



Constitutional Models of a United Ireland

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Executive Summary

The Good Friday Agreement 1998 provides for a pathway to Irish unity, whenever that may come about. The advent of Brexit has brought with it numerous constitutional issues, not least the complication of the border between Northern Ireland and the Republic. Combined with the relative unpopularity of leaving the EU in the Northern Ireland electorate, calls have been made both north and south for a border poll as per the 1998 Agreement. However, the present political and cultural tensions in Northern Ireland make it difficult to begin a dialogue on a possible united Ireland. While examples from other countries have been suggested as models that united Ireland could follow, many of them fail to adequately consider the tensions present in Northern Irish society, and the relationship of its people to the island as a whole.

This analysis sketches out Northern Ireland's constitutional history, the current governmental systems in place in both Northern Ireland and the Republic, and offers three possible models of government in the event of Irish unification. These models are (1) Full Absorption of Northern Ireland into the Republic; (2) Unification with Retention of the Good Friday Agreement; and (3) Federation under a new Constitution. These models are considered with reference to three constitutional areas – state structure, parliamentary make-up and electoral systems – in the context of their ability to deal with the problems that unification may bring. Model 2 (Retention of the Good Friday Agreement) is recommended as the most appropriate to follow, closely followed by Model 3 (Federation). Model 2 is considered most appropriate due to its incorporation of a system of governance that has been moderately functional up until this point (Stormont), while incorporating representation for the now-minority Unionist population in the Oireachtas. Model 3 is somewhat recommended due to its necessary writing of a new Constitution, which would allow the opportunity for the creation of a new constitutional culture alongside the substantive changes made to the state's structure.

Definition of Terms

Dáil: Dáil Éireann is the lower house, and principal chamber, of the Oireachtas, which also includes the President of Ireland and Seanad Éireann. It consists of 160 members, known as Teachta Dála.

DUP: The Democratic Unionist Party is a unionist political party in Northern Ireland favouring British identity. It was founded in 1971 during the Troubles by Ian Paisley, who led the party for the next 37 years.

ECHR: The European Convention on Human Rights is an international convention to protect human rights and political freedoms in Europe.

ECtHR: The European Court of Human Rights, frequently referred to as the Strasbourg Court, is a supranational or international court established by the European Convention on Human Rights.

FPTP: First-Past-The-Post is a plurality voting method where members of the electorate cast their vote for the candidate of their choice and the candidate who receives the most votes wins, even if they did not receive a majority of the votes.

Good Friday Agreement: The Good Friday Agreement, or Belfast Agreement, is a pair of agreements signed on 10 April 1998 that ended most of the violence of the Troubles, a political conflict in Northern Ireland that had been ongoing since the 1960s. It served as a major development in the Northern Ireland peace process of the 1990s.

Leinster House: Leinster House is the seat of the Oireachtas, the parliament of Ireland. Often used interchangeably with the Oireachtas, the Irish parliament.

Nationalist: Irish nationalism is a nationalist political movement which asserts that the Irish people are a nation and espouses the creation of a sovereign Irish nation-state on the island of Ireland. Irish nationalism celebrates the culture of Ireland, especially the Irish language, literature, music, and sports.

NSIPA: The North/South Inter-Parliamentary Association is a forum for discussions between Members of the Northern Ireland Assembly and Members of the Houses of the Oireachtas on issues of mutual interest and concern.

NSMC: The North/South Ministerial Council is a body established under the Good Friday Agreement to co-ordinate activity and exercise certain governmental powers across the whole island of Ireland.

Oireachtas: The Oireachtas, sometimes referred to as Oireachtas Éireann, is the legislature of Ireland. The Oireachtas consists of: The President of Ireland The two houses of the Oireachtas: Dáil Éireann Seanad Éireann The houses of the Oireachtas sit in Leinster House in Dublin.

PR-STV: The single transferable vote (STV) is a proportional voting system designed to achieve or closely approach proportional representation through voters ranking candidates in multi-seat organizations or constituencies.

SDLP: The Social Democratic and Labour Party is a social-democratic, Irish nationalist political party in Northern Ireland. The SDLP currently has 12 MLAs in the Northern Ireland Assembly and two MPs in Westminster.

Seanad: Seanad Éireann is the upper house of the Oireachtas, which also comprises the President of Ireland and Dáil Éireann. It is commonly called the Seanad or Senate and its members senators. Unlike Dáil Éireann, it is not directly elected but consists of a mixture of members chosen by various methods.

Stormont: Stormont is the seat of the Northern Ireland Assembly, the devolved legislature for the region. The Executive or government is located at Stormont Castle.

Tánaiste: The Tánaiste is the deputy head of the government of Ireland and thus holder of its second-most senior office. The Tánaiste is appointed by the President of Ireland on the advice of the Taoiseach.

Taoiseach: The Taoiseach is the prime minister and head of government of Ireland. The Taoiseach is appointed by the President upon the nomination of Dáil Éireann, the lower house of the Oireachtas, and must, to remain in office, retain the support of a majority in the Dáil.

TEU: The Treaty on European Union (TEU) alongside the TFEU sets out the European Union's purpose, democratic principles, institutions and governance framework, as well as provisions on enhanced co-operation, external action and the EU's common foreign and security policy.

TFEU: The Treaty on the Functioning of the European Union (TFEU) is one of two treaties forming the constitutional basis of the European Union (EU), the other being the Treaty on European Union (TEU; also referred to as the Treaty of Maastricht).

Unionist: Unionism in Ireland is a political tradition on the island that professes loyalty to the Crown and Constitution of the United Kingdom, often in opposition to the goals of Irish Nationalism.

UUP: The Ulster Unionist Party is a unionist political party in Northern Ireland. Having gathered support in Northern Ireland during the late-nineteenth and early-twentieth centuries, the party governed Northern Ireland between 1921 and 1972

Part I: Introduction

Before the United Kingdom voted to leave the European Union in June 2016, very little time was spent considering the ramifications of such a decision; the practical details of Brexit were rarely elucidated past an abstract claim of national autonomy and control.¹ Speaking nearly three years after the vote, US anthropologist and author Jared Diamond opined that the issues that Brexit considered were too big for a simple ‘Yes/No’ referendum, stating that ‘Subjects that are suitable for referendum are issues of society values that do not involve complicated questions of economics’.² However, it was a simple ‘Yes/No’ decision that the UK population were faced with, and the consequences of this decision may be felt for decades to come. Applying this reasoning to the case of possible Irish unification, there is an argument to be made that the population might benefit from being better informed as to what a united Ireland would look like.

This gravity of the Brexit decision may have been more easily appreciated on the other side of the Irish Sea. In 2015, then-Taoiseach (Prime Minister of Ireland) Enda Kenny commissioned a special report outlining the challenges the Republic of Ireland would face in the event of a Brexit vote. This report concluded that dependant on the result of negotiations, the Republic may suffer a GDP reduction anywhere from 2.8 to 7.0 per cent by 2030 with respect to 2015 levels.³ This analysis concerned itself exclusively with the economic fallout of Brexit – the issues of Northern Ireland’s constitutional status, citizenship, access to justice, the Good Friday Agreement and the ephemeral border issue are yet to be comprehensively considered. Yet these issues did not seem to immediately attract the level of concern in the UK and the EU that they deserved. Speaking immediately after the vote, European People’s Party leader Manfred Weber wrote ‘Exit negotiations should be concluded within 2 years at max. There cannot be any special treatment. Leave means leave’.⁴ However, such is the complexity of these issues that exit talks continue to drag on nearly 4 years after the UK voted to leave. The most notable of sticking points has been Northern Ireland, with its EU-facing land border. Proposals such as the Northern Ireland ‘Backstop’ and ‘Northern Ireland Protocol’ have been a primary source in contention in recent negotiations. The recent COVID-19 pandemic has further highlighted the complicated jurisdictional tensions on the island – the Republic’s police force have been unable to stop Northern Irish holidaymakers from travelling to various holiday destinations in the Republic, despite there being a ‘stay at home’ order in place for residents in the Republic.⁵

The Good Friday Agreement further complicates the situation. Under the Agreement, there can be no change in the constitutional status of Northern Ireland without the consent of a majority of the population.⁶ With 55 per cent of Northern Ireland voting in 2016 to Remain, the change in Northern Ireland’s constitutional status regardless seemed to some people to

¹ Yasmeen Sehran, ‘In a Bid to ‘Take Back Control’, Britain Lost it’ *The Atlantic* (New York, 28 March 2019) <https://www.theatlantic.com/international/archive/2019/03/brexit-britain-control-may-eu/585940/> accessed 11 February 2020

² Jared Diamond, ‘Brexit too complicated for referendum, says Jared Diamond’ *The Guardian* (London, 1 June 2019) <https://www.theguardian.com/books/2019/jun/01/brexit-too-complicated-for-referendum-says-jared-diamond> accessed 15 February 2020

³ Ireland and the Impacts of Brexit (2015) Copenhagen Economics, <https://dbei.gov.ie/en/Publications/Publication-files/Ireland-and-the-Impacts-of-Brexit.pdf>

⁴ <https://www.bbc.com/news/world-europe-36617128>

⁵ Laura Glenn, ‘Northern Ireland residents urged not to travel over border and to stay at home’ *Derry Journal* (28 April 2020) <https://www.derryjournal.com/news/people/northern-ireland-residents-urged-not-travel-over-border-and-stay-home-2552965> accessed 11 May 2020

