decision making affecting Northern Ireland's governance,[131] should condition such decisions.[132] Some clarity was achieved in 2018, when the campaigner Raymond McCord challenged the Northern Ireland Secretary's failure to publish a policy explaining how she would exercise her powers. Girvan LJ refused to circumscribe the minister's approach where such a complex decision was at issue.[133] He nonetheless provided an extended interpretation of schedule 1 of the Northern Ireland Act:

> It is necessarily implied in this provision that the Secretary of State must honestly reflect on the evidence available to her to see whether it leads her to the conclusion that the majority would be likely to vote in favour of a united Ireland. Evidence of election results and opinion polls may form part of the evidential context in which to exercise the judgment whether it appears to the Secretary of State that there is likely to be a majority for a united Ireland. The overall evidential

[128] See Harvey and Bassett, n.8, para.53.
[129] J. Campbell, 'Shadow NI Secretary Sceptical about Irish Unity Vote' *BBC* (6 February 2019) available at https://www.bbc.co.uk/news/uk-northern-ireland-47143679 (last accessed 25 October 2019).
[130] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [12] (Lord Bingham).
[131] GFA, n.1, Constitutional Issues, para.1(v). ibid., [25] (Lord Hoffmann).
[132] The Divisional Court refused permission for judicial review when it was claimed that the DUP's confidence-and-supply arrangement with the Conservative Party after the 2017 General Election breached the GFA's rigorous impartiality requirement in *McClean v First Secretary of State* (CO/3220/2017) (unreported), but this was on the basis that a challenge against a parliamentary arrangement, as opposed to public authority decision making, was unarguable.
[133] *In re McCord* [2018] NIQB 106, [21].

context on how it should be analysed and viewed is a matter for the Secretary of State.[134]

Any future judicial review is therefore likely to hinge on this requirement of honest reflection on the part of the Northern Ireland Secretary.

This judgment potentially permits game playing.[135] Even if consistent opinion polling in Northern Ireland did suggest a majority in favour of a united Ireland, if the UK Government wanted to stymie calls for a vote the Northern Ireland Secretary could, for example, delay a decision out of a supposed desire for more evidence of popular opinion. Given that such a decision goes to the heart of the divide between Unionism and Nationalism within Northern Ireland, any such moves would undoubtedly be litigated.[136] Notwithstanding the substantial level of discretion which Girvan LJ identifies, the Northern Ireland Act's provisions are designed to operationalise the GFA's principle of consent, and courts should therefore treat any overt effort to block this process as an illegal effort by the UK Government to thwart the legislation's underlying purpose.[137] The Secretary of State should, at the very least, be expected to detail the reasons behind the UK Government's approach to its obligation once some evidence suggests majority support for a referendum.[138] Following the September 2019 Ashcroft poll, which pointed to majority support in Northern Ireland for reunification in the event of a no-deal Brexit, this condition could be on the cusp of being fulfilled.[139] Once such reasons are in the public domain interested parties would be better able to examine the factors taken into account by the Secretary of State and challenge any perceived inadequacies or appearance of bias in the decision. The

[134] ibid., [20].

[135] Due to a lack of political will at Westminster, coupled with the paralysis within Northern Ireland politics, many important provisions of the Northern Ireland Act have not been implemented, notably with regard to the Northern Ireland Bill of Rights; see C. Harvey, 'Mutual Respect? Interrogating Human Rights in a Fractured Union' (2018) 29 *KLJ* 216, 234-237.

[136] An alternative form of game playing might be a "pre-emptive" poll ahead of a perceived period of pressure upon the current constitutional settlement, given that Northern Ireland Act imposes a seven-year hiatus of at least between border polls; Northern Ireland Act 1998, Sch.1, para.3 (UK).

[137] See *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997 and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 All ER 244. See also R. Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, 2009) p.122.

[138] The importance of the issues at stake make it highly likely that the courts would insist upon transparency over the reasons behind a border poll decision; *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 561 (Lord Mustill).

[139] See Lord Ashcroft, *My Northern Ireland survey finds the Union on a knife-edge* (11 September 2019) available at https://lordashcroftpolls.com/2019/09/my-northern-ireland-survey-finds-the-union-on-a-knife-edge/#more-16074 (last accessed 25 October 2019).

weight of evidence might be such that the courts would be prepared to quash a refusal to hold a poll.

Parliamentary Sovereignty

Successive UK Governments have long insisted that Northern Ireland's place in the UK rests on 'the wish of a majority of the people'.[140] The Northern Ireland Act outlines what would happen after a referendum outcome which favours a united Ireland:

> [I]f 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.[141]

The roots of these terms can be traced through the Anglo-Irish Agreement of 1985[142] and back to the 1973 Sunningdale draft declaration.[143] As Morgan notes, '[s]hall lay before parliament is weaker than introduce and support in parliament from 1985, and even arguably support in 1973'.[144]

The Northern Ireland Act might therefore cloud the UK Parliament's role in a reunification process, especially when the Act also affirms Westminster's ultimate authority over Northern Ireland's current constitutional arrangements.[145] These concerns should be addressed by interpreting its provisions in line with the underlying GFA commitments.[146] If a united Ireland is supported in both Ireland and Northern Ireland, the GFA insists that 'it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that

[140] HM Government, *The Future of Northern Ireland: A Paper for Discussion* (1972) para.79.
[141] Northern Ireland Act 1998, s.1(2) (UK).
[142] Agreement on Northern Ireland, Ireland-United Kingdom (1985) 24 ILM 1579, Art 1(a)-(c).
[143] See Morgan, n.12, para.10.17.
[144] ibid., para.10.24.
[145] Northern Ireland Act 1998, s.5(6) (UK). See B. Hadfield, 'The Belfast Agreement, Sovereignty and the State of the Union' [1998] *Public Law* 599, 615.
[146] '[T]he words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it.' *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771 (Lord Diplock).

wish'.[147] Whatever the Northern Ireland Act's wording, the UK Government is, in such circumstances, under an international obligation to support legislation to give effect to this commitment. This obligation would influence how the courts interpret section 1 of the Northern Ireland Act in any subsequent litigation on the issue.[148] Any apparent watering down of the UK Government's commitment in the wording Northern Ireland Act is therefore less significant than the underlying GFA commitment.[149] Section 1 also, surprisingly, implies that legislation would be initiated if Northern Ireland voted in favour of a united Ireland, even if Ireland's voters did not also do so. This language could be a manifestation of the uncertainty, noted above, over whether the GFA (as opposed to Ireland's Constitution) mandates concurrent referendums. At the least, a Northern Ireland vote in favour of reunification which is not reciprocated in Ireland could be used to permit Westminster to transfer further powers to Northern Ireland.

