



A NORTHERN IRELAND BORDER POLL

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Foreword

The prospect of a poll in Northern Ireland about Irish unification, provided for the Good Friday Agreement and often termed a “border poll”, is now widely discussed. But the provisions and wider implications of the law and the Agreement – extending to both parts of the island – are little explored.

The purpose of this report is to set out the key issues, and stimulate discussion. It outlines the current state of opinion on a border poll, and the provision in law and the Agreement. It analyses the framework for a potential transition to a united Ireland that these provisions establish – and the many gaps in the framework.

The Constitution Unit is considering a collaborative project on these matters, building on the report of the 2018 [Independent Commission on Referendums](#), but working closely with others in Belfast, Dublin, and London.

The report majors on the UK/Northern Ireland perspective. Much is conjectural. Other views are welcome, as are factual corrections. Indeed we welcome all comments, which can be sent to constitution@ucl.ac.uk.

I should like to thank Robert Hazell, Alan Renwick and Meg Russell at the Constitution Unit for inviting me to write this report, and for their comments on it. My thanks also go to Dave Busfield-Birch, Edd Rowe and Riley Thorold for editing and research support.

Alan Whysall

21 March 2019

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Executive Summary

The Secretary of State for Northern Ireland must by law call a poll if she believes a majority of the people of Northern Ireland would vote for Irish unity. This is a key part of the mechanism by which the question of Northern Ireland's constitutional status was resolved in the Good Friday Agreement.

A poll in the South would also be held.

Members of the UK government have recently been talking about this possibility, in pointing up the dangers of a no-deal Brexit. There is no real evidence of a majority at present for Irish unity, indeed no inevitability that it will be found in the future. But from a range of opinion polling results it is clear that nationalism has a spring in its step, and opinion has become more volatile. There is some evidence in the polling that Brexit would indeed tip the scales narrowly to unity. If politics becomes especially brittle, such a change could occur in short order.

If there are votes for unity – both North and South – the consequence according to the Agreement is the negotiation of proposals for a united Ireland – taking in, potentially, almost half the Northern Ireland population who opposed such a move.

The provision in law and the Agreement regarding a border poll is stark and minimal. There was no opportunity in the negotiations to develop it further: unity then was a distant prospect. There are hence serious gaps, and ambiguities, in the framework.

So for example it is not clear on what basis the Secretary of State should assess opinion in Northern Ireland. There is no express provision about the Southern referendum. What a united Ireland would look like or how it should be negotiated is barely set out at all.

The vote on constitutional status is framed by history and the Agreement as a binary choice. But how to move on to Irish unity, if the votes were in favour, can be shaped in accordance with the principles embodied in the Agreement of seeking consensus and respecting identity.

The process for doing so remains to be decided. It will require time. It probably needs to proceed in phases. It will only be successful if at every stage efforts are made to bring all interests aboard.

It is possible to envisage a poll taking place in a positive environment, with the proponents of the two different constitutional cases seeking to appeal across the community; and if the result is for unity, then taking part in developing the arrangements for a new Ireland.

But this is far from guaranteed. It needs careful stewardship. It would be much preferable that the devolved institutions were up and running during such a process, and playing their part in maintaining stability and encouraging agreement.

The report is mainly about process. But the real world risks are high. An early poll, particularly if it takes place in a political atmosphere that is strained following a hard Brexit, could seriously destabilise both parts of Ireland, and put at risk the political gains and civil order of recent decades.

It is important that the issues are considered and as far as possible resolved before the machinery is invoked.

It is particularly important that the British and Irish governments have a shared understanding and work closely together in their traditional peace process role of encouraging constructive political engagement and bolstering stability – which the all-consuming nature of the Brexit debate has inhibited them from doing recently.

There are lessons to be learned from elsewhere: the Constitution Unit has been involved in work about [organising public debate and engagement](#) on fundamental issues, and about [structuring referendums](#). More work is needed to address the questions raised by the prospect of a border poll.

1. The State of Opinion

Few Northern Ireland Unionists have favoured a border poll (at least [in recent years](#)). Some have ignored or positively dismissed the prospect of one being called. But the former First Minister Peter Robinson last year [urged](#) unionism to prepare, suggesting a future government might well call one. Other Unionist commentators have [warned](#) of the probability of a poll at some point.

Nationalists have looked forward to a poll – but often with some uncertainty about how far in the future it might be held. Sinn Féin now appears to [favour one immediately](#) after a no deal Brexit. The SDLP [propose](#) there should first be a Forum to establish the shape of a united Ireland – [reserving “a special place in hell”](#) for those seeking a vote without a plan for how united Ireland would work. [Some commentators](#) have seen a poll as inevitable; [others](#) are profoundly doubtful about a united Ireland arising from a narrow majority in favour in the North.

The Irish government has been in the latter camp, hesitant about change based on marginal majorities. The Taoiseach has suggested that raising the prospect now is disruptive and destructive, and has in the past [questioned](#) the wisdom of Irish unity founded on 50%+1, emphasising John Hume’s theme of an agreed Ireland.