⁶ Good Friday Agreement, ‘Constitutional Issues’ (ii)

fundamentally contradict the core principle of the Agreement.⁷ Furthermore, the UK has complicated matters further by advocating for solutions that would necessitate a hard border on the island, which would seem to be a clear breach of another aspect of the Good Friday Agreement. This has led to fresh calls for a referendum in both Northern Ireland and the Republic on a united Ireland.⁸ The recent upswing in pro-unification sentiment post-Brexit is also notable considering support for unification had plateaued in the years beforehand.⁹ In support of unity, both President of the European Commission Jean Claude Juncker and Taoiseach Leo Varadkar both agreed in 2017 that if Ireland were to be united, Northern Ireland would be able to accede to the EU in a fashion similar to that of East Germany in 1990, without the need for a vote of the other Member States.¹⁰ More recently, a joint framework document for Government published by the Fine Gael and Fianna Fáil parties proposed the establishment of a ‘Shared Island’ unit in the Department of An Taoiseach to ‘work towards a consensus on a united island.’¹¹

However, the present political and cultural tensions in Northern Ireland make it difficult to accommodate a dialogue on a possible united Ireland. While examples from other countries have been suggested as models that united Ireland could follow, many of them fail to adequately grasp the tensions present in Northern Irish society. As noted by former Tánaiste and Minister for Justice Michael McDowell:

‘The people of the Republic simply will not vote for any form of Irish unity in which the unionist and loyalist people of the North are dragged against their wishes into an all-Ireland republic by an Anschluss plebiscite. That would be a recipe for repeating the Troubles or even for civil war’.¹²

This illustrates one of the first (and most significant) roadblocks in developing a workable model for Irish unity. While the Good Friday Agreement allows for a border poll to be triggered when in the opinion of the Secretary of State for Northern Ireland there is majority support for it, very few people would support the forced assimilation of hundreds of thousands of Unionists into a culturally homogenous united Ireland, considering the violence that had been visited upon the North in opposition to such a future up until 20 years ago. For these reasons, many international comparative models may not offer the nuance necessary to navigate the issue that a united Ireland poses. If the governments of the British Isles are to learn anything from the political disaster of Brexit, it is that comprehensive models must be outlined out well in advance of any binding vote to unite the island. Andy Pollak, former director of the Centre for Cross Border Studies offers a similar warning, stating that ‘we could be pitched toward a united Ireland without there being any time to get ready for it... If it happens that way, it’s going to

⁷ However, this was rejected by the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, when the Supreme Court restated that consent of a devolved parliament was not necessary in changing the constitutional status of that statelet’s status.

⁸ ‘Brexit ‘could create a majority for a united Ireland’ *BBC News* (London, 3 September 2018) <https://www.bbc.com/news/uk-northern-ireland-45391529> Accessed 5 May 2020

⁹ The 2021 census may in fact be the first one to show Catholics outnumbering Protestants in Northern Ireland. <https://www.ft.com/content/86cc29f6-05a5-11ea-9afa-d9e2401fa7ca>; Between 2015 and 2019 popular support for a United Ireland has shifted from just over one third, to just over two-thirds of voters in the Republic - <https://www.newstatesman.com/politics/staggers/2019/08/support-united-ireland-surg-ing-and-first-time-it-s-backed-moderates>

¹⁰ Mark Davenport, ‘Could EU’s attitude to Irish unity mirror approach to German reunification?’ *BBC News* (London, 11 February 2020) <https://www.bbc.com/news/world-europe-51456404> accessed 11 April 2020

¹¹ Draft Document on Framework for Government (Leinster House, 15 April 2020) 19. <https://static.rasset.ie/documents/news/2020/04/april-15-framework-document-final-version-.pdf> accessed 4 May 2020.

¹² Michael McDowell, ‘Let’s not throw shapes on the issue of Irish unity’ (*Irish Times*, 20 November 2019).

be messy and angry'.¹³ The benefits of drawbacks of any proposed models should be probed in detail, long before they are presented to the wider public for consideration.

This leaves the aspiring constitutional designer with a considerable challenge – in the event of a united Ireland, what would be the best constitutional model to follow? This paper shall focus squarely on outlining and assessing the suitability of a variety of possible constitutional models that a united Ireland could adopt. Before this, the constitutional history of the island shall be outlined, and the current constitutional status of both Northern Ireland and the Republic sketched out. The three models considered in this paper are (1) a unitary state with full absorption of Northern Ireland; (2) a unitary state with a devolved Northern Ireland Assembly and retention of the Good Friday Agreement; and (3) a federal state under a new constitution. These models shall be assessed on their ability to deal with issues in a number of discrete areas such as state structure, parliamentary makeup, and electoral systems. The suitability of each system will be considered with respect of how much each system adequately responds to meet the unique challenges that a united Ireland would present.

¹³ Ed O'Loughlin, 'The 'Messy and Angry' Prospect of Ireland Reunifying' *The Atlantic* (New York, 21 October 2019) <https://www.theatlantic.com/international/archive/2019/10/ireland-britain-brexit-reunification/600328/> Accessed 2 April 2020

Part II: A History of Northern Ireland's and the Republic's Constitutional Status

1. The Opposing forces of Nationalism and Unionism

If the goal in summarising Northern Ireland's constitutional history is to impart a basic understanding of how the polity formed and how it has functioned, the issues of culture, nationalism and creed which have plagued the island for centuries need to be considered. De Mars et al. sum up the issue that arises with invoking abstract terms alone in describing Northern Ireland:

'[it] often disguises the intense human suffering produced when, within a restricted geographical space, two communities divided by faith, ethnicity and nationalism each attempt to impose their preferred vision for society on the other'.¹⁴

The ephemeral 'Irish Question', first used by the British parliamentarians in the 19th century, has gone without a solution for so long due to its seemingly endless aspects that demand consideration.

To offer a simple dichotomy, there are two main groups which feature over the course of this conflict. The first group comprises of the people are in favour of a 32 county all-island Irish Republic. These people are known as Nationalists, due to their endorsement of a single Irish nation on the island. It should be noted that Nationalism in Northern Ireland – like Unionism – is not merely ideological, but encompasses a shared history, common ancestry, and religious unity; Nationalists for the most part identify as Irish and are predominantly Catholic. This group can then be divided further into moderates and republicans; moderates have traditionally supported – as the moniker suggests – moderate political developments, whereas many 'republicans' often take a more hard-line stance on Britain's involvement on the island of Ireland. Paramilitary violence conducted in the name of Irish unity is primarily conducted by those who identify as republican. In the political sphere, moderate nationalist interests in Northern Ireland today are represented by the Social Democratic and Labour Party (SDLP), with Sinn Féin broadly representing republican interests. Their values and aims were considered by the New Ireland Forum:

'For nationalists, a central aim has been the survival and development of an Irish identity, an objective that continues in Northern Ireland today as nationalists seek effective recognition of their Irish identity and pursue their rights and aspirations through political means. For historical reasons, Irish nationalism may have tended to define itself in terms of separation from Britain and opposition to British domination of Ireland.'¹⁵

In opposition to this group are those who identify as Unionist. Unionists identify broadly as British, are predominantly Protestant, and endorse above all else a maintenance and strengthening of the bond between Northern Ireland and the United Kingdom at large. Much like some Republicans in the Nationalist movement, many staunch supporters of the Union have been willing to use violence to both maintain the Union and combat any offences from the republican side of the conflict. Unionists who engage in violence to achieve their aims often identify with a more hard-line version of Unionism known as Loyalism. Unionist interests were historically represented in Stormont by the more moderate Ulster Unionist Party (UUP), but presently are represented by the more hard-line Democratic Unionist Party (DUP) who surpassed the UUP's popularity shortly after forming in the 1970s. The New Ireland Forum described their aims as follows:

¹⁴ Sylvia de Mars, Colin Murray, Aoife O'Donoghue and Ben Warwick, *Bordering Two Unions: Northern Ireland and Brexit* (Policy Press, 2018) 3.

¹⁵ Report on New Ireland Forum (Dublin, 1984) [4.6]

‘Unionists generally regard themselves as being British, the inheritors of a specific communal loyalty to the British Crown. The traditional nationalist opposition to British rule is thus seen by unionists as incompatible with the survival of their own sense of identity... Among unionists there are fears rooted in history and deriving from their minority position in Ireland as a whole. In more recent times the campaign of IRA violence has intensified those fears... What they seek to prevent varies to some degree but includes: an all-Irish State... the breaking of the link with Britain; and loss of their dominant position consequent upon giving effective recognition to the nationalist identity and aspiration.’¹⁶

2. Government of Ireland Act 1920: Northern Ireland and the Irish Free State

Since its formation under the Government of Ireland Act in 1920, the constitutional status of Northern Ireland has been contested in one form or another. The 1920 Act came about as a compromise between Ulster Unionists who feared becoming a minority in an Irish State, the Irish Nationalist population who had campaigned for ‘Home Rule’, and the British Government which was attempting to avoid further conflict after the conclusion of the First World War. The Act itself divided Ireland into a ‘Northern Ireland’ of the six counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and a ‘Southern Ireland’ of the remaining 26 counties. While under the Act both polities were to be united upon enactment of the statute, Northern Ireland invoked its right under the Anglo-Irish Treaty to secede from the Free State two days after the state’s creation. While both territories were to have some level of self-governance, issues such as foreign affairs, defence and matters related to the crown were reserved to the UK parliament. Most interestingly, under the 1920 Act a Council of Ireland was provided for with a view to:

‘[t]he eventual establishment of a Parliament for the whole of Ireland, and to bringing about harmonious action between the parliaments and governments of Southern Ireland and Northern Ireland, and to the promotion of mutual intercourse and uniformity in relation to matters affecting the whole of Ireland.’¹⁷

Of course, much like this Council of Ireland, the territory of ‘Southern Ireland’ never came to be. The Irish public’s acceptance of the revolutionary Dáil which claimed ownership of the entire island meant that this compromise was rejected. This refusal to recognise British authority in Ireland led to the War of Independence from 1920-1921, which was ended with the signing of the Anglo-Irish Treaty in December 1921. Under this Treaty, the partition of Ireland was recognised by the newly established 26-county Irish Free State. According to the Irish Government, the statelet of Northern Ireland was seen to be a transitory phase in the campaign for a 32-county sovereign state, an entity so unworkable that it would eventually collapse and be subsumed by the Free State.¹⁸