Given that successive UK administrations have explicitly reaffirmed their commitment to the principle of consent,[150] this debate could well be academic. If the UK Government did, however, refuse to act on a referendum outcome in favour of reunification, it would precipitate a constitutional crisis. UK courts would not ordinarily challenge proceedings in Parliament,[151] and it would therefore be difficult to use domestic legal mechanisms to oblige a reluctant UK Government to table and support legislation. Such a potential clash between two 'constitutionally significant' statutes (in this instance the pledges contained within the Northern Ireland Act, as interpreted in light of the GFA, and the sanctity of proceedings in Parliament under the Bill of Rights) is envisaged by Lords Neuberger and Mance in the UK Supreme Court's *HS2* decision.[152] Arguably in such circumstances a judicial ruling would have to take into account the decision of the people of Northern Ireland.[153] The UK Supreme Court's

[147] GFA, n.1, Constitutional Issues, para.1(iv).
[148] See *Robinson*, n.130, [30] (Lord Hoffmann), although for a dissenting expression of the contrary position, see [61] (Lord Hutton).
[149] This commitment does not, as such, exist purely on the 'international plane'; see *Miller*, n.21, [104] and *McCord*, n.5, [97]
[150] See Joint Report, n.37, para.44.
[151] Bill of Rights 1688, Art.9.
[152] *R (on the application of Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324, [207].
[153] Although claims about the importance of the "will of the people" as expressed in the Brexit referendum did not sway the UK Supreme Court in *Miller*; *Miller*, n.21, [124].

Miller and Cherry[154] decision also illustrates its willingness to sidestep 'proceedings in Parliament' arguments where significant constitutional principles are at issue.[155]

If a UK Government went one step further, and sought to expressly repeal the Northern Ireland Act's consent provisions, to thwart the obligation to hold a referendum or give effect to its outcome, the UK Courts would again have to decide whether to give effect to the will of Parliament when it enacted the 1998 Act or the will of the current Parliament. The best way to conceive of these Northern Ireland Act provisions is as a 'manner and form' restriction on the activities of future Parliaments, in that legislators must follow the 1998 Act's process if they seek to legislate in a way which affects Northern Ireland's contingent status as part of the UK.[156] Although it would fly in the face of more traditional accounts of parliamentary sovereignty some judges, notably Baroness Hale in *Jackson*,[157] have suggested that the courts would be able to determine whether Parliament in 1998 successfully tied the hands of future legislators, as 'Parliament is not permitted to ignore these requirements when passing legislation on those matters'.[158] Not all her fellow judges in *Jackson* were enthusiastic about this approach to parliamentary sovereignty.[159] Any attempt by the UK Parliament to neglect these GFA requirements would, of course, also precipitate a clash between the UK's international legal obligations and parliamentary sovereignty. The centre of gravity of Northern Ireland's constitutional order nonetheless remains the GFA, making any such constitutional and international dispute unlikely.

Ireland

Contingent and Non-Constitutional Referendums

Article 3.1 of the Irish Constitution conditions the reunification process by separating the Irish nation from the state and recognising the variety of identities and traditions on the island. It also rules out any possible use of force to unite the island under one

[154] *R (on the application of Miller and Cherry) v The Prime Minister* [2019] UKSC 41.
[155] ibid., [68].
[156] See J. Morison and S. Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (Sweet and Maxwell, 1995) p.105.
[157] *R (on the application of Jackson and others) v Attorney-General* [2006] 1 AC 56; [2005] UKHL 56.
[158] ibid., [163] (Baroness Hale).
[159] ibid., [113] (Lord Hope) and [174] (Lord Carswell). This debate over parliamentary sovereignty was foreshadowed, in the context of the consent principle as it applied under the Ireland Act 1949, by Harry Calvert; H. Calvert, *Constitutional Law in Northern Ireland: A Study in Regional Government* (Stevens & Sons, 1968) p.14.

jurisdiction.[160] Article 3 establishes that Ireland can only be reunified through democratic processes involving consent in both jurisdictions. In this regard Article 3 is more explicit than the GFA about the need for a democratic expression in both jurisdictions.[161] Article 3 and 46 of the Constitution, however, impose no requirement for a constitutional referendum; a non-constitutional referendum or a contingent constitutional referendum are also possible.

The process for amending the Irish Constitution, under Article 46 and the Referendum Acts, is relatively straightforward.[162] The 1998 referendum on changing Articles 2 and 3 of the Irish Constitution was nonetheless unusual in that it required a set of GFA arrangements to fall into place before the new articles became part of the Constitution's text.[163] While there was overwhelming support for changing the Constitution, these changes contingent upon the UK's enactment of the Northern Ireland Act (in particular, instituting power sharing) and the Human Rights Act (securing the UK's human rights commitments), amongst other elements.[164] Article 29.7.3˚ to 5˚ were inserted as interim provisions to apply between the passing of the referendum and, as referred to in Article 29.7.3˚, an Irish Government declaration that all parties had complied with their obligations.[165] If the GFA had not been operationalised within 12 months, or an extended period as prescribed by law, then the new Article 29.7.3˚ to 5˚ would have ceased to be constitutional text. Strictly speaking, the Irish referendum in 1998 amended Article 29, in doing so permitting Articles 2 and 3 to be amended upon the Government's declaration that the conditions had been met. This process can be likened to the Irish Constitution's original transitory provisions, Articles 51 and 52, which allowed for the amendment of the Constitution by ordinary legislation for a period of three years after the Constitution came into effect

[160] There is considerable debate over tensions between the use of force and self-determination; see J.D. Ohlin, 'The Right to Exist, the Right to Resist' in F.R. Tesón (ed), *The Theory of Self-Determination* (CUP, 2016) 70, p.87.
[161] Had Article 3 not been so explicit, the example of Germany suggests that reunification, if envisaged in the Constitution, would not require a referendum in the continuing state; Frowein, n.68, 158.
[162] Referendum Act 2001 (Ireland), Referendum Act 1998 (Ireland) and Referendum Act 1994 (Ireland). See O. Doyle, *The Constitution of Ireland: A Textual Analysis* (Hart, 2018) pp.198-203.
[163] D. O'Donnell, 'Constitutional Background to and Aspects of the Good Friday Agreement – A Republic of Ireland Perspective' (1999) 50 *NILQ* 76, 76. Although two other contingent referendums did not pass (Twenty-fifth Amendment of the Constitution Bill 2001 and the Thirty-second Amendment of the Constitution Bill 2013), there is another successful example (Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013).
[164] GFA, n.1, Constitutional Issues, Annex B and British-Irish Agreement, Article 4(3).
[165] 'British-Irish Agreement: Announcement' Dáil Debates, Vol.512, No.2, p.3, cc.337–340 (2 December 1999).

in 1937.[166] Once the initial transition period passed, Article 52 provided that these transitional amendment powers fell from the official text of the Constitution.

