

## BORDER POLLS

1. In the political developments which culminated in the 1998 Belfast Agreement (aka Good Friday Agreement: GFA), the constitutional status of Northern Ireland was a central preoccupation. Among the more important developments were these:

i) the Anglo-Irish Agreement 1985 in which the British and Irish Governments acknowledged that the status of Northern Ireland, whether as part of the UK or as part of a united Ireland, turned on the consent of a majority of the people of NI (the "consent principle"). But this was deliberately expressed in qualified terms to avoid conflict with Articles 2 and 3 of the Irish constitution and thus to obviate the need for their amendment.

ii) the 1993 Downing Street Declaration, by the British Prime Minister and the Irish Taoiseach, included a joint commitment to foster agreement and reconciliation, leading to a new political framework founded on consent and encompassing arrangements within NI, for the whole island, and between these islands, and, by the British side, an acknowledgement of the "consent principle", an affirmation that the British Government had no selfish strategic or economic interest in NI and a recognition of the right of self determination of the people of the island of Ireland alone, expressed in terms compatible with the "consent principle". It also included, from the Irish side, a more forward acknowledgement that it would be wrong to attempt to impose a united Ireland, in the absence of the freely given consent of a majority of the people of NI.

iii) the New Framework for Agreement, published by the two governments in February 1995, contained an important section on Constitutional issues in which many of these positions were reaffirmed, sometimes in slightly more advanced

terms. (For example, the Irish Government came closer to acknowledging the legitimacy of NI's current status as reflecting the consent principle.) In addition there were important commitments about the way NI would be administered, whether as part of the UK or in future as part of a united Ireland. The British would exercise jurisdiction with "rigorous impartiality" (a commitment also made explicit in the case of the Irish government in paragraph 1(v) of the GFA). Both governments made a commitment to the principle that institutions and arrangements in NI and North/South institutions should afford both communities secure and satisfactory political, administrative and symbolic expression and protection. "In particular, they commit themselves to entrenched provisions guaranteeing equitable and effective political participation for whichever community finds itself in a minority position by reference to the NI framework, or the wider Irish framework, as the case may be, consequent on the operation of the principle of consent."

2. These positions were reaffirmed in the GFA. In particular it was made clear that while the present status of NI as part of the UK rested on the consent principle, that consent could in future be tested by a poll in NI; and that such a poll must be held if the UK Secretary of State judged it likely that a majority of those voting would support NI forming part of a united Ireland. In that event, by virtue of section 1 of the Northern Ireland Act 1998, the Secretary of State must lay before Parliament such proposals to give effect to that wish as may be agreed between the British and Irish Governments.

3. It follows that, while a positive vote in a border poll is a necessary condition for achieving a united Ireland, it is not sufficient. For one thing, it is likely an affirmative result in a referendum in Ireland would also be required. For another, as the 1998

Act makes clear, proposals for implementing the new dispensation would need to be agreed between the two governments.

4. Since, as brought out above, an obligation to hold a "border poll" could be triggered at any time, and since complex arrangements to give effect to an affirmative vote would need agreement between the two governments, it would be prudent to begin serious consideration of what these arrangements might be sooner rather than later. Even on the most optimistic view, the achievement of a united Ireland is likely to involve controversy and to be contested, even by some who have purportedly signed up to the consent principle. That controversy could be better managed, and the affirmative vote made more meaningful (and, conceivably, more likely), if there were available, in advance of the poll, a clear blueprint for a united Ireland and for the transition to it, agreed by the two governments and, if possible, by the democratic representatives of the people of Northern Ireland.

5. Stepping back from the existing Declaratory provisions, Treaty commitments and constitutional and legislative provisions, the matter might be expressed as follows.

- i) referendums, almost certainly North and South, will play an important role in the transition, if a majority of the people of NI consent to it, to a united Ireland;
- ii) but the referendums should not be expected to bring about change of this magnitude and significance on their own. They could not, without a supporting context, bear the weight;
- iii) a Process is needed and planning for this, if only on a contingency basis, should begin soon, led by the two governments but closely involving democratic representatives of the people of NI;
- iv) such a process risks destabilising the somewhat fragile settlement in NI. It will

therefore require careful management. But doing nothing, with the prospect of a "border poll" being required, under the legislation, without advanced preparation poses a greater risk.

v) the process would need to involve an EU dimension, particularly as NI is now outside the EU but would presumably, if it were to form part of a united Ireland, return within it.

6. A Process of the kind envisaged could take many forms. In any event it requires serious discussion, initially by the two governments. It might involve some or all of these components;

i) an explanatory Declaratory Statement by the two governments outlining the proposed line of approach;

ii) referendums, North and South, to seek popular approval for the launch of the Process, and its nature. The results of such referendums would be indicative rather than decisive;

iii) the initiation of a process of exploration, consultation and negotiation to devise a blue print for the transition and for the constitutional and political arrangements for a united Ireland;

iv) while the British government would be directly involved in important transitional and legacy issues, the Irish government would clearly take the lead on the future constitutional and political arrangements within a united Ireland

v) the promulgation of a developed scheme for a united Ireland and, if approved, for the transition to it. It would be this scheme which, at the appropriate time, would be put to the people North and South in decisive referendums (i.e. in the North the so called "Border Poll").

7. Such a process would be an opportunity to consider the nature of the second, decisive, referendums: for example whether the outcome should be settled by simple or qualified majority and whether the validity of the result should depend on reaching a set threshold of the number voting. The transition to a united Ireland, if it occurs, is likely to be contested and the period could be dangerous. The greater the measure of consensus the better. However it has long been assumed that the issue would turn on a simple majority and, though some nationalists such as the late Seamus Mallon saw risks in this, a wider view among those seeking a united Ireland might be that an attempt to introduce, at this stage, such a requirement would constitute an illegitimate manoeuvre to frustrate change.

8. There is another important consideration. Successive British governments have willingly accepted the responsibilities and challenges, sometimes considerable given popular dissent and terrorism, of governing NI on the basis that they were upholding the consent principle, with the privilege of legitimacy thereby conferred. But, once it became clear that a majority of people in NI supported a united Ireland, that privilege would evaporate, opinion in Great Britain & elsewhere would shift decisively & the government's position would become untenable, save in the short term.

9. Against this background, it would be prudent for the British and Irish Governments to begin serious preparations, on a contingency basis, for the possibility of a transition to a united Ireland.

Quentin Thomas

June 2020