3. 1921-1973: From Partition to Sunningdale

Under the 1920 Act, Northern Ireland was to be ruled by a bicameral parliament, with a directly elected House of Commons of 52 seats and a 26 seat indirectly elected Senate. The crown itself was represented by a Governor who granted royal assent to Northern Ireland Acts of Parliament. Like in Westminster, executive power was vested in the Prime Minister. The 1920 Act also provided for a Single Transferable Vote (PR-STV) system for electing members of parliament across several multi-member constituencies, a system that was abolished before the 1929 general election in favour of a First-Past-The-Post (FPTP) system, to bring it in line with Westminster elections. The redrawing of constituency borders into single-member districts was

¹⁶ Report on New Ireland Forum (Dublin, 1984) [4.8-4.9.1]

¹⁷ Government of Ireland Act 1920, s2

¹⁸ Donnacha Ó Beacháin, *From Partition to Brexit: The Irish Government and Northern Ireland* (2019, Manchester University Press) 13.

not conducted by an independent commission, but on the instruction of Northern Ireland Prime Minister James Craig. Following this, the assertion was made by many Nationalists that the boundaries had been gerrymandered in order to secure a Unionist majority in the North.¹⁹

The decision for Northern Ireland's government to adhere to UK electoral norms is perhaps representative of its general attitude to state organisation over the following 50 years. With the fledgling Free State and subsequent Irish Republic struggling to find its feet economically and politically in the first half of the 20th century, there was little stopping the Unionist government imposing its will on the Nationalist population in the North. In the Republic, there was little movement towards actively resisting partition. However, in 1924 a federal solution to uniting Ireland was proposed in a memorandum on Northern Ireland policy by Irish Free State civil servant Diarmuid O'Hegarty. This federal solution involved the creation of an all-island federal government, with two regional legislatures situated in both Dublin and Belfast.²⁰ However, this proposal never got off the ground, and by the time that De Valera's Fianna Fáil came into power in the Free State in 1932, focus had shifted from resisting partition to expanding the sovereignty of the 26 counties. This lack of engagement in the affairs of Northern Ireland mirrored the UK's position. It was only in the late 1960s, with the breakout of major political violence in Northern Ireland did Westminster exercise any direct influence in the affairs of Stormont.

This period of violence known as 'The Troubles' claimed over 3,500 lives by the signing of the Good Friday Agreement in 1998. Discontent in the Nationalist community had steadily been growing as a result of systemic discrimination perpetuated by the Unionist ruling class.²¹ Movements such as the Northern Ireland Civil Rights Movement (NICRA) highlighted the level of structural oppression evident in the governance of Northern Ireland. NICRA organised peaceful protests relating to perceived gerrymandering, social housing discrimination, voting rights curtailment, and government-sanctioned paramilitary violence throughout the late 1960s and early 1970s.

After the killing of 13 peaceful marchers by British soldiers in the 'Bloody Sunday' massacre, the resultant national and global outrage caused a significant surge in violence on both sides of the divide. Following this, NICRA's momentum was effectively halted, and militant nationalism became the dominant force within the civil rights movement. The IRA split, and a group called the 'Provisional IRA' began taking up arms against both the British Government, and loyalist paramilitaries. In response to this upswing in violence, Westminster suspended the Northern Ireland parliament and invoked s 70 of the Government of Ireland Act 1920 to bring about direct rule for the first time since the foundation of the statelet.

4. 1973-1983: Sunningdale Agreement

After the imposition of direct rule came the Sunningdale Agreement of 1973. Sunningdale was the first cross-border attempt to establish a Northern Ireland Government under the principle of consociational power-sharing – the first arrangement of its kind on the island. The structure of this Agreement was a progenitor to the Good Friday Agreement 1998, sharing similar basic ideas such as power-sharing and establishing an institutional link between the Republic and Northern Ireland; First Minister Seamus Mallon famously described the Good Friday

¹⁹ R. D. Osborne, 'The Northern Ireland Parliamentary Electoral System: The 1929 Reapportionment,' (1979) 12 *Irish Geography* 42. However, others have claimed that the apparent gerrymandering was not necessarily the primary intention of the electoral reapportionment – D. G. Pringle has noted that 'although evidence of gerrymandering is to be found, it does not appear to have been the main objective'.

²⁰ Diarmuid O'Hegarty, 'Memorandum on Northern Ireland policy by Diarmuid O'Hegarty with Covering Letter' (Dublin, 15 October 1924) <https://www.difp.ie/docs/1924/Basis-of-a-federal-structure-for-Ireland/613.htm> accessed 28 March 2020

²¹ Henry Patterson, 'The British State and the Rise of the IRA, 1969-71' (2008) 23 *Irish Political Studies* 491.

Agreement as ‘Sunningdale for slow learners’ shortly after its enactment.²² However, such a declaration may have been somewhat inaccurate, or at the least an oversimplification.

The Sunningdale Agreement differed from the subsequent Good Friday Agreement in a few significant ways. In constitutional terms, Sunningdale was an Agreement that did not explicitly recognise Northern Ireland as exclusively part of the UK. Furthermore, under Sunningdale, the newly established Council of Ireland (an institution that featured politicians from the Republic) had executive powers which according to SDLP leader John Hume could be ‘the real arena where "a constitution for a new Ireland" can be planned’.²³ Across the Irish Sea, the UK’s position was that while it recognised the wishes of the majority to ‘stay British’, it opted not to include the phrase ‘the present status of Northern Ireland is that it is part of the United Kingdom’, despite the UUP insisting on its inclusion.²⁴ Combined with SDLP councillor Hugh Logue’s statement that the Council of Ireland would ‘trundle Unionists into a united Ireland’,²⁵ many Unionists were anxious that Sunningdale would be the ‘thin end of the wedge’, and would be used as a backdoor for Irish Unity without Unionist consent.²⁶

After the Northern Ireland Constitutional Act 1973 made Sunningdale official, Unionists who were staunchly opposed to the power sharing government began campaigns of striking and paramilitary violence in order to destabilise and ultimately bring down the government. These included the Ulster Workers’ Council Strike, the subsequent rioting and violence, and the lack of British police/military intervention in resolving the conflict. The most notable bout of violence was perhaps the bombings of Dublin and Monaghan on 17 May 1974. The paramilitary loyalist force, the Ulster Volunteer Force (UVF), claimed responsibility for these bombings which killed 34 people and injured over 150. Combined with the collapse of the executive and a vote of no-confidence in First Minister Brian Faulkner, the Sunningdale Agreement was dissolved and direct rule from Westminster was reinstated. This political failure brought Northern Ireland back into out-and-out conflict, and the armed campaigns of both Republicans and Loyalists continued throughout the 1970s, 1980s and 1990s. It would not be until the IRA Ceasefire in 1994 and the signing of the Good Friday Agreement in 1998 that relative peace would come to Northern Ireland.

5. 1983-1998: New Ireland Forum to Good Friday Agreement

The next major development in finding a peaceful constitutional compromise after Sunningdale came in the form of the New Ireland Forum in 1983. This Forum, devised by then-Taoiseach Garrett FitzGerald, John Hume, Michael Noonan and other prominent political and academic personalities sought to generate possible models of a United Ireland, and endorse a position of ‘constitutional nationalism’. The Forum eventually advocated for a united independent Ireland, and at the same time criticised the current structures of Northern Ireland, stating that they had failed to provide a peaceful and stable form of governance. It also explicitly criticised s 1 of the Northern Ireland Constitution Act 1973, which had become known colloquially as the

²² Gordon Gillespie, ‘The Sunningdale Agreement: Lost Opportunity or an Agreement too far?’ (1998) 13 *Irish Political Studies* 100, 100.

²³ Gordon Gillespie, ‘The Sunningdale Agreement: Lost Opportunity or an Agreement too far?’ (1998) 13 *Irish Political Studies* 100, 103.

²⁴ Thomas Hennessey, ‘“Slow Learners”? Comparing the Sunningdale Agreement and the Belfast/Good Friday Agreement’ in D McCann and C McGrattan eds., *Sunningdale, the Ulster Workers’ Council Strike and the Struggle for Democracy in Northern Ireland* (Manchester University Press, 1st ed 2017) 176.

²⁵ Martin Melaugh, ‘A Chronology of the Conflict: 1974) CAIN Web Service <https://cain.ulster.ac.uk/othelem/chron/ch74.htm> Accessed 27 February 2020.

²⁶ Lord Brookeborough, former Prime Minister of Northern Ireland, noted that ‘[The Proposal paper Sunningdale was based on] represents the clearing of the road which would lead loyalists into a united Ireland. I call for a total rejection of its proposals’. *News Letter* 28 June 1973.

‘Unionist Veto’, due to it being an effective barrier to any sort of dialogue on Northern Ireland’s constitutional status.

This first proposed option – a unitary state – had many purported benefits. In terms of political systems, the unitary state would include minimum seats for Unionists in a new Senate which would provide for veto powers, the need for weighted majorities in the Lower House on particular issues, and full integration of the North in the Irish civil service. It also brought with it an end to the duplication of social services on the island, which would remove the issues of taxational and jurisdictional conflict. This approach also endorsed a commitment to human rights in its Constitution that would guarantee civil and personal liberties in a non-discriminatory way, supposedly safeguarding the rights of the would-be Unionist minority in this new state.²⁷ This focus on human rights also included incorporation of the clauses of the European Convention on Human Rights, and right of access to the European Court of Human Rights. The uniformity and simplicity of a simple state solution is probably its most persuasive feature – with more than one state on the island, the general dispensation of government becomes much more complex.