The constitutionality of the contingent constitutional referendum was litigated in *Riordan*, a challenge which was dismissed in both the High Court and the Supreme Court.[167] Barrington J stated that:

> The people have a sovereign right to grant or withhold approval to an amendment to the Constitution. There is no reason therefore why they should not, provided the matter is properly placed before them, give their approval subject to a condition.[168]

The Irish courts have repeatedly re-affirmed the paramountcy of popular sovereignty in the process of constitutional amendments.[169] As such, it would be possible for a reunification referendum in Ireland to be contingent on Northern Ireland also voting for reunification and/or Westminster giving effect to the outcome of such a vote.

It is also possible for Ireland to hold non-constitutional referendums (or plebiscites), albeit such a vote could not of itself change the content or interpretation of the Constitution. The Local Government Act 2019, for example, provided for three plebiscites on directly elected mayors. Under the terms of the Act, unlike constitutional referendums, the Referendum Commission had no responsibility for these plebiscites.[170] The Irish Constitution potentially allows for a constitutional referendum, contingent constitutional referendum or non-constitutional referendum to take place concurrently with Northern Ireland's vote on reunification. This gives a measure of flexibility to structuring a reunification process which takes full account of principles of self-determination, democracy and constituent power.

---

[166] There had been considerable controversy about the transitionary arrangements under the 1922 Constitution, when the Irish Government used Article 2A to extend its emergency powers, prompting a legal challenge; *The State (Ryan) v Lennon* [1935] IR 170. See A. Greene, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis* (Hart, 2018) p.91.

[167] *Riordan v An Taoiseach* [1998] IESC 45.

[168] ibid., para.24.

[169] G. Hogan, 'The British-Irish Agreement and the Irish Constitution' (2000) 6 *EPL* 1, 8. See also Doyle, n.162, p.196.

[170] Local Government Act 2019, s.4 (Ireland). Article 27 of the Irish Constitution provides that the President, after receiving petitions from a majority of senators and one third of TDs, may put to a referendum a Bill that has been deemed to have passed through Oireachtas. This provision has never been used.

Mutually Assured Construction

The GFA's Continuing Provisions

Aspects of Northern Ireland and Ireland's governance became increasingly intertwined after the GFA. When voters in Ireland agreed to amendments to Articles 2 and 3 which Unionists 'found offensive or threatening',[171] in a parallel referendum to the vote on the Agreement in Northern Ireland, these changes provided a justification for pro-Agreement Unionists accepting North-South co-operation and integration across multiple areas of governance. The GFA, however, did not stop at cross-border cooperation. It also required that 'whatever choice' the people of Northern Ireland make in a referendum, 'the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality'.[172] In other words, the GFA includes "future-lock" provisions which operate whatever constitutional future transpires.

As Jim Bulpitt presciently recognised in 1983, Ireland's reunification would have to be preceded by a 'future contract which Dublin would offer the majority community in Norther Ireland'.[173] In 1998, Ireland's then-Attorney General went out of his way to highlight that 'the commitments in the British-Irish Agreement to equality of treatment and parity of esteem, and to the dual citizenship rights of the people of Northern Ireland, are explicitly to apply irrespective of the status of Northern Ireland'.[174] These provisions were intended to provide a 'reassuring and confidence-building'[175] baseline of protections which would apply upon Northern Ireland's eventual reunification with Ireland. They contrast with those GFA terms which would no longer operate after reunification, most prominently the contingent references to UK sovereignty. Other GFA provisions might be retained, or reworked, dependent on the shape of the constitutional settlement for the united polity. For instance, Article 3.2 of the Irish Constitution gives authority for cross-border bodies to be created on the island under the GFA, acknowledging a form of joint decision-making which may impact on either jurisdiction. This provision would make little sense after reunification, unless some internal jurisdictional division of Ireland persists.

[171] Byrne, n.9, 1216. For detailed analysis of these changes, see D. Clarke, 'Nationalism, the Irish Constitution, and Multicultural Citizenship' (2000) 51 *NILQ* 100.
[172] GFA, n.1, Constitutional Issues, para.1(v).
[173] J. Bulpitt, *Territory and Power in the United Kingdom: An Interpretation* (Manchester UP, 1983) pp.227-228.
[174] Byrne, n.9, 1219.
[175] ibid., 1219.

The GFA makes no provision for unilateral withdrawal by either of its state parties,[176] and there is no basis for claiming that unification would amount to a 'fundamental change' vitiating the GFA's future lock.[177] Sceptics, however, might perceive little protection in the future lock. Despite its assurances, the DUP leader Arlene Foster, has claimed that she would probably emigrate in the event of Ireland's reunification.[178] The Sino-UK Joint Declaration on Hong Kong of 1984 is notable in that it also included conditions which were intended to remain in effect after the Hong Kong's hand over to China in 1997.[179] And yet, over two decades into the practice of "one country, two systems", this mantra has worn thin.[180] The GFA's commitments, however, extend beyond the issues covered within the 1984 Joint Declaration, which focuses upon Hong Kong as an economy and trading centre. The GFA's commitments explicitly cover East-West cooperation, the birthright of the people of Northern Ireland to claim UK or Irish citizenship and, as we have seen, 'rigorous impartiality' in official treatment of Unionists and Nationalists.[181] This lock is therefore much more difficult to pick, and aims to ensure that the aftermath of a reunification vote will not involve a 'sudden, triumphalistic hoisting of a tricolour at Parliament buildings in Stormont at 12 noon on some wet Tuesday following a border poll'.[182] They can even be conceived as an ur-text for parts of the Constitution of a reunified Ireland.

Stitching Together Two Polities

Although, as discussed above, Ireland will almost certainly be the successor state on the island following a reunification vote, the GFA requires that aspects of the two polities be stitched together, rather than Ireland subsuming Northern Ireland. This raises a range of challenges to be navigated and deliberated upon within both polities,

[176] C. Murray, A. O'Donoghue and B. Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2016-2017) 11-12 *IYIL* 71, 94.
[177] Vienna Convention on the Law of Treaties 1969 (1980) 1155 UNTS 331, Article 64. See Humphreys, n.110, pp.106-111.
[178] Interviewed in P. Kielty, 'My Dad, the Peace Deal and Me' *BBC* (24 April 2018).
[179] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984) 1339 UNTS 36.
[180] Interestingly, in the midst of pro-democracy protests in Hong Kong, UK ministers continue to talk of the UK as a 'guarantor' of the 1984 Joint Declaration, with 'a responsibility to monitor its implementation', a term that the UK Government remains reluctant to use with regard to Ireland in relation to the GFA; M. Field, HC Deb., vol.662, col.142 (18 June 2019).
[181] See Humphreys, n.110, pp.106-119.
[182] ibid., p.240. See also C. Donohue, 'The Northern Ireland Question: All-Ireland Self-Determination Post-Belfast Agreement' (2016) 47 *VUWLRev* 41, 67-68.

and the handful of existing examples of peaceful exercises of self-determination by unification provide some important insights.