The UK government has consistently rejected ideas of any early poll. But in the course of recent debate on a no deal Brexit, a string of [statements](#) and [leaks have emerged](#) of its apparent concerns that such an outcome would make a poll more likely, [dismissed by unionists](#) as Project Fear.

Recent opinion polling in Northern Ireland appears to show a [trend towards support for a united Ireland](#). A few years ago, support appeared to be flagging: [a survey in 2013](#) appeared to show as little as 15% backing for a united Ireland.

There is still no poll suggesting an overall majority at present for a united Ireland. But [polling last September](#) suggested 52% of people in Northern Ireland would vote in favour in the event of Brexit, and [another in December](#) suggested in that case an even split. [A poll in November](#) showed 62% of respondents thinking Brexit would make a united Ireland more likely, and only 11% less likely.

The [most recent poll](#) suggests a clear majority against a united Ireland, by 45% to 32%, but with a strikingly high proportion of don’t knows, 23% – unexpected in the light of the relatively narrow centre ground usually shown by Northern Ireland election results, and suggesting there would be much to play for in a referendum campaign. That poll also assessed southern opinion, and half of voters there favoured a referendum on Irish unity, 62% saying they would vote in favour.

[Different surveys produce sharply different results](#) but [the accuracy of some polling methodologies is questioned](#). Indeed [polling in Northern Ireland has for long thrown up particular problems](#).

But it seems there is more volatility in Northern Ireland public opinion than hitherto. [Recent politics](#) has re-mobilised the nationalist vote, and, [it appears](#), led significant numbers of Catholics who were previously content to work along with present constitutional structures to reassess their outlook. There may also be a proportion of Unionists, discontented with decisions over Brexit – Northern Ireland voted by a majority to remain – and unhappy with the stance of Unionist elected representatives, who have become more open to the idea of a united Ireland, as is perhaps evidenced in the don’t knows in the recent poll.

2. Law and Principles

i. The story of border polls

The way in which the present provision for border polls evolved is important to an understanding of it.

What might be considered the pre-history of the border poll starts with the [Government of Ireland Act 1920](#), setting up Home Rule Parliaments and Governments for the two parts of Ireland. It made provision for each Parliament to vote in favour of unified Home Rule institutions, within the United Kingdom. This provision became a dead letter following the [Treaty](#) establishing the Irish Free State. The Northern Ireland Parliament voted, under an option set out in the Treaty, to remain outside the Free State and within the United Kingdom.

Ireland in due course ceased to be a member of the Commonwealth. The British [Ireland Act 1949](#), passed in response, guaranteed that Northern Ireland would not cease to be a part of the United Kingdom without the consent of its then Parliament.

At the height of the Northern Ireland Troubles, the UK Government, as it imposed direct rule on Northern Ireland, and therefore suspended the Parliament, [legislated for](#) the first of what were intended to be periodic “border polls” on the question (the last statutory use of the term “border poll”, it appears).

The poll held on 8 March 1973 was the subject of a nationalist boycott: 98.9% of those voting, amounting to 57.5% of the electorate, voted for the union to be maintained.

The [Northern Ireland Constitution Act 1973](#), intended to set up a new form of power-sharing government in Northern Ireland, replaced the 1949 provision. Section 1 set out what came to be called the “constitutional guarantee”, that Northern Ireland would not cease to be part of the UK without the consent of a majority of the people of Northern Ireland voting in a poll. The Secretary of State was given a discretion to hold such polls at any time, subject to a minimum interval of 10 years. None were ever called.

There had been political commitments by the UK government that a positive vote would lead to a united Ireland since the [Sunningdale Agreement](#) of 1973. They were reiterated in the [Anglo-Irish Agreement of 1985](#). But they were not reflected in domestic law (some nationalists spoke of the 1973 provisions as the “negative guarantee”).

And there remained serious differences of outlook across-the-board. Many nationalists denied the legitimacy of the northern veto. The [Irish Constitution of 1937](#) indeed embodied, in the original Articles 2 and 3, a claim of right to the territory of Northern Ireland, with no qualification as to consent.

Following much reflection and debate on these issues within nationalism and between the governments, the [Joint Declaration](#) by the UK and Irish governments of 1993 fused the (unionist-facing) principle of Northern Ireland’s status depending on majority consent there with the (nationalist-facing) principle of Irish self-determination. The UK Government affirmed that

it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South.

The Irish government made a commitment to similar effect; it also stated that, in the context of new political arrangements, the Irish constitution might be amended.

The British government also reiterated an earlier declaration that it had “no selfish strategic or economic interest in Northern Ireland”.