While the most popular option was this sovereign United Ireland, the Final Report of 1984 offered two other possible solutions. The second proposal was that of a federal or confederal state. This would require the drafting of a new Constitution, which would be conducted by a joint constitutional convention between the Republic and the United Kingdom. This model would devolve most powers to the two individual states North and South, with a federal government dealing with matters such as security. This federal parliament would be somewhat weak, committed mostly to dealing with issues of ensuring application of then-EEC directives in the two states, and guide development of island-wide industries such as energy, transport and agriculture. Special provisions would ensure that Unionists could have parallel British citizenship, and maintain special links with Britain. The final suggestion, ‘Joint Authority’, recommended a system where both Irish and British Government rule Northern Ireland together. This could be exercised either by direct joint rule, or by a devolved assembly organised by both countries.

The reaction from Unionists and the UK as a whole was emphatically negative. In a now famous speech, British Prime Minister Margaret Thatcher stated, ‘A unified Ireland was one solution. That is out. A second solution was confederation of two states. That is out. A third solution was joint authority. That is out’.²⁸ Following this, active discussion with the aim to radically alter the constitutional status of Northern Ireland was placed on the political backburner, and talks turned to agreeing on some common principles upon which the future of Northern Ireland would be decided.

In 1985 Thatcher found common ground with the Irish government with the signing of the Anglo-Irish Agreement 1985. This Agreement was the first notable political development since Sunningdale which aimed to foster cooperation between the Republic, Great Britain and Northern Ireland. This Agreement was the result of a few factors; the New Ireland Forum, Margaret Thatcher’s reluctance to engage with the IRA, and a new sphere of influence from the USA in the form of the Reagan Administration and the Irish-American Lobby, led by Tip O’Neill, Edward Kennedy and Daniel Moynihan. Signed by both Thatcher and FitzGerald, the Agreement stated that there would be no change in Northern Ireland’s constitutional status without the majority of the population agreeing to it. It also offered a series of conditions necessary for devolved consociational government to be established in the North.

²⁷ Report on New Ireland Forum (Dublin, 1984) [6.1]

²⁸ John Bowman, ‘Thatcher told FitzGerald there would be no problem – then came ‘Out! Out! Out!’ *The Irish Times* (Dublin, 27 December 2014) <https://www.irishtimes.com/news/politics/thatcher-told-fitzgerald-there-would-be-no-problem-then-came-out-out-out-1.2042522> accessed 1 May 2020

This political atmosphere of acceptance and compromise continued throughout the late 1980s and 1990s, and led to the Downing Street Declaration of 1994. This Declaration, issued jointly by UK Prime Minister John Major and Irish Taoiseach Albert Reynolds, affirmed the principle of ‘change by consent’ of the population on the island of Ireland, which would come to form a main point of the Good Friday Agreement 1998.²⁹ This Declaration also provided for the inclusion of the political arms of paramilitary organisations to take part in discussions relating to the constitutional future of Northern Ireland, provided they agreed to a ceasefire. Following this, by the end of the year both the IRA and the Loyalist Military Command suspended their military campaigns, and set the stage for talks to come about that would eventually lead to the formulation of the Good Friday Agreement.

6. 1998-2020: Good Friday and Subsequent Developments

The signing of the Good Friday Agreement came about as a result of over two decades of slight political nudges toward disarmament and a bona fide engagement in the political process by both sides of the conflict. Signed on 10 April 1998, the Good Friday Agreement was the term given to two documents which formally set up consociational power-sharing government in Northern Ireland, and outlined the legal relationship between the British and Irish Governments. The Agreement itself acknowledged that the majority of the people of the Northern Ireland wished to remain a part of the United Kingdom, and that a substantial section of the people of Northern Ireland and the majority of the people on the island of Ireland, wished to bring about a united Ireland. This Agreement was supported by every major political party in Northern Ireland, save for the DUP.

The Agreement was hailed internationally as a successful compromise that brought an end to a bloody period of conflict, with US President Bill Clinton describing it as Northern Ireland’s ‘best chance for peace in a generation’.³⁰ The Agreement provided for a new power-sharing government in Stormont, cooperative bodies between the North and South, and cooperative institutions between the island of Ireland and Britain. Alongside this, provisions were made for the establishment of a Northern Ireland Human Rights Commission, a statutory Equality Commission, a commitment to minority language rights, decommissioning of arms, a commission for policing arrangements and a review of the justice system.

The Agreement required a vote in Northern Ireland and a referendum in the Republic of Ireland, passing with 71.1% of the vote in the former and 94.4% of the vote in the latter. In the Republic, Articles 2 and 3 of the Irish Constitution were amended to remove the territorial claim of the entire island of Ireland, and instead stated that it was a united Ireland could be created through peaceful means, ‘with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island’.³¹

The Agreement itself was divided into three strands:

- (1) The status and system of government of Northern Ireland within the United Kingdom;
- (2) The relationship between Northern Ireland and the Republic of Ireland, and;
- (3) The relationship between the island of Ireland and the United Kingdom.

These strands are the legal bedrock upon which Northern Ireland’s political and constitutional systems function today. The specifics of how Stormont functions have been amended intermittently – the St Andrew’s Agreement 2006, Hillsborough Agreement 2010, the Fresh Start Agreement 2015, and the New Decade, New Approach Agreement 2020 ushering in the most notable changes in response to various political issues that have cropped up. Over its first

²⁹ Art 1 s 2, Good Friday Agreement 1998.

³⁰ ‘Implementing the Good Friday Agreement’ <https://alphahistory.com/northernireland/implementing-good-friday-agreement/>

³¹ Good Friday Agreement 1998, ‘Constitutional Issues’ (ii)

20 years of operation, the Northern Ireland Assembly ('Stormont') has been operational for 12 of those years, with the most notable periods of suspension being between 2002-2007 due to Unionists withdrawing from the Northern Ireland executive, and 2017-2020 following the Renewable Heat Incentive scandal. Today, the Assembly is operational, with the next election scheduled for May 2022 at the latest.

Part III: Current Systems in Northern Ireland and the Republic

1. Northern Ireland

1.1 State Structure and Constitutional Documents

The constituent unit of Northern Ireland has existed in one form or another since the Government of Ireland Act 1920. While Northern Ireland is considered a ‘country’ in relation to its place in the United Kingdom, it is not recognised as a sovereign country by the International Organisation for Standardisation; its membership of the United Nations stems from its membership of the UK. As a country in the UK, Northern Ireland operates under its unitary constitutional monarchy. Its head of state is the Queen of the United Kingdom. Under this system, Northern Ireland is governed by a devolved legislature and executive (‘Stormont’) with competencies in local policy issues – national issues are dealt with by Westminster. It is worth noting that Northern Ireland does not have a singular supra-legal constitution, unlike the Republic’s Constitution. This is a uniquely British idea; Unionism has traditionally balked at the prospect of a codified, singular source of law. Stemming from this, Unionists may treat with suspicion any suggestion of a united Ireland which is founded upon a written constitution.

The current constitutional makeup of Northern Ireland stems from the Good Friday Agreement, the provisions of which are detailed in the UK’s Northern Ireland Acts 1998 and 2006 – its ECHR obligations informed by the Human Rights Act 1998. Despite being a mere piece of legislation, the Northern Ireland Act 1998 is effectively a ‘Northern Ireland constitution’.³² Instead of a referendum, the constitutional documents of Northern Ireland such as the Northern Ireland Act 1998 may be amended by a simple Act of Westminster. However, the alteration of such a foundational document may be seen as constitutionally dubious.

Northern Ireland features a broadly consociational governmental system. Consociationalism is a system of government that prioritises stability in divided societies through power-sharing arrangements. This is achieved by ‘a government of elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy’. According to Rudy Andeweg, this stable democracy is accomplished through the implementation of a number of mechanisms:

‘The threat to democratic stability by social segmentation is neutralized at the elite level by the use of various non-majoritarian mechanisms for conflict resolution, institutionally anchored by inclusive coalitions and proportionality in appointments’.³³

Northern Ireland’s consociational government is predicated on four major principles: executive power-sharing, autonomy or self-government, proportionality, and veto-rights.³⁴ These principles inform the nature of the Northern Ireland Assembly, judiciary, police services and other civil services.

As previously mentioned, the Good Friday Agreement is the foundational document from which Northern Ireland’s political institutions flow. The Agreement is divided into three strands – (1) Northern Ireland matters; (2) the relationship between the North and South; and (3) the relationship between Britain and Ireland. The first of these strands details how Northern Ireland is to be run on a day-to-day basis, and sketches out the main features of the Legislative Assembly and its relationship with Westminster. Strands Two and Three provide for additional inter-governmental structures which are of constitutional status pursuant to their incorporation into UK domestic law. In Strand Two, this comes in the form of a North/South Ministerial Council (NSMC). This Council is comprised of Ministers from both Northern Ireland and the

³² *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [11] ‘The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution’.

³³ Rudy Andeweg. ‘Consociational Democracy’ (2002) 3 *Annual Review of Political Science* 509, 512.

³⁴ John McGarry and Brendan O’Leary, ‘Consociational Theory, Northern Ireland’s Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland’ *Government and Opposition* (2006) 43, 44.

Republic for the purposes of ‘discussion of matters of mutual interest and concern’³⁵ The stated goal of the NSMC is to foster cooperation between Stormont and the Oireachtas, with the possibility of both governments establishing a sort of independent consultative forum to represent civic society on both sides of the border.³⁶ However, this North-South cooperative effort was only established in 2012 as a watered-down North/South Inter-Parliamentary Association (NSIPA), that operates only when Stormont is functioning. The consultative forum envisaged as a result of this cooperation has not yet been established.