Brexit will potentially make it more difficult to integrate Northern Ireland into Ireland; the latter will continue to be an EU member state, and the former will start to diverge from areas of EU law (with the degree of divergence being dependent upon the terms of any Withdrawal Agreement[183]). Indeed, an underlying element in the support for Brexit within elements of Unionist opinion is the idea that taking Northern Ireland out of the EU will shift it out of alignment with Ireland and make reunification more difficult to realise.[184] Elements of continuity matter when a people is given the opportunity to fundamentally change its governance order. One prominent factor in the Scottish National Party's pitch for independence ahead of the 2014 referendum, for example, was that Scotland would remain within the EU, providing for a degree of continuity which might sway some doubters towards the independence cause.[185] As we have seen, in the aftermath of the Brexit referendum the Irish Government moved quickly to gain the European Council's support for recognition that Irish unification would see Northern Ireland automatically integrated into the EU, notwithstanding the difficulties posed by any post Brexit divergences.[186]

Beyond the immediate Brexit backdrop, steps could be taken regarding the changes to the Irish Constitution which reunification could necessitate. This is a difficult process to initiate, in part because it requires Northern Ireland's people to engage with an unfamiliar codified constitutional culture, and Ireland's people to reopen a range of hitherto settled constitutional provisions.[187] Article 3 of the Constitution would need to be altered if the will of the Irish people for unity was fulfilled. Article 7, on the flag, would need to be considered in the context of addressing Unionist population. Article 8, which makes Irish the first official language and English the

[183] See de Mars, et al., n.41, p.11-12.

[184] Note the echo of this approach in Theresa May's Lancaster House speech claim that Brexit would 'strengthen the bonds of Union'; T. May, 'The Government's Negotiating Objectives for Exiting the EU' (17 January 2017) available at https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech (last accessed 25 October 2019).

[185] See S. Douglas-Scott, 'Scotland, Secession, and the European Union', in A. McHarg, T. Mullen, A. Page and N. Walker (eds.), *The Scottish Independence Referendum: Constitutional and Political Implications* (OUP, 2016) p.175.

[186] See European Council, n.107.

[187] See A. Aughey, 'Obstacles to Reconciliation in the South', pp.1-52 and B. Dickson, 'A Unionist Legal Perspective on Obstacles in the South to Better Relations with the North', pp.53-84, in Forum for Peace and Reconciliation, *Building Trust in Ireland: Studies Commissioned by the Forum for Peace and Reconciliation* (Blackstaff, 1996).

second, might also need to be considered, perhaps to incorporate Ulster Scots or take away the primacy of Irish.[188] Article 9.3 on loyalty and fidelity to the state and references to the Holy Trinity in the Preamble, for example, might need to be reconsidered to accommodate the significant Protestant minorities which would become part of the state's constituents. Article 15.2.2˚ contains provisions for 'for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures' which could accommodate the continuation of the Stormont Assembly in some form, albeit not with any scope for executive authority, under Article 28.2, which makes no provision for subordinate executive competence.[189] Article 18 on the Seanad may also be revised to incorporate further constituencies for instance representing Queen's University Belfast and Ulster University as enumerated alongside the NUIs and Trinity.[190] There are also questions over the extent to which the police and armed forces, human rights bodies and other administrative structures in both polities would continue, be merged or be reconstituted. Given that far reaching constitutional upheaval is thus all but inevitable, an entirely new constitution could also be contemplated to better reflect the wishes of the constituents of a unified polity. In short, assumptions in either polity about what groups in the other would desire or demand must therefore give way to active deliberation and discussion.

The questions become when and how these decisions are to be made. Ought they be contingent on Northern Ireland voting for unification, be made after unification as part of constituting the new polity, or settled, on a contingent basis, in the run up to the referendums on reunification? The processes and timings of deliberation require careful reflection.[191] In Ireland, deliberations on constitutional change take myriad forms. Recent examples include the 2016-2018 Citizen's Assembly and the 2014 Constitutional Convention.[192] There are also examples for other jurisdictions providing assemblies for citizen-based deliberations, including British Colombia, Ontario and the

[188] See D. Mac Síthigh, 'Official status of languages in the UK and Ireland' (2018) 47 *CLWRev* 77.
[189] See Doyle, n.162, p.43.
[190] The Seventh Amendment altered the constituencies for Higher Education bodies, although enacting legislation has never been passed; Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Act 1979 (Ireland).
[191] See P. Fournier, H. van der Kolk, R.K. Carty, A. Blais, and J. Rose, *When Citizens Decide: Lessons from Citizen Assemblies on Electoral Reform* (OUP, 2011).
[192] See J. Suiter, D.M. Farrell and E. O'Malley, 'When do Deliberative Citizens Change their Opinions? Evidence from the Irish Citizens' Assembly' (2016) 37 *International Political Science Review* 198 and E. Carolan, 'Ireland's Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change' (2015) 13 *IJCL* 733.

Netherlands.[193] Historically, reviews of the Irish Constitution have been led by "experts", including Informal Committee on the Constitution in 1967, and the Constitutional Review Group in 1996.[194] Even Ireland's ongoing Citizen's Assembly is heavily reliant upon expert evidence on law and other matters.[195] Other bodies, however, have created a space for deliberation on governance challenges affecting the island of Ireland including, most recently, the All Island Forum on Brexit.[196] In keeping with this constitutional heritage, the options for a reunification referendum must prioritise the authority to the peoples of the island to frame their own constitutional future. Such deliberations could potentially range across the protection of human rights,[197] the substantive character of parity of esteem in a new polity, the impact of reunification on Ireland's relations with the UK, the legacy of the Northern Ireland conflict, the continuation of the Northern Ireland Assembly and the character of public services in the new polity.

Modelling the reunification referendums

The Franchise for Concurrent Referendums

Whatever model is chosen for the concurrent referendums on the constitutional status of Northern Ireland, one necessary preliminary step is to determine the franchise for these votes. The key GFA provision explains that:

[193] See A. Lang, 'But Is It for Real? The British Columbia Citizens' Assembly as a Model of State-Sponsored Citizen Empowerment' (2007) 35 *Politics and Society* 35 and B. Baum, *Experts vs Amateurs: The British Columbia Citizens' Assembly and Dilemmas of Participatory Democracy* (Centre for the Study of Democratic Institutions, University of British Columbia, 2007).