Political dialogue, and paramilitary ceasefires, followed. Five years later the Good Friday Agreement emerged – but though the negotiations for the Agreement lasted almost two years, it was the product of detailed engagement on the substance lasting only a few months, from late 1997.

ii. The provision for a poll

The current provision on polls is in section 1 of the [Northern Ireland Act 1998](#), draft elements of which featured in the Agreement – which was endorsed by large majorities in referendums, North and South (albeit on [questions differently formulated](#)). The first subsection in substance reproduces the 1973 guarantee, but the second is new:

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

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

The associated Schedule 1 to the Act, also featured in the Agreement, retained the Secretary of State’s general discretion to call border polls, but added a duty to exercise it if a vote for a united Ireland appeared likely:

1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2. ... the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

There remains a minimum interval in all cases between polls, but reduced to 7 years (in practical terms, rather more: the prohibition runs from the holding of the earlier poll to the making of the order for the next). The order is subject to Parliamentary approval.

iii. The Good Friday Agreement, consent and self-determination

The 1998 Act reflects the principles in the [Constitutional Issues section](#) of the 1998 Agreement. There the participants endorsed the declaration of the Governments, set out in a Treaty between them (thus having the force of international law), that they:

- (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
- (ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;
- (iii) acknowledge that ... the present wish of a majority of the people of Northern Ireland... is to maintain the Union ... and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;
- (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish...

iv. Irish provision

The same principles are recognised in the new [Article 3](#) of the [Irish Constitution](#), a draft of which, like the British provision above, was embodied in the Agreement and enacted following it:

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

3. Analysis: An Incomplete (and Misunderstood) Framework

These provisions were remarkably little discussed at the time of the Agreement. The parties coalesced around the approach to consent in the Joint Declaration, but there was never significant engagement then or afterwards about the outworkings. The debate being focused on more immediately contentious issues, particularly about the scope and operation of the institutions; a vote in favour of a united Ireland was seen as a distant prospect. So vast cans of worms remained unopened.

The provisions we have establish a part of the framework, but it is notably incomplete.

There has not been much academic commentary subsequently. An [article](#) by Roger Mac Ginty and others in 2003 considered aspects of consent. Richard Humphreys, now a judge of the Irish High Court, has addressed issues around unification in several books, most recently [this](#). And in recent weeks there has been a [paper](#) by Mark Bassett and Colin Harvey (which appeared after this one was drafted; some account of it has been taken below). The Northern Ireland courts addressed the issue in [the case of McCord](#) last year, the judgment in which has just become available.

Referendums indeed have not been much studied in the UK context until recently. But there is now much more experience, and more reflection on them, much of it undertaken through the work of the [Independent Commission on Referendums](#), whose report was published last year.

The following are some key features of the border poll framework established in law, North and South, and the Agreement.

i. A poll at any time

The UK provision on the circumstances in which a poll is called is clear on its face. It gives a general discretion to the Secretary of State to hold a poll at any time. It supplements that with a duty to do so if there appears to be a majority for Irish unity (subject in both cases to a time limit between successive polls, which has no relevance at present).

It is worth emphasising this because commentators and politicians sometimes omit to acknowledge the overall discretion to hold a poll, including at times [within the UK government](#). But it is clearly there, as was clearly affirmed in the McCord case. It reflects the legislative history set out above. And it is clear from the drafting. Had the intention been to specify that a poll could only be held when the Secretary of State thought there was a majority for a united Ireland, which would have been a substantial but unremarked departure from the earlier discretion, the statute would have been more simply drafted, straightforwardly imposing a duty to call a poll if the condition were met.

It may be unlikely that the Secretary of State in present circumstances would call a poll without the clearest evidence of a majority for unity. If she did, consistently with the principles of the Agreement, she would need to work in consultation with the Irish government. But the power may not be without significance in the future.

ii. The trigger for a poll

But how, assuming she does not decide on a poll as a matter of discretion, would the Secretary of State go about determining if it was likely that there would be a vote for a united Ireland?

There is no statutory guidance on this. Nevertheless, in principle, this is a legal duty, to which she could be held as a matter of law.

It is unlikely the courts would want to substitute their view on the substantive question: in *McCord*, the court emphasised that “the holding of a border poll involves extremely complex political considerations and if not carefully handled taking account of prevailing circumstances it could give rise to great instability”.

If the Secretary of State appeared not to be addressing the issue properly in the face of significant evidence she might get into legal trouble: the court emphasised that she must honestly reflect on the evidence available to her. But, it continued, “the overall evidential context and how it should be analysed and viewed is a matter for the Secretary of State”. It declined to hold that as a matter of law she had to set out and be bound by a policy on the issue. The Secretary of State in the case said that she believed the publication of such a policy would be “unnecessarily restrictive and not in the public interest”.

The issue of construction in the last section is relevant here: if Parliament had decreed that a border poll was something only to be held where it appeared there was a majority for a united Ireland, the courts might take a more restrictive attitude to the trigger than if, as is in fact the case, Parliament was content for a border poll at any point.

What might be the triggers the Secretary of State should have regard to? There are several possibilities, none of them straightforward.

- A clear majority in a succession of reliable opinion polls may seem the most obvious indicator. But judging what is a sound poll is not straightforward, especially when the results elicited (see above) are so variable.
- So any conclusion might reasonably require the assessment of a series of polls of different sorts. And it might also be reasonable to assess results over a certain time – flash in the pan shifts in opinion should presumably not trigger the duty, since they offer limited insight into the result of the vote that may take place some, perhaps many, months later.
- Some have suggested a Catholic majority in a census, [which may be achieved in 2021](#), would be a tipping point, but that is clearly not determinative – opinion poll evidence a few years ago suggested that a bare majority of Northern Ireland Catholics favoured a united Ireland even in the longer term. A Sinn Féin elder statesman has [suggested a census question](#) specifically on the issue. That may have merits, but it is not clear that that would necessarily be accurate, and it might politicise the census.
- A majority of members in the Northern Ireland Assembly, or the general election, from nationalist parties, would also be a pointer, but again much less than a definitive indication: many vote for these parties as a matter of community allegiance, not necessarily subscription to every policy position. The one indication the Secretary of State gave of her

approach in the McCord case was that an election result alone could not be a determining indication of opinion for these purposes.