Strand Three 3 of the Agreement deals with relations between Britain as a whole and the island of Ireland. This Strand provides for two institutions in particular, the British-Irish Council (BIC) and a British-Irish Governmental Conference (BIIGC). The former functions as a forum for various governments in the British Isles (including the devolved institutions of Scotland, Wales, the Isle of Man and the Channel Islands) to meet and ‘promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands’.³⁷ This Council deals with issues of mutual concern among all governments, such as ‘transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues’.³⁸ The British-Irish Governmental Conference is a successor to the 1985 Anglo-Irish Intergovernmental Council and Conference with its aim being ‘to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments’, and operates as a consultative forum between the Republic and Britain on non-devolved matters.³⁹ When Stormont is suspended, the BIIGC is empowered to discuss matters that were devolved to Stormont. The BIC meets approximately twice a year, whereas the BIIGC traditionally meets whenever the power-sharing Assembly is suspended.⁴⁰

The sheer number of interconnected institutions that both guarantee and influence the operation of Northern Ireland’s government is no bureaucratic oversight. One of the criticisms of Sunningdale’s power-sharing arrangement in 1973 was the lack of external measures that would guarantee its enforcement. As a result, the SDLP pushed strongly for the inclusion of such institutions in the 1998 Agreement. The Agreement (and subsequent Agreements) provides for many more institutions than previously mentioned, with many either currently not operational or having never been established. A full table of that is featured below:⁴¹

Body	Source	Functionality as of April 2020
Assembly	Agreement, Strand One	Functioning
Executive	Agreement, Strand One	Functioning
Civic Forum/Civic Advisory Panel	Agreement, Strand One	Forum Functioning
North/South Ministerial Council	Agreement, Strand Two	Functioning
North/South Implementation Bodies	Agreement, Strand Two	Functioning

³⁵ Good Friday Agreement, [18]

³⁶ Richard Humphreys *Beyond the Border: The Good Friday Agreement and Irish Unity After Brexit* (near footnote 15)

³⁷ Good Friday Agreement Strand 3, [1]

³⁸ Good Friday Agreement [5]

³⁹ Good Friday Agreement Strand 3, British-Irish Intergovernmental Conference [2]

⁴⁰ The BIIGC has met 21 times since its formation, most frequently between 2002-2007 and 2018-2019.

⁴¹ Adapted from Richard Humphreys, *Beyond the Border* (page with the table on it)

North/South Inter-Parliamentary Association	Agreement, Strand Two	Functioning
North/South Independent Consultative Forum	Agreement, Strand Two	Never Established
British-Irish Council	Agreement, Strand Three	Functioning
British-Irish Parliamentary Assembly	Agreement, Strand Three	Functioning
British-Irish Intergovernmental Conference	Agreement, Strand, Three	Functioning
Northern Ireland Human Rights Commission	Agreement, Rights, Safeguards and Equality of Opportunity	Functioning
Equality Commission for Northern Ireland	Agreement, Rights, Safeguards and Equality of Opportunity	Functioning
Irish Human Rights and Equality Commission	Agreement, Rights, Safeguards and Equality of Opportunity	Functioning
Joint Committee of the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission	Agreement, Rights, Safeguards and Equality of Opportunity	Functioning
Independent Commission for the Location of Victims' Remains	Bilateral Agreement, 27 April 1999	Functioning
Commission for Victims and Survivors for Northern Ireland	St Andrews Agreement, Annex B	Functioning
North/South Ministerial meetings on Criminal Justice Co-operation	Hillsborough Castle Agreement	Not Functioning
Working Group on Criminal Justice Co-operation	Hillsborough Castle Agreement	Not Stated
Commission on Flags, Identity, Culture and Tradition	Stormont House Agreement	Functioning
Oral History Archive	Stormont House Agreement	Not Established
Historical Investigations Unit	Stormont House Agreement	Not Established
Independent Commission on Information Retrieval	Stormont House Agreement	Not Established
Implementation and Reconciliation Group	Stormont House Agreement	Not Established
Joint Agency Task Force	A Fresh Start	Functioning
Independent Reporting Commission	A Fresh Start	Functioning

Party Leaders' Forum	New Decade, New Approach	Functioning
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The Agreement also provides for the process by which Northern Ireland may change its constitutional status:

'1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

- (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 while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; 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;
- (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.'

This was also detailed in the Northern Ireland Act 1998:

'Section 1. Status of Northern Ireland.

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.

Schedule 1

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. Subject to paragraph 3, 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.
3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.'

Considering the complexities of a unification vote, the few paragraphs devoted to the issue in the Agreement raises many questions as to the specifics of such a process. Firstly, there is no specific process by which the Republic must indicate its consent; Oran Doyle and David Kenny have noted that it is possible for a form of Irish unification to come about by simple legislation in the Oireachtas, without any need for constitutional amendment.⁴² While such a situation is practically unlikely (and possibly unfavourable), it is indicative of the lack of granularity in the Agreement's provisions. Furthermore, there is no requirement for Unionist consent to unity, and the definition of 'majority' is 50%+1. In the event of a slim majority vote for Irish unity – the 52/48 Brexit vote, for example – half of Northern Ireland's population would be incorporated into another country against its will. While this is how simple majoritarian systems function, it may not be conducive to a peaceful transitory period. As noted by Lord Kilclooney, 'Assuming ... a 50.1% in favour of a united Ireland, in no way would one dare have a united Ireland... Because the reality on the ground in Northern Ireland is there would be civil war.'⁴³ However, Richard Humphreys has argued that the 50% +1 mechanism is the most legitimate method with reference to the Agreement's principle of 'parity of esteem'. To assuage Unionist fears, he offers the qualification that following such a vote, a transitory period would of joint authority should follow for at least a few decades, with Britain maintaining an ongoing 'consultative and cultural role'.⁴⁴ In the absence of such a transitory period, it is reasonable to assume that a slim majority vote for unification may have the undesirable consequence of violent resistance from some parts of Northern Irish society.

Northern Ireland is also under the rule of EU law, and its citizens have access to the European Court of Human Rights ('ECtHR'). From the UK's accession to the then-EEC in 1973 up until 2020, Northern Ireland has been informed by law stemming from the Treaty of the European Union ('TEU') and the Treaty on the Functioning of the EU ('TFEU'). While negotiations between the EU and the UK are still ongoing, it is currently the case that for the foreseeable future Northern Ireland will continue to be governed by at least some EU regulations; the full extent of which is not yet clear. The status of the European Charter of Human Rights' (ECHR) incorporation into Northern Ireland's law is similarly unclear. Under the GFA, the ECHR must be a part of Northern Irish law, due to the commitment of all parties involved in that Agreement to keep human rights at the centre of the peace process.⁴⁵ It is also inserted into s 7 of the Northern Ireland Act 1998. The ECHR's incorporation into Northern

⁴² Oran Doyle and David Kenny, 'Models of Irish Unification Processes' (2020) Working Paper

https://www.academia.edu/42189568/Models_of_Irish_Unification_Processes Accessed 29 April 2020

⁴³ 'Peer: Tiny majority for united Ireland would spark civil war' *News Letter* (Belfast, 18th October 2017).

⁴⁴ Richard Humphreys, *Beyond the Border, The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018) 103.

⁴⁵ Maggie Burlington, 'The Role of Northern Ireland Legislation in the Protection of the Human Rights Act' (2017) 68(1) *Northern Ireland Legal Quarterly* 81, 82.

Ireland law allows for laws to be declared invalid under the ECHR. However, this does not immediately invalidate the law. Instead, authority is given to Westminster to decide how to remedy the problem. Successive British Governments have expressed their displeasure at the ECHR and have advocated for a 'British Bill of Rights' to replace the ECHR in the UK.⁴⁶ If this comes to pass, this new Bill of Rights may not fulfil the GFA requirements of ensuring equal rights protection in the Republic and Northern Ireland such as non-diminution, and adequate access to the ECtHR; some commentators think the current draft Bill does not meet these.⁴⁷ Considering the constitutional status of the GFA, replacing ECHR protections with a British Bill of Rights that doesn't conform to the GFA may result in a major constitutional issue.

1.2 Executive, Legislature and Local Government

Formed under the Northern Ireland Act 1998 and subsequent amendments, Stormont features a unicameral parliament with 90 members, known as Members of the Legislative Assembly ('MLAs'). The executive branch of Northern Ireland is an administrative branch of the legislature, which is known as the Northern Ireland Assembly. Under the 1998 Act, the executive is known as the Executive Committee of the Legislature. The executive itself consists of the First Minister and Deputy First Minister who have broadly similar powers (and which combined make up the Executive Office), along with a cabinet of various ministers. The number of ministries given to each party is decided by the d'Hondt system, with each party receiving a number of ministries proportional to the number of seats they won in the previous election. Most of these ministries are appointed by the individual assembly parties, except for the Minister of Justice who is elected by a cross-community vote. This d'Hondt system is credited by John McGarry and Brendan O'Leary as being significant in the de-escalation of extremist policies from the political extremes, writing that 'a fair case can be made that the d'Hondt rule contributed to the moderation of the hard-line parties after 1998 and the stability of institutions after 2007'.⁴⁸

An MLA's membership of a particular community is designated when they take their seats in Stormont – they must designate themselves as 'Nationalist', 'Unionist', or 'Other'.⁴⁹ The executive can only function if both the First Minister and Deputy First Minister positions are filled. These two positions are given to the two largest elected parties – currently the Unionist DUP and Nationalist Sinn Féin parties – which in effect gives either of them the power to collapse the government at any time. This mechanic has been used at multiple times throughout the history of Stormont, most recently by Sinn Féin in 2017 in the wake of the Renewable Heat Incentive scandal.

This power-sharing system at an executive level has had a marked effect on party policy in each bloc. At the signing of the Good Friday Agreement, some argued that the consociational institutions would encourage more extreme politics and that parties would engage in 'ethnic outbidding' between parties of the same tradition.⁵⁰ The argument goes as follows: a hard-line party (such as Sinn Féin) would take a stronger line on ethnic issues than its moderate counterpart (such as the SDLP), which in turn would emphasise the ethno-national dimension of Northern Irish politics. In effect, it would create a 'race to the bottom' through polarisation

⁴⁶ Alexander Horne, 'A British Bill of Rights?' *House of Commons Library* (London, 18 May 2016) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7193> Accessed 2 February 2020.

⁴⁷ Maria Helen Murphy, 'Repealing the Human Rights Act: Implications for the Belfast Agreement' (2015) 26 *King's Law Journal* 3, 340.