[194] Further details on these reviews are available at http://www.constitutionalconvention.ie/Constitution.aspx (last accessed 25 October 2019).

[195] See Doyle, n.162, pp.206-210.

[196] The All Island Forum on Brexit builds on the legacy of the New Ireland Forum in the 1980s, which became a testing ground for novel constitutional approaches; see R. Kearney, *Postnationalist Ireland: Politics, Culture, Philosophy* (Routledge, 1998) p.16. Details of the operation of the All Island Forum on Brexit are available at https://merrionstreet.ie/en/EU-UK/Consultations/ (last accessed 25 October 2019).

[197] The progress made towards alignment of reproductive rights and marriage equality in Northern Ireland under the Northern Ireland (Executive Formation) Act 2019 potentially circumvents some of the most obvious challenging rights issues linked to reunification. German reunification, for example, saw the need to standardise widely divergent legal arrangements covering reproductive rights; see R. Will, 'German Unification and the Reform of Abortion Law' (1996) 3 *Cardozo Women's LJ* 399.

> [I]t is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of *consent, freely and concurrently given, North and South*, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to *the agreement and consent of a majority of the people of Northern Ireland*.[198]

The italicised text requires unpacking. One issue is the requirement that consent be 'freely and concurrently given, North and South'; what amounts to a free-and-fair referendum and to what extent do the rules on the conduct of such votes have to align in both polities? A further issue concerns the thorny issue of the 'people of Northern Ireland'. Given that their majority consent is required in the Northern Ireland referendum, does this entail the creation of a special franchise open to this people? The Northern Ireland Act, after all, makes provision for special electoral arrangements for a reunification referendum to reflect these GFA terms.[199]

First to the issue of alignment between the two referendums. The GFA could be read as requiring that, at a minimum, the votes in Northern Ireland and Ireland be free-and-fair, by connecting the use of the term 'freely' to international human rights standards applicable to the right to vote.[200] In 1998, the franchise for the concurrent referendums on the GFA broadly aligned. Both were open to citizens who were over the age of 18 and not imprisoned on polling day. There were some differences (which persist). For one, UK electoral law permitted citizens who had been overseas for less than 15 years to remain on the electoral register for their "home" constituency,[201] whereas Ireland's law imposes residency requirements for referendums.[202] For another, the Northern Ireland vote, based on the Westminster elections franchise, allowed a vote to some groups of non-citizens, whereas the vote in Ireland did not. Irish citizens from the Republic of Ireland who were living in Northern Ireland were

[198] GFA, n.1, Constitutional Issues, para.1(ii) (emphasis added).
[199] Northern Ireland Act 1998, Sch.1, cl.4(i) (UK).
[200] The UK has noted the importance of 'free, fair and transparent' processes in referendums over its continuing sovereignty in the context of its overseas territories; see W. Hague, HC Deb., vol.560, col.12WS (13 March 2013).
[201] Representation of the People Act 1985, s.1(3)(c). Challenges against this limitation as a denial of the right to vote have been unsuccessful; *R (on the application of Preston) v Wandsworth London Borough Council* [2013] QB 687, [89] (Mummery LJ) and *Shindler v United Kingdom* (2013) 58 EHRR 5, [116].
[202] Electoral Act 1992, s.7(1)(b) and s.8(1)(b) (Ireland). See I. Honohan, 'Should Irish emigrants have votes? External voting in Ireland' (2011) 26 *Irish Political Studies* 545.

therefore able to vote in the Northern Ireland referendum, but not UK citizens living in the Republic of Ireland.

Since 1998, however, the basic franchise arrangements for referendums in Ireland and Northern Ireland have diverged (and could diverge further). All citizen prisoners have been able to vote in Ireland since 2006,[203] a move which the Irish Government expressly connected to Ireland's duty under the European Convention on Human Rights (ECHR), following the case of *Hirst v United Kingdom*,[204] to fulfil the right to free and fair elections.[205] In the UK, by contrast, successive governments have loudly complained about the requirements of the *Hirst* judgment, and have taken only the most minimal steps to enfranchise day-release prisoners.[206] In the course of this crisis the Strasbourg Court has interpreted the requirements of Article 3 of Protocol 1 ECHR restrictively, as applying to only elections and not referendums.[207] This overt effort to placate the UK Government, amid a growing crisis over the UK's continued adherence to the ECHR, would not foreclose the issue before the UK and Ireland's domestic courts if the GFA is interpreted as requiring alignment on what constitute a free vote in the two polities.

Following the Scottish Parliament's decision to enfranchise 16-to-17-year-olds in the 2014 independence referendum, the Northern Ireland Secretary would likely face some pressure to make a similar arrangement for a reunification referendum in Northern Ireland.[208] On the face of it, given the precedent set in Scotland, the arguments for enfranchising this group would seem no less strong in the Northern Ireland context.[209] One problem, however, is the degree to which such a move would oblige Ireland to follow suit, particularly in the context of a constitutional referendum,

---

[203] Electoral (Amendment) Act 2006, s.2 (Ireland).

[204] *Hirst v The United Kingdom* (No 2) (2006) 42 EHRR 41.

[205] European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (3 September 1953), Article 3, Protocol 1. See C. Murray, 'We need to talk: "democratic dialogue" and the ongoing saga of prisoner disenfranchisement' (2011) 62 *NILQ* 57, 62.

[206] Under the Representation of the People Act 1983, s.3 (UK), a prisoner is barred from voting 'during the time that he is detained in a penal institution in pursuance of his sentence'.

[207] *McLean and Cole v United Kingdom* (2013) 57 EHRR SE8, [33]. In doing so the Court was drawing upon decisions by the Commission on Human Rights; see *X v United Kingdom* (Application No 7096/75, 3 October 1975).

[208] The demographic divide, which currently shows more Catholics in school than Protestants, is certain to see any such proposals contested by Unionist parties; see G. Gordon, '"Catholic majority possible" in NI by 2021', *BBC* (19 April 2018) available at https://www.bbc.co.uk/news/uk-northern-ireland-43823506 (last accessed 25 October 2019).