- A vote by a majority in the Assembly in favour of a poll might be much more persuasive, however (though any formal resolution would presumably be blocked under the Assembly's cross community voting rules). A majority would be unlikely in the Assembly elected in 2017, which is currently not sitting because of the political impasse.

What is required is that the Secretary of State should make a rounded judgement based on all the evidence. But that is very much easier said than done where opinion is finely balanced.

The judgement to be made is complicated by the fact that it is not formally about the state of opinion at present, but about the way the electorate *would* vote. The vote might take place months or even years later (see below). And it would follow after a campaign: past evidence of referendum campaigns suggests that opinion often shifts markedly.

Legally, if she acts in good faith, the Secretary of State probably has a broad latitude. Bassett and Harvey record (paragraph 22 of their [paper](#)) that in the McCord case the judge said that decision-making by the Secretary of State required political assessment and a degree of flexibility, and it was for her to decide what matters should be taken into account.

But there is great scope for incurring mistrust, if she is seen not to be acting fairly.

iii. The franchise

The Secretary of State's order would stipulate "the persons entitled to vote". The 1973 poll followed the Parliamentary franchise (which allows a vote to Irish citizens, but not other EU citizens resident in Northern Ireland).

Some precedent would support other arrangements – the Scottish independence referendum used the Scottish Parliament franchise. A range of controversies may arise. Some would no doubt favour 16 and 17 year olds voting, as in the Scottish independence referendum, and indeed other Scottish elections. This is liable to be contentious – the demographics are such that it would be likely to favour the Irish unity cause.

There would be arguments, given that the Agreement sees this as an act of self-determination by the two parts of the island of Ireland, that the franchise should be aligned, North and South.

iv. PPERA, the Electoral Commission and the question

Once it was decided to conduct a poll, the [Political Parties, Elections and Referendums Act 2000](#) would come into play, giving the Electoral Commission certain responsibilities – it would need to be consulted on the terms of the question, and would be involved in designating campaigners, who might receive public funding. These issues might themselves be controversial, on the issue whether there is a "yes" and "no" for example. The 1973 poll avoided that, as did the Brexit vote; but the Scottish referendum had "yes" (for independence) and "no" (for the union).

v. Date of the poll

Besides the stipulation for minimum intervals, there is nothing in the 1998 Act or the Agreement to say at what point, if the Secretary of State considers the duty to call a poll is engaged, the poll itself should be held. Setting it many years ahead without a clear rationale would presumably be regarded in law as a breach of the duty. But setting it several years ahead, in the context of a plan to ensure full and proper debate, and preparation for the consequences that might ensue, should be acceptable.

vi. The 50%+1 criterion

The 1998 Act and the Agreement appear unequivocal that all turns on a “majority of the people of Northern Ireland voting in a poll”.

The reference in the Act to “the people of Northern Ireland” may introduce an element of ambiguity. But the only plausible interpretation is that the provision refers to a majority of those who actually vote – rather than a majority of the electorate, or of the whole population (government statements have been consistent with that interpretation. If otherwise, the Act would have defined “people of Northern Ireland”, as it does not).

And there appears nothing to justify any minimum turnout threshold.

There has so far been little dissent on either side of the debate in Northern Ireland from the 50%+1 consent formulation. Some [polling work](#) just after the Agreement suggested widespread, though not universal, popular acceptance among Unionists – although at that point the prospect was a distant one.

vii. A binary choice – but no detail, and no timescale

The choice as to constitutional destiny is a binary one, between remaining in the UK and a united Ireland. Other approaches previously canvassed, for example joint authority, are not acknowledged. Nor are independence or repartition, which anyway have negligible support.

As regards the form of government in Northern Ireland, the Agreement is founded on operation by consensus. But as regards constitutional status, it is all or nothing. This partly reflects the nature of the question, but the absence of provision also reflects the state of debate at the time of the Agreement: the achievement of the years preceding had been agreement on the principle of consent in both parts of the island (without external impediment). Further detail was left to be worked out later.

The Agreement prescribes the destination that must be attained, a united Ireland. It does not, however, prescribe the timescale, nor the journey there.

viii. Irish polls

The two sets of constitutional provisions, North and South, and the Agreement, are far from symmetric.

- The British provisions provide a mechanism for a poll, and envisage that the UK Government and the Irish Government would develop proposals thereafter to give effect to a wish for a united Ireland.
- But they make no mention of the requirement of consent in the South envisaged in the Agreement before that process gets underway.
- The new Article 3 of the Irish Constitution makes clear that a poll must be held in the South as well as the North, but makes no provision for it (though there is general provision in Irish law for referendums, both in the context of constitutional amendments and on other legislation), nor does it say when it should happen.
- Subparagraph (iv) of the Constitutional Issues section of the Agreement, though, speaks of consent to unity being “concurrently” given, North and South, and makes clear that there must be polls before legislation to bring about a united Ireland is introduced in the two Parliaments.