⁴⁸ John McGarry and Brendan O'Leary 'Power-Sharing Executives: Consociational and Centripetal Formulae and the Case of Northern Ireland' (2016) 15(5) *Ethnopolitics* 497, 509.

⁴⁹ Standing Orders 2016, s 3.

⁵⁰ Rupert Taylor 'Northern Ireland: Consociation or Social Transformation?' In John McGarry (ed.), *Northern Ireland and the Divided World*. (Oxford University Press, 2001) 37.

with respect to political relations on both sides of the political divide. However, according to James Tilley, John Garry and Neil Matthews there has been a reduction in ethno-national policy differences between parties, and that at least among Protestants it has become less important in predicting voting choice.⁵¹

Most legislation that is passed in the Legislative Assembly comes in the form of bills proposed by Ministers. Between 2011 and 2016, 60 of the 67 bills passed were passed by Ministers.⁵² This is somewhat similar to the Republic's tradition, where most legislation is passed by Government Ministers as opposed to opposition members of parliament. Northern Ireland features a novel system of legislative vetoing particular to its parliamentary structure, known as a Petition of Concern. This Petition of Concern can be triggered by 30 MLAs on any particular legislative issue, which then requires 60% support of the Assembly, and cross-community support of the majority of each tradition.⁵³ The rationale behind this is to ensure broad support for issues that may be particularly contentious, such as abortion, same-sex marriage, or language rights. However, the precondition of such a level of Assembly support means that minority parties such as the Alliance Party are unable to successfully file a Petition of Concern without the backing of one of the major parties. According to Rick Wilford, this creates a two-tier system of party power:

'In effect, there are two orders of Assembly members: in relation to key decisions there are those whose votes always 'count' and those whose votes never do so. Not only is this patently undemocratic, in the particular case of the Alliance Party it is also richly ironic. Since its inception, it has been bi-confessional and committed to the promotion of positive cross-community relations and yet it is a casualty of this anomalous and wholly unnecessary procedure which could easily be surrendered in favour of weighted majority voting on key issues'.⁵⁴

Such an approach is considered by Donald Horowitz to be one of the few instances in which the Good Friday Agreement veers away from consociationalism; with broad support and 'parallel consent', politicians are incentivised to conform to either the 'Nationalist' or 'Unionist' bloc in order to take advantage of this veto power.⁵⁵ Since 1998, 159 petitions of concern have been tabled in an attempt to block proposed legislation.⁵⁶

While Northern Ireland is a devolved governmental system with special powers, the UK still retains ultimate authority over all legislative issues. It is accepted practice of Westminster to respect the use of a Legislative Consent Motion,⁵⁷ but this is not legally binding. In the words of the UK Parliament:

'The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the

⁵¹ James Tilley, John Garry and Neil Matthews 'The Evolution of Party Policy and Cleavage Voting under Power-Sharing in Northern Ireland' (2019) *Government and Opposition* 1, 1.

⁵² http://education.niassembly.gov.uk/post_16/the_work_of_the_assembly/making_legislation/legislative_record

⁵³ S 42, Northern Ireland Act 1998.

⁵⁴ Rick Wilford, 'Northern Ireland: The Politics of Constraint', (2010) 63 *Parliamentary Affairs* 134, 139.

⁵⁵ Donald Horowitz 'Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus' (2002) 32(2) *British Journal of Political Science* 193, 195

⁵⁶ Lisa O'Carroll, 'What are the concerns over Stormont's role in proposed Brexit deal?' *The Guardian* (London, 3 October 2019) <https://www.theguardian.com/politics/2019/oct/03/what-are-the-concerns-over-stormonts-role-in-proposed-brexit-deal> accessed 2 April 2020.

⁵⁷ This norm is predicated on Westminster attaining consent of the devolved government before stepping in.

UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.⁵⁸

Local Government in Northern Ireland is exercised through 11 councils as per the Local Government (Northern Ireland) Act 2014,⁵⁹ which are empowered to deal with community issues such as community planning, local economic development, waste disposal and maintaining the general well-being of the community.⁶⁰ There are 462 councillors spread out across the 11 councils, with each council having a chairperson or mayor who plays a ceremonial role in civic events. Much like in the Republic, these local councils have very little in the way of significant power, and have been described as ‘the “poor relation” of central government or non-departmental public bodies’.⁶¹ However, the recent reforms have introduced the power of ‘community planning’, which enables local councils to hold government bodies to account for the implementation of services and facilities in their areas.

1.3 Electoral System

Before the signing of GFA in 1998, FPTP was the default electoral system for Stormont elections. Under the GFA, Northern Ireland adopted a PR-STV system for the first time since 1929. PR-STV has the effect of incentivising the electorate towards a candidate-based preferential system, as opposed to a party-based one. This PR-STV system also brings Northern Ireland in line with the Republic, which has used a PR-STV system since the enactment of the Free State Constitution in 1922. The implementation of PR-STV instead of a list-system is considered by Horowitz to be another divergence from the Agreement’s typically consociational grounding. The rationale for this is quite clear:

‘Consociationalists generally prefer list-system proportional representation, in order to attain thoroughly proportional legislative delegations of parties representing the various groups, so that power and position can be allocated proportionately. As consociational arrangements are premised on ‘a cartel of elites’, list-system PR is preferred also because it is thought to give central party leaders considerable latitude to enter into intergroup compromises.’⁶²

However, It is worth noting that PR-STV has been implemented in both traditionally centripetal and consociational systems – the Republic and Sri Lanka being two moderately centripetal systems – so it is not by itself indicative of one type of system to the exclusion of the other. In Northern Ireland, inter-ethnic vote pooling has seemed to increase under PR-STV. In the first 10 years after the implementation of the Good Friday Agreement, Paul Mitchell has noted that ‘terminal transfers from the moderate Unionist UUP to the moderate nationalist SDLP averaged 32 per cent (and 13 per cent in the opposite direction)’.⁶³ Following this, there may be some centripetal incentives at work. Viewed in this light, PR-STV makes sense as a natural compromise between consociational and centripetal extremes – while Horowitz may claim PR-STV as a moderately-centripetal voting system, it does not necessarily prevent the functioning of Stormont’s consociational power-sharing executive. However, it is difficult to determine if PR-STV is aiding Northern Ireland’s relative political stability. Boggards frames it as such:

⁵⁸ Memorandum of Understanding and Supplementary Agreements (London, October 2013) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf Accessed 3 March 2020

⁵⁹ Reduced from 26 in 2015

⁶⁰ <https://www.nidirect.gov.uk/articles/local-councils>

⁶¹ Colin Knox and Paul Carmichael, ‘Local government reform: Community planning and the quality of life in Northern Ireland’ (2015) 63(2) *Administration* 31, 31.

⁶² Donald Horowitz ‘Explaining the Northern Ireland Agreement: The Sources of an Unlikely Constitutional Consensus’ (2002) 32(2) *British Journal of Political Science* 193, 195.

⁶³ Paul Mitchell, ‘The Single Transferable Vote and Ethnic Conflict: The Evidence from Northern Ireland, 1982-2007’ (2013) 33 *Electoral Studies*

‘We thus cannot tell where political moderation comes from, whether it is due to a centripetal electoral system and/or a consociational grand coalition. Nor can we rule out the possibility that the rules on government formation have contributed to the moderation of the radical parties at the expense of voting for the moderate alternatives within each bloc, as well as cross- or non-ethnic parties’.⁶⁴

The Northern Ireland Assembly consists of 90 MLAs (‘Members of the Legislative Assembly’), which are elected from 18 five-member constituencies with PR-STV. These elections take place every 5 years. Northern Ireland elections to Westminster are conducted by a FPTP system and take place every 5 years, in accordance with the rest of the UK.

2. Republic of Ireland

2.1 State Structure and Foundational Documents

The Republic of Ireland is a 26-county unitary state, and is governed as a parliamentary republic. Its head of state is the President, a near-ceremonial position provided for in Article 25 of the Irish Constitution. Since 1937, the foundational law of the Republic has been its written Constitution, *Bunreacht na hÉireann*. A direct successor to the 1922 Free State Constitution, the Irish Constitution is a document which represents broadly liberal democratic ideas such as popular sovereignty, fundamental personal rights, and separation of powers.

The Irish Constitution at present contains many provisions which may be considered objectionable to Unionists. Firstly, the Preamble puts the Irish people directly at odds with Britain, recognising the ‘heroic and unremitting struggle to regain the rightful independence of our Nation’ against Britain’.⁶⁵ The Constitution also states Irish as the first language of the country, with English being the second language. This rears its head more explicitly in the name of the heads of state and organs of government, such as the Taoiseach (Prime Minister), Tánaiste (Deputy Prime Minister), Oireachtas (combined Houses of Parliament), Dáil (Lower House) and Seanad (Upper House). The Irish Constitution also recognised the ‘special status’ of the Roman Catholic Church up until its removal in a 1973 amendment.⁶⁶

The Irish Constitution enshrines the principles of power-sharing, devolution and self-determination as per the Good Friday Agreement in Articles 2 and 3. These Articles originally made a territorial claim to the entire island of Ireland.⁶⁷ Today, the articles read as follows:

Art 2:

‘It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage’.

Art 3:

‘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

⁶⁴ Matthijs Bogaards, ‘Consociationalism and Centripetalism: Friends or Foes?’ (2019) *Swiss Political Science Review* 1, 9.

⁶⁵ Irish Constitution, Preamble.

⁶⁶ ‘Referendum Results 1937–2015’ (2016) Department of Housing, Planning and Local Government, 31.

⁶⁷ However, these were judged by the Supreme Court to be ‘aspirational’, see *Boland v An Taoiseach* [1974] IR 338.

application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2 Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island’.