[209] The refusal to enfranchise this age group in the context of the Brexit referendum has been linked to David Cameron's efforts to 'control of the right wing of the Conservative Party'; B. Davies, 'The EU Referendum: Who Were the British People?' (2016) 27 *KLJ* 323, 327.

as such changes would require a prior adjustment to Article 16.1.2° of Ireland's Constitution (which stipulates a voting age of 18).[210] The enfranchisement of 16-to-17 year-olds in the Scottish Independence referendum, moreover, took considerable time to organise. When suggestions were made about a similar adjustment to the franchise in the run in to the Brexit referendum in 2016, the UK's Electoral Commission estimated that making such arrangements would delay the vote for a year.[211]

Even if the GFA does not 'de jure' mandate concurrent polls,[212] the practical effect of its terms is that 'there would have to be an agreement between the UK and the Republic to have parallel polls in each jurisdiction'.[213] Such an agreement will also, in light of the above analysis, have to set expectations as to what both Ireland and the UK would accept as constituting a free-and-fair poll and justify disparities between Ireland and Northern Ireland's franchises. In Ireland, the choices of constitutional or non-constitutional referendum will affect flexibility over the franchise.[214] Given the experience of the Scottish Independence and Brexit referendums, it is a virtual certainty that the terms of the referendum franchise will be litigated in Northern Ireland. The special context of these concurrent polls, moreover, means that it is likely that the courts will be asked to pay close attention to disparities on either side of the border. Should one poll be held ahead of the other, for instance, would this unduly impact upon the second vote, and if so, which polity should go first? There is also the question of purdah in Ireland before referendum and whether, if voting is on the same topic, this rule should be suspended or extended to Northern Ireland. If this groundwork is rushed, the two Governments will be relying on the courts extending them a considerable measure of deference given the complexity of making such concurrent arrangements, which is hardly a comforting scenario given the importance of the issues at stake.

The second element of the GFA text highlighted above, requiring the 'agreement and consent of a majority of the people of Northern Ireland', is even more

---

[210] This voting age for the election of members of Dáil Éireann is transposed to referendums by virtue of the Constitution of Ireland, Article 47.3.

[211] See A. Stratton and J. Clayton, 'EU poll "may be pushed back" if 16 and 17-year olds get vote', *BBC Newsnight* (3 November 2015) available at https://www.bbc.co.uk/news/uk-politics-34708742 (last accessed 25 October 2019).

[212] *In re McCord* [2018] NIQB 106, [5] (Girvan LJ). See also O'Donoghue and Warwick, n.22, 100. For a counter argument, see Donohue, n.182, 60.

[213] ibid., [5].

[214] *Re Article 26 and the Electoral (Amendment) Bill* 1983 [1984] 1 IR 268, regarding the Ninth Amendment of the Constitution Act 1984.

likely to be litigated. This clause has been disputed since the 1998 settlement was unveiled. Various commentators have insisted that the UK's sovereignty over Northern Ireland could not be brought to an end by a simple 50-percent-plus-one majority.[215] Seamus Mallon has recently joined this chorus by calling for 'Parallel Consent' to be achieved amongst both Nationalists and Unionists in Northern Ireland.[216] As Humphreys insists, however, a simple majority is the only reading of the GFA text which is compatible with the underlying principle of parity of esteem between Unionists and Nationalists within Northern Ireland.[217] There is, moreover, nothing within the GFA's text which would support a deviation from the presumption in favour of a simple majority approach which emerges from the general principles of self-determination and democracy, as explored above.[218] Quite apart from the force of these arguments in favour of a simple majority, there is no workable way to divide the entire electorate into Unionists and Nationalists, as Mallon suggests, in a manner that mirrors the designation system for Members of the Legislative Assembly.[219]

The 'people of Northern Ireland' element of this clause could present intractable difficulties. This formulation was developed over decades by John Hume as a means of encompassing all of the holders of constituent power in Northern Ireland, whether they personally identified as British, Irish, Northern Irish, did not fit within those categories or preferred to avoid fraught questions of identity.[220] The category has taken on further significance within the Brexit context, providing a basis for negotiations over parts of the Ireland/Northern Ireland Protocol.[221] An interpretive provision within the GFA states that the 'people of Northern Ireland' covers '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'.[222] Without this stipulation the

[215] For a summary of such claims, see Humphreys, n.110, pp.84-92.
[216] S. Mallon with A. Pollak, *A Shared Home Place* (Lilliput Press, 2019) p.152. Even if it was feasible to create a franchise of "registered" Unionists and Nationalists, this idea perpetuates a binary distinction inherent in the GFA's workings which has long marginalised the political voice of those whose primary identity is not associated with the question of Northern Ireland's constitutional status; Houghton, n.85, 226.
[217] Humphreys, n.110, pp.92-94. See also Harvey and Bassett, n.8, para.95.
[218] See McCorquodale, n.77, p.315.
[219] Northern Ireland Act 1998, s.4(5) (UK).
[220] See, for example, J. Hume, *A New Ireland: Politics, Peace and Reconciliation* (Roberts Rinehart, 1997) p.66.
[221] See *Joint Report*, n.37, para.52.
[222] GFA, n.1, British-Irish Agreement, Annex 2.

concept risks being 'amorphous',[223] but the certainty that it provides carries consequences for the franchise for any reunification referendum.

The GFA's linkage of a change in Northern Ireland's constitutional status to majority assent by the people of Northern Ireland does not merely suggest the possibility of special franchise arrangements for a reunification vote, it effectively obliges them as a matter of international law. Its terms have the literal effect of excluding from this franchise people resident in Northern Ireland but born outside it, regardless of connections or citizenship. Many people who voted on the GFA in 1998 would, ironically, have no right to vote in a reunification referendum if its franchise was constructed on this basis. History suggests that these exclusions are not, however, accidental. The UK Government conducted the 1973 border poll on the basis of the franchise for the then-defunct Northern Ireland Parliament, not the Westminster franchise, thereby excluding some 2000 people born in Ireland.[224] Civil servants justified this approach on the basis of a supposed need to prioritise those with a deep connection to the polity,[225] but the decision reflected Unionist concerns about the votes of people from Ireland resident in Northern Ireland skewing demographics towards Nationalism.[226] The UK Government has not clarified its stance on this issue. When Karen Bradley, then Northern Ireland Secretary, was asked about how she would exercise her powers to construct a special franchise for a reunification referendum, with specific regard Irish citizens born in the Republic of Ireland, she appeared not to appreciate the context of the question and her response bordered upon incoherent, sparking fears for the general voting rights of Irish citizens resident in the UK.[227]

Any attempt to apply the GFA's 'people of Northern Ireland' franchise literally (excluding people born in Ireland and Great Britain) would certainly be litigated on the

[223] That was the description Lord Kerr gave to the term 'the people of England' used in the National Health Service Act 2006, s.1(1)(a) (UK); *R (on the application of A) v Secretary of State for Health* [2017] UKSC 41; [2017] 1 WLR 2492, [56].