Given the recognition of the principle of self-determination within the island, with the requirement that consent must be concurrently given in both parts, many would argue that the Agreement requires a Southern poll at the same time as the Northern one. That happened with the Good Friday Agreement: some regarding the simultaneous aspect of the votes as important, displacing the all-Ireland poll to the First Dáil in 1918 from which physical force nationalism has claimed to derive legitimacy.

On the other hand this means the date of the Southern poll is dictated by the Secretary of State’s judgement on opinion in the North. It is not clear what opinion in the South might be at that point – no prior assessment of that is provided for. If the referendum were later, it might be significantly influenced by the reaction in the North to a positive vote (if the vote were negative, it would strictly not be needed). An Irish government might believe that the poll was better delayed. But that would put a strain on the stipulation in the Agreement (which however does not feature in the Constitution) about concurrent consent.

Could the referendum that would eventually be required to amend the Irish Constitution (below) meet the requirement of Southern consent? It could only do so if the arrangements for a united Ireland had been settled before the border poll happened – which is unlikely, at least if there is an early poll; or perhaps if it were cast as a very broad enablement, the details to be filled following further work – but that seems unusual in a constitutional context.

So the first Southern vote would not necessarily be linked to constitutional changes, and might well take place before negotiations of some sort on the form of a united Ireland: see below.

The conclusions would be presented to the UK Parliament, according to the schedule to the 1998 Act. Indeed both Governments would under the terms of the Agreement be obliged to support legislation in their parliaments.

ix. Post-negotiation polls

But there would clearly be a need at some stage as a matter of law for substantial change to the Irish Constitution. Amendments to the Constitution [require](#) a referendum.

So it appears there would be a Southern referendum at some point following negotiation. This would be the second, if there had been a Southern poll in parallel with the Northern one.

No poll in Northern Ireland is provided for at the later stage. Is such imbalance acceptable? If there is to be a new, or radically different, future Irish Constitution, should the future Irish citizens of the North not have an opportunity to vote on it? On the other hand, those in unionism not reconciled to a united Ireland might, if a second referendum loomed, focus all their attention not on the harmonious drafting of a scheme for unity, but on defeating the proposal, North or South, on the second vote.

Arguments for a post-negotiation referendum in the case of Brexit have not so far prospered in the UK, and have been strongly opposed by many Northern Ireland Unionists. But they might take a different view in this case. Some nationalists, reciprocally, might regard this as denying them their entitlement under the terms of the Agreement, the people having spoken.

x. Further polls?

The Agreement offers no provision for any further poll: the process that has led to a united Ireland appears to be the conclusion, the electorate of the former Northern Ireland having no entitlement to reverse their vote. In the abstract this is an imbalance in the Agreement: Northern Ireland's membership of the UK is always conditional, but a switch to a united Ireland is definitive. In any negotiations, such a demand may arise; certainly there are likely to be demands for guarantees of rights for the British-identifying population, in its absence.

xi. What is settled about a united Ireland

Perhaps the starkest gaps in the Agreement relate to the shape of the united Ireland and the way it is to be determined. There are a few pointers.

- There is the reference in the 1998 Act, a draft of which features in the Agreement, to the laying before the UK Parliament of “such proposals to give effect to [the] wish [for a united Ireland] as may be agreed between” the UK and Irish governments.
- Certain guarantees and principles are set out in the Agreement, and a few are expressed to be of enduring validity, as where the governments, in the Treaty, with the endorsement of the participants:
 - (v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;
 - (vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is

accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

- More recently (in April 2017) it has been formally [declared](#) by the European Council that the whole of such a united Ireland would form part of the European Union, even though Northern Ireland might by then have left in the context of Brexit.

Beyond that, little is stated. Nor is any provision made in the Agreement for the case where the UK and Irish governments cannot agree any proposals.

xii. How the terms of the united Ireland would be negotiated

It is hardly conceivable, anyway, that the two governments alone could develop proposals on the issues to be resolved in the context of Irish unity, beyond perhaps outline ones for a further process. Much of this is the stuff of constitutional conventions.

The Agreement itself speaks of the need for “the achievement of reconciliation, tolerance, and mutual trust”, and “partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands”, and the development of plans for Irish unity should presumably proceed on this basis.

Some negotiating framework would be required, drawing in all the main political forces in the island, as well as the two governments. There is also much here that could be explored through new techniques of [citizen deliberation](#), already used to good effect in the South.

A key question about the process is how far it would follow the principle in the negotiations over the Agreement that there needed to be “sufficient consensus” – the Agreement had to command majority support among representatives of each main part of the community in Northern Ireland, as well as the UK and Irish governments (the UK government alone as regards internal arrangements); after which it was put to referendums in both parts. In what form might this apply to these negotiations, if it is not to give unionism a veto on the united Ireland that has been voted for?

xiii. Issues to be addressed

This is not the place to develop an agenda for such negotiations, but it is important to have some idea of their magnitude. A process is needed that is sufficient to deal effectively with all the key issues, meeting as far as possible the aspirations of different strands within the community.