Constitutional change is brought about by a referendum process as outlined in Article 46. Any part of the Constitution may be changed as long as the amendment is passed in both the Dáil and the Seanad, it is supported by a majority (50% + 1) public vote, and is then signed into law by the president. Since the enactment of the 1937 Constitution, there have been 32 successful amendments to the Constitution, and 11 attempts which failed at the public referendum stage. This ranks Ireland’s Constitution as one much more open to modification than other similar democracies, such as the more entrenched United States Constitution. Of course, it is still comparatively difficult to amend in comparison to the UK’s non-codified constitution, which can be amended through a simple act of Westminster.

The Republic of Ireland is also a member of the European Union. Much like Northern Ireland up until relatively recently, Ireland is bound by directives stemming from both the TEU and TFEU since its accession to the Union in 1973. Ireland’s responsibility to implement EU law is enshrined in Article 29, which states that EU law takes precedence over the Constitution in the case of a conflict, but only to the extent that the EU law is necessitated by Ireland’s membership. Furthermore, the Supreme Court ruled in *Crotty v An Taoiseach*⁶⁸ that any substantive change to an EU treaty must first be put to the public by a referendum.

Like Northern Ireland, the Republic is also informed by the ECHR. Incorporated into law under the ECHR Act 2003, the provisions of the ECHR are implemented in Ireland by the creation of similar domestic laws that mirror ECHR rights: Ireland operates on a dualist system where international treaties must be translated into domestic law for them to have any effect.⁶⁹ In practice, the ECHR has been somewhat ineffective in relation to providing adequate remedies for ECHR violations, most notably due to its being overlooked where there is a remedy available under constitutional invalidity. According to Gerard Hogan, this may be due to the fact that even in the case of a law being held incompatible with the ECHR, this law still remains in effect until the Oireachtas changes it.⁷⁰ This mirrors the position in Northern Ireland, with the direct incorporation of ECHR into domestic law having a less than marked impact on litigation.

2.2 Executive, Legislature and Local Government

The Republic of Ireland features a bicameral parliament – a lower house known as the Dáil and an upper house known as the Seanad – known collectively as the Oireachtas. The Dáil features 158 fillable seats, is formed under Article 15 of the Constitution, and is the home of the legislature. Its members are known as Teachtaí Dála (‘TDs’).

The executive branch is made up of elected TDs who hold senior ministries in government, with the Taoiseach as head of both the legislature and executive.⁷¹ This executive branch holds much more power than typical Westminster-style parliaments, with virtually all bills being devised by one of the ministerial departments. The majority of these bills are intended to serve some goal of the Programme for Government, which is a prepared at the foundation of a new Dáil and outlines the intended goals of the incoming government.

⁶⁸ [1987] IR 713

⁶⁹ Irish Constitution, Article 29.6; EU law is excepted.

⁷⁰ Gerard Hogan, 'Ireland - The European Convention of Human Rights Act 2003, The' (2006) 12 *European Public Law* 331, 339.

⁷¹ Irish Constitution, Article 28.

Combined with the fact that the party-whip system is a major force in Irish politics, very little happens in the Dáil without governmental consent. While Dáil members who are in opposition can propose bills (known as Private Members Bills), these are often unable to gain majority support in the Dáil or more recently have been suspended indefinitely by the Government's (controversial) use of a little-known Constitutional provision.⁷²

The two institutions of lower precedence in the Irish political order include the Presidential branch of the executive, and the legislative Upper House of the Seanad. The President wields little power in the Irish constitutional order, its role being near ceremonial. That being said, the President has some power such as the ability to dissolve the Dáil, the ability to refer Bills to the Supreme Court for scrutiny on their constitutionality, and the ability to refer Bills to the public for scrutiny if sanctioned by over half the members of the Seanad and over a third of the Dáil. The Seanad is the Upper House of the Oireachtas, and features 60 seats. It is formed under Article 18 of the Constitution, and plays a somewhat advisory role in the Irish parliamentary system. The ineffectiveness of the Seanad in relation to other Upper Houses has been a source of contention for the past few years, resulting in a referendum in 2013 to abolish the Seanad in its entirety. While this proposal narrowly defeated by a 51.7% 'No' to 48.3% 'Yes' result, the institution is still often criticised with even the Government commissioning a report in 2015 proposing changes to the Seanad - While the recommendations in this report are yet to be implemented, the future of the Seanad in its current form is still moderately uncertain.

Local government in Ireland is exercised by 31 local authorities, known as either City or County Councils. These local bodies are tasked with a variety of administrative and democratic functions such as planning, libraries, sanitation and public safety services such as the local fire brigade. Under reforms ushered in by the Local Government Reform Act 2014, the power of local councils has been reduced significantly.⁷³ What is also notable is the vesting of power in every council in a central chief executive appointed by the Minister for Local Government. This chief executive single-handedly carries out most of the statutory functions of these local authorities, making the role of local councillors even more ineffectual. This is in stark contrast to the position in Northern Ireland, where the head of the local council fulfils a merely ceremonial role.

2.3 Electoral Systems

For most Irish elections, the PR-STV system proportional representation is used. Voting for the Dáil, Seanad, and Local Councils take place every 5 years,⁷⁴ with the Seanad elections held within 90 days of the dissolution of the Dáil. The Presidential election is held every 7 years.⁷⁵ The constituencies for Dáil elections comprise of 3-5 seats, with each TD representing at least 20'000 and no more than 30'00 citizens. The PR-STV voting system has resulted in the Dáil being represented by a multitude of multi-party coalitions, as opposed to rule under a single majority party. Such an outcome is common under a traditional List PR system, but it is even more likely under a PR-STV system. Out of the 31 governments formed since the enactment of the 1937 Constitution, only 6 of them have been led by a majority government.⁷⁶

Over the last 100 years, there have been multiple attempts to change this system. In 1958, Taoiseach Éamonn De Valera proposed to replace the PR-STV system with a FPTP

⁷² Eoin Daly and David Kenny, 'Government blocking of legislation is constitutionally dubious' *The Irish Times* (Dublin, 14 June 2019)

⁷³ The number of councils was reduced from 114 to 31, counties were divided into Municipal Districts and Local Electoral Areas, and councillors were no longer able to overturn planning permission decisions

⁷⁴ Local Council elections are held at a different time to Dáil and Seanad Elections.

⁷⁵ 'A Proposal for a New Seanad Éireann – An Seanad Nua' (2015)

<https://assets.gov.ie/8448/99fd6c678b604203b69959dde248bdc1.pdf> Accessed 19 February 2020

⁷⁶ For comparison, there have been 12 minority governments and 13 coalitions.

system, but was narrowly rejected by the people in a referendum.⁷⁷ If this had passed, the Republic would have come into line with Northern Ireland and the UK as a whole. A similar referendum was again rejected in 1968 by a wider margin,⁷⁸ and since then there have been few attempts to change the system. In fact, the electorate have recently expressed their relative satisfaction with the PR-STV system.⁷⁹

⁷⁷ The Third Amendment of the Constitution Bill 1958 was rejected by a 52% No to 48% Yes margin. What is notable is the division of preference between urban and rural districts; Dublin constituencies returned a 61.5% No vote, whereas rural constituencies such as Donegal East and Galway West returned No votes of 36.6% and 38.3% respectively; see *Report on Referendum Results 1937-2015* (Department of Housing, Planning and Local Government) <https://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Voting/referendum_results_1937-2015.pdf> Accessed 15 February 2020.

⁷⁸ Fourth Amendment of the Constitution of Ireland Bill 1968.

⁷⁹ See 'Chapter 25: Ireland: The Discreet Charm of PR-STV' in Michael Gallagher and Paul Mitchell, *The Politics of Electoral Systems* (Oxford University Press, 2008) 511.

Part IV: Possible Models of a United Ireland

1. Unitary State: Full Absorption

The first, and perhaps most obvious model is that of a simple absorption of Northern Ireland into the Republic. This would result in a 32-county unitary republic. Northern Ireland's institutions would all be dissolved, and there would be an effective 'Dublin Rule' in the North. The key aspects of this model would include:

- Dissolving the Good Friday Agreement and terminating Northern Ireland's existence as a six-county administrative unit;
- Dissolving Stormont and removing all power-sharing structures;
- Dissolving all cross-border and British Isles-wide institutions – the NSIPA, BIC, BIIGC etc;
- Redrawing constituency lines in line with Irish constitutional norms; and
- Not extending any special protection to the now-minority Unionist population.

This model serves to effectively 'extend' the 26-county Republic as it currently functions across the entire island without any significant changes to its governmental systems. This model differs from most other models due to it (a) making the Republic's Oireachtas the sole parliament on the island, (b) maintaining the 1937 Irish Constitution for the most part, (c) offering no special status (in identity or political representation) to Unionists, and (d) necessitating the dissolution of the Good Friday Agreement due to its removal of Northern Ireland's power-sharing structures. The most striking aspect of this model is the removal of Northern Ireland as its own six-county administrative unit – a cornerstone of the Good Friday Agreement. This model is an extremely 'Republic-centred' approach, with no regard being paid to Northern Ireland as an entity existing up until this point, or for the different identities held by its citizens. Such an approach is necessarily more centripetalist than what has been taken in the Good Friday Agreement. According to Reilly:

'In direct opposition to consociational recommendations, centripetalists maintain that the best way to manage democracy in divided societies is not to replicate existing ethnic divisions in the legislature and other representative organs, but rather to depoliticise ethnicity by putting in place institutional incentives for cross-ethnic voting to encourage a degree of accommodation between rival groups'.⁸⁰

Such an approach is similar to the 'One-State' solution advocated for by some in the Israel-Palestine conflict:

'The proponents of a one-state solution firmly believe that a single unified state with full equal rights of citizenship regardless of race, ethnicity or religion, based on freedom is the most plausible with less xenophobic nationalism on both sides'.⁸¹

This model may serve as a sort of 'baseline' against which to compare the later models, due to it changing the Irish Constitution the least, and not necessitating the writing of a new Constitution. It also follows that such a system is necessarily more centripetal than most:

1.1 State Structure and Foundational Documents

Under this model, the 1937 Irish Constitution would be the highest source of law, extending its jurisdiction over the entire island. While this approach may not necessitate any constitutional change, there will almost certainly be the need for a series of legislative efforts in order to ameliorate the multitude of legal issues that would crop up. The laws that originally applied in

⁸⁰ Benjamin Reilly 'Institutional Designs for Diverse Democracies: Consociationalism, Centripetalism and Communalism Compared' (2012) 11(2) *European Political Science* 259, 263.