[224] The Northern Ireland (Border Poll) Order 1973, n.117, Reg.2(1).

[225] See UKNA File CJ 4/729 Letter from J.T. Williams (Northern Ireland Office) to William Whitelaw's (Northern Ireland Secretary) Private Secretary (2 November 1972) p.1.

[226] Beyond the exclusions from the franchise for the Northern Ireland Parliament, legislation such as the Safeguarding of Employment (Northern Ireland) Act 1947 operated to discourage migration from Ireland to Northern Ireland until the UK joined the EEC; see S. de Mars, C. Murray, A. O'Donoghue and B. Warwick, *Discussion Paper on the Common Travel Area* (Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, 2018) p.24.

[227] K. Bradley, HC Deb., WA 230086 (13 March 2019). Her successor as Northern Ireland Secretary has been no more forthcoming; J. Smith, HC Deb., WA 281830 (3 September 2019).

basis of the right to vote.[228] The UK courts, however, have often been unreceptive to challenges to decisions over the franchise.[229] In one prisoner voting case, Lord Hodge raised the possibility of the courts declaring anti-democratic legislation to be unlawful, but set a particularly high bar upon such a judicial intervention:

> [I]n the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by the principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful.[230]

With regard to the franchise for a reunification referendum, the UK courts would nonetheless be obliged to assess the arrangements put in place in light of both the GFA's requirements and the right to vote under Article 3 of Protocol 1 ECHR.[231] The wording of Article 3 in terms of a right to free-and-fair elections is, as noted above, unhelpful.[232] In the UK Supreme Court, Lord Kerr supported a broader reading of the right in line with Article 25 of the International Convention on Civil and Political Rights in the context of the Scottish Independence referendum.[233] If this hurdle is surmounted, legal challenges would turn on the proportionality of any exclusions from the referendum franchise, and on the level of discretion/margin of appreciation applicable in light of the special nature of the GFA. The closest comparable case is *Gillot*,[234] in which France's decision to construct a special referendum franchise for New Caledonia, based on the Nouméa Accord regarding that territory's self-determination claims, was challenged before the UN Human Rights Committee. The Committee accepted that this franchise could be based upon based upon a 20-year residency requirement.[235] It is, however, difficult to see how a requirement of connection to Northern Ireland from birth could similarly be accepted as proportionate.

---

[228] See Harvey and Bassett, n.8, para.73.
[229] See *Shindler and MacLennan v Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWCA Civ 469; [2016] 3 WLR 1196, [50] (Lord Dyson).
[230] *Moohan v Lord Advocate* [2014] UKSC 67; [2015] AC 901, [35].
[231] See *Garland*, n.146.
[232] See *McLean and Cole*, n.207.
[233] *Moohan*, n.230, para.83. See H. Davis, 'A Bizarre Anomaly? Rights of Political Participation and the Scottish Independence Referendum: *Moohan v Lord Advocate*' [2015] *EHRLRev* 488.
[234] *Gillot v France*, UN HR Committee Communication of 15 July 2002, 932/2000.
[235] ibid., para.14.7

The potential for litigation, together with the destabilising impact of any boycott by either Nationalist or Unionist parties, therefore mean that if the Northern Ireland Secretary decides to trigger a referendum on reunification, the UK Government's apparently broad discretion under the terms of Northern Ireland Act over the franchise arrangements is illusory. Notwithstanding the terms of the discretion in the domestic legislation, it will need to operate in line with the UK's GFA and human rights commitments. In these important regards, reunification votes under the GFA are not simply a "reiteration" of the position established in 1973; the UK Government's discretion is more circumscribed.[236] The construction of a special franchise from scratch in Northern Ireland would likely take a considerable amount of time, likely well over a year, especially if the arrangements were litigated. Such a preparation period should, however, be seen as part and parcel of the GFA process with regard to the principle of consent; it creates an opportunity to prepare for the votes. The question remains how to proactively use such a period to engage the peoples of Ireland and Northern Ireland in constructing their own constitutional future.

Three Possible Pathways towards Reunification Referendums

Reunification referendums could potentially take place under one of three models. Although these models are not the only approaches to running concurrent referendums, we have constructed each archetype to reflect the issues raised in this article. Variations in the timeline and form of decision-making under each model are intended to reflect rival priorities in the process. All three models involve the process being initiated by the UK Government reaching the conclusion that there should be a reunification referendum, in part because recent civil society efforts have demonstrated the difficulty in starting a broad conversation across Northern Ireland's communities in the absence of this impetus.[237] The second model, and particularly the third model, however, seek to move away from this top-down point of initiation under Tierney's maxim that 'the credibility of the outcome [will] ultimately depend upon the legitimacy of the referendum process'.[238] None of these models is intended to advance

[236] V. Bogdanor, *Beyond Brexit: Towards a British Constitution* (Taurus, 2019) p.96.
[237] See, in a repost to the Ireland's Future initiative, R. McGreevy, 'Assembly on Irish unity risks being a echo chamber' *Irish Times* (6 November 2019).
[238] S. Tierney, 'Direct Democracy in the United Kingdom: Reflections from the Scottish independence referendum' [2015] *Public Law* 633, 633.

particular substantive outcomes (this is not, however, to say that the different format of such processes would not have the potential to influence the relevant outcomes).

Model I

Step 1: Evidence of majority opinion in Northern Ireland favouring reunification

Step 2: UK and Irish Government discussions to:

- Decide on question to be asked in both polities;
- Decide the date of the vote and franchise.

Step 3: Concurrent Referendums:

- In Northern Ireland, a poll held under the terms of the Northern Ireland Act 1998;
- In Ireland, a contingent constitutional referendum to change Article 3 of the Irish Constitution.

Step 4: Both Governments introduce legislation to give effect to outcomes of yes/no or split votes

This model addresses the most minimal reading of the requirements of the GFA, constitutional and general international law. The more difficult questions regarding the nature of the continuing state, which we have flagged in this article, are left to a post-reunification process. While it may lead to a shorter run-in period to the concurrent referendums, difficult questions around the franchise for the votes will still need to be addressed. Despite the potential attractiveness this model's simplicity, it provides little information to voters in Ireland on Northern Ireland about the polity they are responsible for creating. It therefore provides a poor basis for such a decision, especially by comparison to the options we outline below.

Model II

Step 1: Evidence of majority opinion in Northern Ireland favouring reunification

Step 2: UK and Irish Government discussions to:

- Decide on question to be asked in both polities;
- Decide the date of the vote and franchise.

