

Brexit and the Constitutional Future of Northern Ireland

Professor Colin Harvey, Queen's University Belfast

A. Introduction

Thank you for the kind invitation to deliver this 20th annual lecture. It is a privilege to be asked and the opportunity to contribute to this series of lectures is very much appreciated. I am particularly grateful to David Wardrop for his assistance in making this evening possible.

We are reflecting on these questions at a time when the world urgently needs structures for effective international cooperation, and when the foundational principles and values of the United Nations are more significant than ever. The focus of this lecture is on how the Good Friday Agreement deals with the questions of self-determination and sovereignty that rest at the heart of the ethno-national conflict in and about Northern Ireland. The precise mechanism used is of wider international significance and interest. The 25th anniversary of the Agreement offers the opportunity for reflection and renewal. I will draw upon three themes this evening: context, framework, and where now.

B. Context

Northern Ireland is a post-conflict society with a population of around 1.9 m and this year we mark the 25th anniversary of the overarching peace/political agreement. What is the Agreement? It is a multi-party political agreement and - in the form of the British-Irish Agreement - a bilateral treaty between the UK and Ireland. Politics and law are therefore in play.

The Agreement was overwhelmingly endorsed in concurrent referendums held on the island of Ireland on 22nd May 1998. Relevant aspects of the Agreement have been implemented in domestic law in the UK and Ireland. There is clear evidence that both governments - and especially their officials - played a key role in drafting the provisions that emerged, shaped by thinking on the island of Ireland about how self-determination would be addressed. These provisions are referenced in Article 1 of the Protocol/Windsor Framework - on a 'without prejudice' basis. The European Council, in April 2017, confirmed that operationalising the self-determination mechanism would result in automatic re-entry to the EU, if the vote is for a united Ireland. This is significant because Brexit has placed an external border of the EU on the island of Ireland. And it is worth recalling here that a majority in Northern Ireland voted against Brexit.

Why am I telling you this? To underline that this is an anticipated possible constitutional future for Northern Ireland – grounded in existing law, policy and practice. It should not need to be said: This is an entirely legitimate discussion about the future of the island of Ireland.

C. Framework

There is then an international legal framework arising from a political/peace agreement outlined in the Agreement. Both the UK and Ireland are dualist states – and we know what that means. Domestic incorporation matters. How is the constitutional question addressed? The Agreement rests the choice of whether to remain in the Union with Britain or join a United Ireland with 'the people'. The right of self-determination belongs to the people of the island of Ireland alone without 'external impediment' – to bring about a united Ireland if they

wish on the basis of consent ‘freely and concurrently given’ – subject to ‘principle of consent’ in Northern Ireland. If this is exercised, and people opt for change, there is a binding obligation on both governments to introduce and support legislation in their respective Parliaments. The government with sovereignty at present has an obligation of rigorous impartiality with norms surrounding how power should be exercised in the here and now. Much of this has remained at the level of an international agreement only. In the UK, the Northern Ireland Act 1998 s 1 and sch 1 give effect to aspects of this framework. There has been litigation around these provisions leading to a significant judgment from the NI Court of Appeal – *Re McCord* [2020] NICA 23. This judgment confirmed the extent of the legal flexibility of the Secretary of State for Northern Ireland, subject to constraints around the nature of the right, the rigorous impartiality obligation and questions of the public interest. A duty and a discretion; a duty where it appears likely that a majority would vote for change and a discretion to do so at any time. The existing framework continues to prompt much speculation about what would trigger the UK government to take this step. The *McCord* litigation provided guidance and there has been academic reflection on possible approaches to the test. It is likely that politics - and not law - will determine next steps, shaped by trends, preferences and events on the island of Ireland and the political pressure that might fall on the UK government if a clear preference for change emerged. Although electoral and demographic trends are raising questions, current polling evidence suggests that a vote for a united Ireland looks unlikely. Unsurprising, perhaps, given the lack of clarity on what voting for change means. Notable, however, in much polling is the size of the ‘undecideds’ category, and the precarious nature of the explicit pro-union support.

It should also be noted that Bunreacht na hÉireann/Irish Constitution was amended with the inclusion of a new version of Article 3, to quote:

‘1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.’

At this stage, much advance and initial thinking about the broad framework for the process has been done. It would be helpful if both governments - operating within the terms of the Agreement - would commence dialogue on the parameters for this process. The British-Irish Intergovernmental Conference is the obvious forum.

D. Where Now?

The immediate political focus is on the Windsor Framework, and the restoration of the power-sharing institutions in Northern Ireland. There is also wide and deep concern here – as elsewhere - about the human rights and equality consequences of the actions of the UK government across a range of fields, including legacy, immigration and asylum, and its plans to repeal and replace the Human Rights Act 1998. Where does the constitutional conversation go now? On the island of Ireland, the signs suggest a pre-referendum phase or at minimum a firm sense that planning needs to be undertaken - particularly marked in civic and university initiatives - but also evident in the work being done by political parties, their members and by the Oireachtas, a recent example is the Seanad Consultation on the Constitutional Future of

the island of Ireland. Other examples include the work of civic groups, like Ireland's Future, and the academic work undertaken, for example, by the ARINS project. Useful and rigorous comparative research is being done, some for the first time, looking at the position North and South. The ESRI's work is a good example, as well as projects flowing from the Irish Government's Shared Island Initiative. Whatever other disagreements there might be, there is apparent consensus on doing the work in advance. This is particularly the case for those advocating constitutional change. As noted, there is an obvious and pressing need to clarify what a united Ireland will mean in practical terms. At present, for example, there are proposals to develop this thinking, including the creation of an all-island citizens' assembly, an Oireachtas committee, a dedicated minister on reunification and department, among other things. What is the purpose? The end point will be a set of proposals that will ultimately shape the offer from the Irish state. There are ongoing conversations about how this might be designed and progress, as well as varying views on possible time frames. Given trends on the island of Ireland, what is striking is the absence of reflection at Westminster, and within British politics, on these questions. That needs to be addressed. Why has there been no serious consideration of these matters by a relevant Westminster committee, for example? Even more concerning are the suggestions that the UK government might be considering unilaterally tampering with the constitutional compromise of 1998 – in mooted supplementary incentives to the DUP to encourage them back to power-sharing.

The main question I want to raise about 'where now' is on preparedness. If a future Irish government – using the framework of the Agreement – became much more proactive on this question, what would the response in London be? Keeping in mind there may well be new governments in London and Dublin in the next few years. Questions to every legislature, executive, public body and civil society organisation across this island and these islands: Will you be prepared if this constitutional conversation accelerates even further this decade? If your organisation was called to give evidence what would you say about process and substance? Is any thinking being done now?

E. Conclusion

To conclude. The Agreement rests the constitutional future of Northern Ireland on majority consent – the principle of consent. People can opt for a united Ireland or stay in the Union with Britain. That already makes Northern Ireland distinctive in a UK context. A special arrangement where it is constitutionally recognised that departure remains an open option, as a legally guaranteed right and democratic choice. People also have the right to pursue constitutional change. Brexit and political and demographic changes on the island of Ireland have intensified the levels of interest and practical work being done. The dominant focus remains on planning and preparation for possible constitutional change. No one doubts the challenges that concurrent referendums might present. But the responsible way forward - particularly for governments engaged in serious horizon scanning - is to face into this and ensure that whatever new constitutional configurations freely emerge good relations are managed and maintained across these islands.