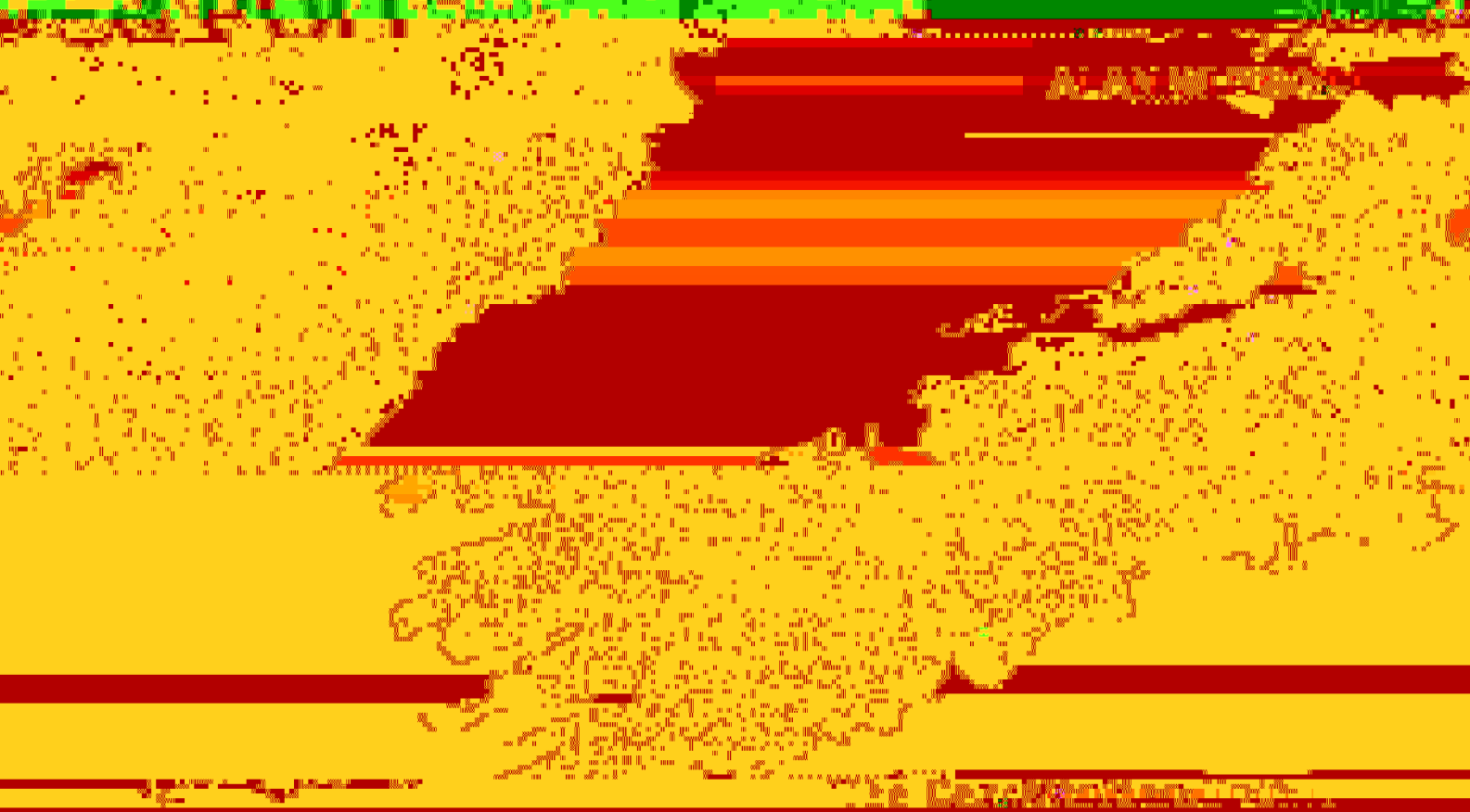


THE IRISH TRAIL AND A NOVEL

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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

1. The State of Opinion

Few Northern Ireland Unionists have favoured a border poll ([at least](#) [years](#)). Some have ignored or positively dismissed the prospect of one being called. But the former First Minister Peter Robinson [last year](#) [urged](#)

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.

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 British 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 referendum in North and South (albeit [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 .nd v3 (nt)2 (l) v-v l of majority of f5u TJ.1 (-v)-1ut-4 (j) sel peng ping-vp.. (a)

iii. The Good Friday Agreement, consent and self

3. Analysis: An Incomplete (and Misunderstood) Framework

These provisions were remarkably little discussed at the time of the Agreement. The parties

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

- x A vote by a majority in the Assembly in favour of ~~might~~ might be much more persuasive however though any formal resolution would ~~presumably~~ presumably be blocked under the Assembly's cross community voting ~~rules~~ 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~~ 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-

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; 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 just after the Agreement suggested widespread, though not universal, popular acceptance among Unionists, though at that point the prospect was a distant one.

Viii 2 A M D n E r y O c (u) e t (a) 2 (h m e) l d . 2 [(w) 1 T d [v T d m E T 0 (u i 2 M C 2

x The British provisions provide a mechanism for a poll, and envisage that the UK

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 the later stage. Is such imbalance acceptable? 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 Northern Ireland Unionists. But they might take a different view in this case. Some nationalists 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.

- x 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.
- x 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 within jurisdiction there shall be exercised with rigorous impartiality on behalf of the people in the diversity of their identities and traditions and shall be based on the principles of full respect for, and equality of, political, social and cultural rights, of freedom from discrimination

Examples of the issues to be addressed include:

- x 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

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 it has opted for 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 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 around the immediate unification debate. They may include

- x 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;
- x British politics, including the government's dependence on Northern Ireland votes at Westminster;
- x whether it has been possible to resume devolved government in Northern Ireland – would potentially be a source of stability otherwise missing, because the local 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;

- x 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 every few 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, 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 ~~quest~~ ^{question} he 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 ~~is clearly a~~ ^{is clearly a} key role here. It will at some point have its own polls to organise, and its role in the process of negotiating

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 is hard to see even a delayed border poll as a 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 April](#), 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. ["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 to 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 the interim a 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 today, while the terms of a new Ireland were negotiated.

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

5. Conclusion

Until a few years ago, these issues appeared to be resolving themselves, 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 the underdeveloped form in which it features in the Agreement 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.