So far this has been little discussed. But a [report](#) adopted by a committee of the Irish Parliament in 2017 started to get into some of the issues, building heavily on work by Richard Humphreys, now a judge of the Irish High Court (whose latest thoughts are set out [here](#)). It envisaged there might be a further New Ireland Forum, based on [one established by the Irish Government of Garret FitzGerald](#) in the 1980s, a call picked up by some other nationalists.

There may be lessons to be learned from processes elsewhere about unification, for example Germany, but this field appears relatively little explored.

Examples of the issues to be addressed include:

- *The governance of Northern Ireland within a united Ireland.* Most fundamentally, is it separately administered at all, or does it become part of a unitary state, like the other 26 counties? Many have acknowledged that there would have to be special provision for Northern Ireland. If so, do the principles of the Agreement form the starting point? Should the aim be, at least as a starting point, to retain in Northern Ireland the existing institutions, interacting however with the sovereign institutions of Dublin rather than those at Westminster, and sending representatives to the Oireachtas (Irish Parliament) as they do to Westminster at present? Does the whole corpus of UK law as it applies to Northern Ireland, in the Assembly's field and beyond, carry over with minimum necessary changes, or is more radical legal surgery envisaged? And does that extend to very expensive entitlements not fully paralleled in the South, like free NHS treatment? Some have seen the cost of state provision in Northern Ireland, heavily subsidised from London, as the ultimate stumbling block to unity.
- *The wider Irish context.* Does the 1937 Constitution of Ireland continue, with minimum necessary modifications to accommodate a united Ireland? Or is there some much more comprehensive revision, removing elements that might be the cause of friction – such as those relating to the primacy of the Irish language over English? Indeed is there at some point a process to develop a new constitution, with an input from the new Irish citizens of the North, acknowledging the British identity of many of them?
- *Broader networks of relations.* Does the UK government have any continuing place in arrangements within the island of Ireland? Would anyone want it to take over a role as regards the former Northern Ireland, comparable to the one that the Irish government has at present – with a power, effectively as guarantor of the rights of Unionists, to put forward views and proposals as regards Northern Ireland, with determined efforts at the British Irish Intergovernmental Conference to resolve differences? Does London continue to fund Northern Ireland's substantial public sector deficit for a period? Would Ireland rejoin the Commonwealth? In the context of unity, there might be political and practical value in thickening the East-West ties and guarantees (between the UK and Ireland) in what both Governments have recognised as a uniquely close relationship, potentially embodied in an international Agreement building on the GFA foundations and in particular the [British Irish Council](#). And at Westminster – Northern Ireland would presumably no longer send representatives there, but would peers appointed from there continue to sit? Would there be a strengthening of inter-Parliamentary ties, building on the current [British Irish Parliamentary Assembly](#)?
- *Transitional arrangements.* The breadth and abruptness of the changes to be made provoke thoughts of phasing the progression to Irish unity, to permit the working up of new Irish constitutional arrangements, and the removal of sharp edges. And perhaps indeed in a number of stages, over a prolonged period, featuring a period of joint sovereignty on the way to fulfilling the mandate for a united Ireland? Such halfway houses would however complicate the position with regard to EU membership, assuming Brexit has taken place.

4. Principles and Realities

i. The approach to Irish unity

The nature of the Agreement provision makes the basic proposition a dramatic one: the movement of almost a million people, essentially traditional Unionists, into a united Ireland against their preference.

The opposite outcome is even harder to defend as a matter of principle – keeping Northern Ireland within the United Kingdom, potentially by the use of force, when a majority wanted something else.

But abrupt change may entail seismic shock.

Given that history and the Agreement have cast the choice here as a binary one between remaining in the UK and Irish unity, the decision cannot proceed on the sufficient consensus formulation. That would involve saying Irish unity could only come about where a majority of Northern Ireland Unionists agree – but a Northern Ireland Unionist is by definition someone who opposes Irish unity. Hence the decision has to be one way or the other.

But once the decision on Irish unity is taken, the spirit of the Agreement, of moving by consensus, can be applied to the shape of the new Ireland.

The Agreement negotiations had no opportunity to work through how this might be achieved, which is why we have such a minimal and incomplete set of provisions.

Many, including probably the two governments, will be inclined to play things long in the interests of stability. And if the provisions are triggered, they may be keen to embody staging points in the hopes of minimising division.

But they may not be able fully to control the process.

ii. The wider political context

And the overall climate is likely to be conditioned by various factors beyond the immediate unification debate. They may include:

- continuing negotiation over Brexit and its consequences; a hard Brexit, and a painful negotiation about the future, are liable to leave a degree of bitterness in both parts of the island, leaving a brittle and dangerous political landscape;
- British politics, including the government's dependence on Northern Ireland votes at Westminster;
- whether it has been possible to resume devolved government in Northern Ireland – which would potentially be a source of stability otherwise missing, because the political parties would once again bear a part of the responsibility for keeping the show on the road. But this may be particularly unlikely in the context of a hard Brexit;

- any moves to Scottish independence. Northern Ireland politics registered the Scottish independence referendum fairly minimally, but there was at that point functioning (if creaking) devolution – things are notably different now. Indeed the influences may be felt in both directions.

iii. Is an early poll desirable?