Both Governments conclude a treaty, with terms contingent on outcome of polls:

- o Both Governments agree the division of sovereign debt, pensions payments and any ongoing subvention for Northern Ireland;

- Both Governments agree to abide by continuing GFA provisions.
- Irish Government agrees to hold an All-Ireland Constitutional Convention after concurrent votes for reunification covering, *inter alia*:
  - Article 3, Article 7 (flag), Article 8 (official language) Article 9.3 (loyalty and fidelity to the state), and the reference to the Holy Trinity in the preamble of the Irish Constitution;
  - Legislation under Article 15.2.2˚ of the Irish Constitution to maintain/recognise a modified Stormont Assembly (contingent upon the outcome of the concurrent referendums);
- Declaration on the "continuing" nature of two states.

Step 3: Concurrent Referendums:

- In Northern Ireland, a poll held under the terms of the Northern Ireland Act 1998;
- In Ireland, a constitutional referendum to change Article 3 of the Irish Constitution using Article 29 and give effect to the UK-Ireland Agreement (contingent upon the outcome of the vote in Northern Ireland), or a non-constitutional referendum simply setting the Constitutional Convention in train.

Step 4: Both Governments introduce legislation to give effect to the outcomes of yes/no or split votes

Step 5: After unification, a modified Stormont Assembly remains operational under Article 15.2.2˚ (at least for the duration of the Constitutional Convention) and the Constitutional Convention commences

Step 6: The people would respond to the Constitutional Convention's outcomes through:

- A single 'package' vote; *or*
- Votes on each of the proposed constitutional changes

This model addresses the GFA, domestic and international law requirements, but unlike the previous model would require extensive work before the concurrent reunification referendums were held. Much of this preliminary work ahead of the votes is at inter-government level, which forefronts official considerations, rather than constituent deliberations. As a result this could be considered a top-down model. Offsetting this disadvantage, however, through the final step in this process the entire

constituent body of a unified Ireland would deliberate and vote on its new constitution. This action re-constitutes popular sovereignty on an all-Ireland basis.

Model III

Step 1: Evidence of majority opinion in Northern Ireland favouring reunification

Step 2: UK and Irish Government discussions to:

- Decide on question to be asked in both polities;
- Decide the date of the vote and franchise.

Step 3: Contingent All-Ireland Constitutional Convention:

- Elements to be considered *inter alia* Article 3, Article 7 (flag), Article 8 (official language) Article 9.3 (loyalty and fidelity to the state), the Holy Trinity in the preamble of the Irish Constitution – decision on provision changes to be incorporated into the referendums as a 'package';
- Legislation under Article 15.2.2˚ of the Irish Constitution to maintain/recognise Stormont Assembly if this is recommended by the Constitutional Convention (contingent upon the outcome of the concurrent referendums).

Step 4: Concurrent Referendums:

- In Northern Ireland, poll held under the terms of the Northern Ireland Act 1998, based on the 'package' produced by the Constitutional Convention;
- In Ireland, a constitutional referendum changing articles as per the 'package' (contingent upon the outcome of the vote in Northern Ireland).

Step 5: Both Governments introduce legislation to give effect to outcomes of yes/no or mixed votes

Step 6: Unification based on the new Constitution

This model addresses the GFA, domestic and international law requirements as a baseline, but prioritises the concurrent referendums taking place in a context in which the nature, structure and content of both continuing states is fully demarcated. Under this model the reunification referendums are based on a fully realised scheme for the governance of the two continuing states of Ireland and Great Britain. This model forefronts the constituent actors in both polities and, as such, is a more bottom up approach than that which was put forward in Model II. It does, however, mean that Ireland's post-unification constitution will be constructed by the will of two peoples

rather than a single body of constituent power holders. This, of itself, would acknowledge how the "future lock" rights enjoyed by the people of Northern Ireland under the GFA will persist.

Conclusion

The GFA is the fulcrum around which issues of domestic constitutional law, human rights law and international law pivot in the Northern Ireland context. Although it has become emblematic of a negotiated settlement to an ethno-nationalist conflict, the ongoing Brexit impasse has exposed the degree to which its supposedly legalised principle of consent remains malleable. The 1998 settlement leaves some questions over how Ireland and Northern Ireland determine the "constitutional question" unanswered, but not unanswerable. This is not a failing; as Thomas Paine argued, it is up to every generation anew to determine its relationship with the rules by which it is governed.[239] The subsequent revisions of the GFA's arrangements point towards how it could allow our understandings of self-determination, constituent power and democracy to adapt to new circumstances.

Against the backdrop of Brexit, many fear that any discussion of a reunification referendum is premature; that Northern Ireland is not ready for such a debate. The resultant desire to slow the process is, in many instances, rooted in genuine concerns over how destabilising such a referendum would be for Northern Ireland at a time when power sharing has collapsed.[240] It is therefore unsurprising that the principle of consent has become an increasingly contested concept, and that calls are growing for it to be fundamentally reworked, as exemplified by Seamus Mallon's proposals for dual consent. Departing from the principle of majority consent would certainly delay any reunification vote(s), but such a course would undermine a vital element of the 1998 settlement. It is, moreover, unnecessary. Under our account, the GFA does not support a hasty vote in the mould of the 1973 border poll. The models for a reunification process which we have outlined demonstrate that there are multiple paths to addressing the social, cultural, economic and political questions at issue in reunification. Each model emphasises different public goods in the reunification

[239] T. Paine, 'Rights of Man', in M.D. Conway (ed), *The Writings of Thomas Paine Volume II 1779-1792* (Putman's Sons, 1894) p.278.
[240] Mallon with Pollak, n.216, p.149.

process; expediency, certainty for constituent power holders ahead of their vote, or a collective process of constituting a new constitutional polity after a vote in favour of unity.

Even an approach which favours expediency, however, does not provide for an "instant" poll. The GFA requires policy makers to make choices over the franchise in both polities and the type of referendum at issue. It also, through the future lock, places important constraints on the nature of a unified Ireland, which will allow London ongoing input into aspects of Ireland's governance after reunification. These preliminary issues will take time to address and explain, thereby providing an extended period for public engagement in Ireland and Northern Ireland ahead of any reunification referendums. The approaches adopted in our second and third models seek to structure and facilitate this engagement, which we regard as being more important for any process towards reunification than making rapid progress towards a vote. As TK Whitaker once commented, '[t]here is … no valid alternative to the policy of "agreement in Ireland between Irishmen"'.[241] That sentiment still stands (at least, if we substitute the people of the island of Ireland for Irishmen), but the seeds of such agreement will not be sown through political wrangling behind closed doors, followed by statements outside official buildings which speak only to particularised constituencies.[242]

[241] Whitaker, n.34, p.6.
[242] Little, n.84, pp.185-189.