It is unlikely the Secretary of State, in the current UK government at least, would call a poll unless obliged to do so.

Secretaries of State have traditionally pushed the issue aside, on the grounds that it would be a distraction from the pressing issues of economics and society in Northern Ireland, might interfere with the smooth operation of the Executive, and was in any event a foregone conclusion, because there was clearly no majority for a united Ireland.

These arguments now have much less validity. There has been no Executive in Northern Ireland for two years, key issues are not being tackled, Brexit has further distracted attention from them, and recent polling suggests that the result is less obviously predictable than it was.

But there would still be a marked reluctance to undertake a poll. It would risk draining the remaining energy and will from efforts to resume the Executive, on which all hope of regaining political stability rests. Any UK government, like its Irish counterpart, would fear the consequences for stability of a narrow vote for unity. And if the result was a narrow negative, it might mean that the focus of politics would thereafter change radically away from making things work in Northern Ireland towards preparing the battle lines for further polls at seven-year intervals.

Some nationalists will continue to see an early poll as the longed for opportunity. But many others within nationalism, including most probable future Irish governments, will continue to have serious reservations about a poll in current circumstances, and the potential disarray that might ensue from a vote in favour.

It is also possible that a Southern poll would reject unification, even when the Northern one favoured it, the Southern voters believing that the admission to a united Ireland of nearly a million recalcitrant Unionists would bring more disruption than they wished to contemplate. Such a result might seriously shake both parts of Ireland. Divisions and disorder in Northern Ireland may boost the nationalist vote there; they may arouse nationalist instincts in the South too; but they may also incline the Southern electorate towards caution.

iv. Informing the judgement on a poll

The Secretary of State might in various ways seek to engage others in informing her eventual judgement on a poll, though legally she cannot divest herself of it.

As a first step, if the prospect of a majority for unity seemed imminent, there might usefully be a process of consultation - conducted by herself or others, and aiming directly to establish what the state of opinion was, or to devise procedures for doing so, the better to decide whether her duty is triggered.

But as the analysis above shows, there is no obvious single indicator. The Secretary of State might legitimately say that, on such a question, she would be assisted by the considered views of Northern Ireland's elected representatives expressed through the Assembly. That would be entirely justifiable in itself: more enlightenment is likely to emerge when the parties are talking to each other within the institutions, rather than through megaphones.

Such a position would also offer a reason for the parties to work for the return of devolved government, rather than let the prospect of a border poll inhibit it. If the institutions were in place at the time of the poll, with elected representatives sharing responsibility for managing the consequences, the prospects for maintaining stability would be much improved.

The legal duty is the Secretary of State's alone. But the Irish government clearly also has a key role here. It will at some point have its own polls to organise, and its role in the process of negotiating new arrangements. And both governments have the fundamental responsibility to work individually but also together for the maintenance of peace and stability in both parts of the island.

v. If the duty to call a poll is engaged...

In various contexts, though, perhaps particularly that of a variant of Brexit that provoked acute discord, calling a poll may become the Secretary of State's legal duty. That might arise if a series of opinion polls appeared suggesting a majority for a united Ireland. Some might argue that on recent precedent something of the order of 52:48 would be sufficient.

She could, legitimately, call for dialogue about the way forward, and consult on how to discharge the duty.

But if she dragged her feet too much, she would risk appearing to nationalists, and others, to be turning her back on one of the key pillars of the Agreement – that the decision on constitutional status is one for agreement between the two parts of the island of Ireland alone, without external impediment. What remains of nationalism's belief in the good faith of the UK government would quickly evaporate. That would add further to the fragility of the political situation. And the courts might ultimately find themselves unable to sidestep involvement.

At that point, though, it may be a widely held view in Northern Ireland, and among the governments, that a period of several years was needed before the poll, in order to seek to resolve some of the questions above before it was conducted. That might be reasonably safe from legal challenge. (New Westminster legislation could make it safer yet, though here as elsewhere appearing to go beyond the GFA provisions carries political risks).

vi. A benign dynamic?

A benign dynamic might set in at that point. As soon as it becomes clear that a border poll is an imminent possibility, parties on both sides of the community would logically feel themselves as a matter of self-interest obliged to appeal not only to their own side, but also to the other. This would be a novelty in Northern Ireland politics, where most voting is determined by community allegiance, but there would be a clear self-interest in it. In the course of this, Unionist and nationalist "packages" might emerge, each seeking to draw the greatest possible number of people from across the community.

In advance of a poll, though, it is hard to see how Unionists could be induced to make any constructive contribution to the question of how a united Ireland might work – so it is hard to see even a delayed border poll as a post-negotiation referendum.

There have already been recent strands of nationalist thought about constituting an "agreed Ireland" – including an impressively well attended [conference in Belfast in January](#). At times, there have been gestures of outreach to unionism, or at least individual Unionists, though the nature of politics is such that there has not been any great wave of involvement.

Until very recently, there has not been much sign among Unionists about the need to persuade the Catholic population of the benefits of the union, beyond Peter Robinson's contributions mentioned above. A ["civic Unionist" group](#) has however started to put its head above water.

Unionism would in the context of a poll have to think very quickly about how it might win the allegiance of nationalists, and what plausible spokespeople they would have with that community.

And it is possible a measure of agreement would develop about the staging of any eventual move to Irish unity, with the aim of reducing the immediate shocks to which the minimal provisions of the Agreement might give rise, and their potential for division.

There are many possibilities, which need careful reflection that they have not so far received. But for example if the Secretary of State concluded that her duty to call a poll is engaged, there might be a framing phase of several years leading up to it, in which the ensuing process was developed. The British and Irish governments would need to work closely together, in the interests of maintaining stability, but also as a recognition that the political landscape was changing.

If the poll were for unity, there might then be a move to a transitional phase, perhaps of formal joint sovereignty, with the current arrangements applying day-to-day, while the terms of a new Ireland were negotiated.

Perhaps, recognising that the decision had been made, there might need to be a default set of provisions, which might be a mirror image of the current ones but looking to Dublin sovereignty rather than London, to come into effect after a period of years if negotiations had not produced a different plan (which if agreed might then to be put to further polls).

vii. Or an abyss?

But in the increasingly polarised atmosphere of Northern Ireland politics such constructive outcomes are not to be counted on.

Much of the spirit of working together that built up during the negotiation of the Agreement and after has dissipated in the last couple of years. The prospect arises in certain contexts of the whole process set out above being triggered with many of the key questions unanswered.

And the UK and Irish governments, whose partnership has been the motor and the guardian of the process in the past, are now, because of preoccupations with Brexit, their differences over it, and the government's parliamentary dependence on the DUP, less able to work effectively together.

United States interest and influence, once a significant force for compromise, has waned, and the EU is not obviously well placed to help broker deals.

And civil society voices in Northern Ireland that might support agreement have not been effectively articulated.

If a poll were triggered, it would be essential that the two governments found ways to work more effectively together than they have been able to do recently (and they might need to limit the extent to which they involved themselves directly in debate). If they are at odds, challenges to stability and order may increase dramatically. Potentially further overlays of confusion are added to a first one stemming from the consequences in the island of Ireland of post-Brexit division.

This is not the place to forecast the consequences of that, but it is hard to be confident given the history that all in the community will take this on board with perfect serenity. Among other consequences, movements of people outside Northern Ireland might be feared: Arlene Foster, the DUP leader and former First Minister has [said](#) that she would probably not stay in a united Ireland, and if there were disorder, significant numbers of others might want to follow her.

5. Conclusion

Until a few years ago, these issues appeared to be resolving themselves – the border no longer mattered for most purposes, and everyday politics, though profoundly imperfect, was beginning to get a foothold. The border poll increasingly seemed a form of, as it might be termed, backstop – that either would never be engaged, or if it were, might not cause great upheaval.

Recent political developments mean that it may rapidly come to life. It is, perhaps, the least indefensible of all the alternatives, but in the underdeveloped form in which it features in the Agreement, it is a brutal and indiscriminate mechanism, and, triggered without preparation, may have many casualties.

There is a need for reflection and preparation; to establish what the process might be, and then to find ways in which, on the path to the vote and beyond, the aspirations of as large a part of the community as possible are accommodated and the worst ill effects are avoided.

The [Independent Commission on Referendums](#), sponsored by the Constitution Unit, laid heavy emphasis on the need for such preparation for future referendums. But it requires serious consideration, among the parties, and indeed society, in Northern Ireland; in the South; and certainly in London.

The prospect of a poll in Northern Ireland about Irish unification, provided for in the Good Friday Agreement and often termed a “border poll”, is now widely discussed. But the provisions and wider implications of the law and the Agreement – extending to both parts of the island – are little explored. In the fullest and most comprehensive analysis of the issues so far, this report outlines the current state of opinion on a border poll, and the provision in law and the Agreement.

There is scant evidence at present of a majority for a united Ireland, but if the political situation becomes still more fractured, it could arise, perhaps quickly. The provision in law and the Agreement is stark and minimal. There are hence serious gaps and ambiguities in the process to be followed. It is important that the issues are considered and as far as possible resolved before the machinery is invoked. A move to Irish unity could be shaped in accordance with the principles embodied in the Agreement seeking consensus and respecting identity, but the way in which this is done needs reflection, and careful stewardship by the British and Irish governments.

The Constitution Unit is planning a project to address these questions, with partners from both Northern Ireland and the Republic. The purpose of this report is to set out the key issues, and stimulate discussion.

About the Constitution Unit

The Constitution Unit is a research centre based in the UCL Department of Political Science. We conduct timely, rigorous, independent research into constitutional change and the reform of political institutions. Since our foundation in 1995, the Unit’s research has had significant real-world impact, informing policy-makers engaged in such changes – both in the United Kingdom and around the world.

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