⁸¹ Manuel Hassassian 'A Paradigm Shift from Two-State to One-State Solution' (2019) 24 *Palestine-Israel Journal* 120, 123.

Northern Ireland prior to unity may retain their legal effect, provided they are not repugnant to the Irish Constitution.⁸² According to Oran Doyle and David Kenny, such a model would not necessarily require a constitutional referendum in the Republic, even if constitutional amendment would be preferable.⁸³ Doyle and Kenny also note that if the Constitution is not amended, there would still remain a number of provisions which may be considered objectionable to Unionists:

- Irish people defined with reference to those whom they struggled against (Preamble).
- Implicitly Catholic or Catholic-influenced provisions in the Constitution (Preamble, Articles 41-45).
- Irish as national language and first official language (A8).
- Irish language titles for Taoiseach (Article 13), Tánaiste (Article 28), Oireachtas, Dáil and Seanad (Article 15).
- National flag as tricolour of green, white and orange (Article 7).
- Give status (beyond that associated with being Head of the British Commonwealth, if the Commonwealth were joined) to British Monarch in the Constitution (Article 29).
- Granting full political rights (vote in referendums and presidential elections, in addition to parliamentary, European, and local elections) to non-citizens (re Article 26 and the Electoral (Amendment) Bill 1983 [1984] IR 268)⁸⁴

Such an approach would do more than just dissolve Stormont. While one may consider the success of Stormont being predicated solely on cooperation between the parties that inhabit it, such an analysis fails to appreciate the effect of external forces that often operate in consociational arrangements. Arend Lijphart – doyen of consociational theory – considers eight of his nine factors conducive to consociational agreements to be endogenous. However, John McGarry and Brendan O’Leary have argued that the case of Northern Ireland, is more complex than that; the USA, the EU, and cross-border institutions lent the Good Friday Agreement’s consociational settlements a level of legitimacy that was unlikely to have been achieved with no external power present.⁸⁵ Following the Agreement’s signing, it has been these cross-border institutions such as the NSIPA and the BIIGC that have apparently assured the Agreement’s success. McGarry and O’Leary have stated their importance to both Nationalist and Unionist groups:

‘Had the Agreement included only traditional consociational institutions, not even moderate nationalists would have signed it. The Social Democratic and Labour Party (the SDLP) signed only because the Agreement provided for a number of political institutions that joined both parts of Ireland, and maintained an oversight role for the Republic’s government. The most important all-island institution is a North–South Ministerial Council (NSMC), a body nominated by the Irish Republic’s government and the new Northern Ireland premiers... It also established the British–Irish Inter-Governmental Conference (B–IGC), the successor to the inter-governmental conference established under the Anglo-Irish Agreement. This arrangement guarantees

⁸² Raymond Byrne, Paul McCutcheon, Claire Bruton and Gerard Coffey *Byrne and McCutcheon on the Irish Legal System* (Bloomsbury Professional, 6th edn 2014) 57.

⁸³ Oran Doyle and David Kenny, ‘Models of Irish Unification Processes’ (2020), 7 (Working Paper) https://www.academia.edu/42189568/Models_of_Irish_Unification_Processes Accessed 29 April 2020

⁸⁴ Oran Doyle and David Kenny, ‘Models of Irish Unification Processes’ (2020) 13-14 (Working Paper) https://www.academia.edu/42189568/Models_of_Irish_Unification_Processes Accessed 29 April 2020

⁸⁵ John McGarry and Brendan O’Leary, ‘Consociational Theory, Northern Ireland’s Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland’ (2006) *Government and Opposition* 43

Ireland's government access to policy formulation on all matters not – or not yet – devolved to the Northern Ireland Assembly or the NSMC.⁸⁶

Besides dissolving Stormont, the decommissioning of these institutions is likely to have the greatest negative effect on Northern Ireland. While the role played by North-South and East-West institutions might necessarily be lessened by any form of Irish unity, dissolving the links in their totality may be extremely problematic. Consider the possible Unionist response: if there is no formal institutional agreement tying them to the United Kingdom, there would be necessarily less recognition of their cultural identity. A group of people who identify as British may be gravely concerned about not having any institution that recognises their Britishness. It would also seem to contradict a now decades-long tradition of mutual recognition between Nationalists and Unionists recognising each other's identities, recognised in the Good Friday Agreement.⁸⁷

1.2 Executive, Legislature and Local Government

Extending the Republic's governmental systems to the entirety of the island is a relatively straightforward task. The parliamentary system as outlined in Article 15 would remain, with the Taoiseach leading a cabinet of Ministers, who are then accountable to the Dáil.

Imposing the current parliamentary system on the six counties of Northern Ireland would bring with it a cruel irony; a Nationalist majority imposing its will on a Unionist minority is a reversal of the state of affairs in Northern Ireland prior to the signing of the Good Friday Agreement. The Republic's Oireachtas makes no attempt to accommodate power-sharing – its executive is comprised entirely of Ministers from the ruling party.⁸⁸ Without any power-sharing measures such as the allocation of ministerial portfolios through Northern Ireland's d'Hondt system, it may be difficult for Unionist parties to claim any of the important ministries without forming a coalition with a party from the Republic. With the extension of Ireland's current multi-member districting system into Northern Ireland,⁸⁹ there would be an additional 94 contestable seats in the Oireachtas. Taking the stats of Northern Ireland's last assembly election: the DUP won 29.2% of the seats; the UUP won 12.6%. Translating this to the new Dáil would result in the DUP winning 28 seats, and the UUP 11. Placing this in the context of the 2020 election, this would make the DUP the 4th largest party behind Fianna Fáil, Sinn Féin and Fine Gael, and the UUP would become the 6th largest party behind the Green Party.⁹⁰ It is difficult to determine how the nationalist vote would be split; many parties from the Republic (Fine Gael, Fianna Fáil etc) may stand to gain some seats in the new Northern constituencies.

One of the most important aspects of this system is a lack of veto mechanism for opposition parties, either in the executive or the legislature. While Stormont features the Petition of Concern and necessitates cooperation between both First and Deputy First Minister, no such procedures are in place in the current Dáil. As noted earlier, the vast majority of legislation is pushed through the Dáil by the Government. Considering that it is unlikely for a

⁸⁶ John McGarry and Brendan O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland' (2006) *Government and Opposition* 43, 56.

⁸⁷ John McGarry and Brendan O'Leary, 'Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland' (2006) *Government and Opposition* 43, 58, 'Unionists who made the Agreement recognized nationalists as nationalists, not simply as Catholics. Nationalists recognized unionists as unionists, and not just as Protestants.'

⁸⁸ Or parties, if there is a coalition government.

⁸⁹ As it stands, one TD is representing approx. 30,000 of the population. The number of new seats in the Dáil was calculated by dividing Northern Ireland's current population (approx. 1.882 million as of 2018) by 30,000.

⁹⁰ Of course, if the national elections in Northern Ireland were to shift to a Dáil election, it may be the case that the more hard-line DUP would gain more of the Unionist vote, due the DUP's stronger line on ethno-nationalist issues compared to the more moderate Unionist parties.

Unionist party to feature in government in a significant capacity,⁹¹ there is very little an opposition Unionist party could do to prevent the passing of legislation that they take serious issue with. While the point could be made that there is nothing stopping a Unionist party from putting forward a Private Member's Bill, such an approach has been stopped in its tracks by the Government by invoking the 'money message' provision, effectively killing the bill.

Unionists are unlikely to have much luck in the Seanad, either. Firstly, 11 of the 60 members of the Seanad are directly nominated by the Taoiseach; as previously mentioned, the election of a Unionist Taoiseach is extremely unlikely to occur. A further 6 seats are then nominated by universities in the Republic. The rest of the seats are filled by nominations to vocational panels, which are voted on by members of the incoming Dáil, members of the outgoing Seanad, and members of the city and county councils. Under this nomination system, it is unlikely that Unionists would be able to assemble in large numbers in the Seanad. Even if they did, they would still run into the problem of the Seanad's lack of power. The Seanad can't block bills, only postpone them. With the presidency similarly unlikely to go to a Unionist,⁹² it would appear that Unionist parties would have very little power under this parliamentary system.

Unionists are more likely to win seats in local government elections in the North West of the country, that being their population centre. However, the local government system in the Republic affords extremely little power to these municipal councils. As a result, winning in these county council elections will likely be of little consequence to any Unionist party attempting to achieve representation at a significant level.

1.3 Electoral System

Imposition of the Republic's PR-STV system onto Northern Ireland would make practical sense; the North has been using PR-STV since the Good Friday Agreement's implementation in 1998. Retaining the PR-STV system also does not preclude a centripetalist approach to constitutional organisation. According to Horowitz, the Alternative Vote (AV) system is most preferable for centripetal constitutions due to its strong incentives for vote pooling and cross cutting cleavages. PR-STV is the system most similar to AV due to its incentivising vote pooling in multi-member districts through its rank ordering system. That being said, the low threshold required for winning a seat makes it a lower incentive than AV.⁹³

Under this model, the aim would be to hedge all of one's bets in a centripetalist worldview and hope that the PR-STV system would incentivise Nationalists and Unionists to adopt policies that would cross-cut cleavages. At the very least, one would hope it would not cause unnecessary aggravation in the same way that a closed-list PR system may; under a closed-list system, there is less incentive for parties to scale back extreme rhetoric. In the Republic, PR-STV has effectively moderated extreme policymaking almost to the point of preventing any major policy-based conflict to take place. One of the reasons for this is the preponderance of independent TDs in the Dáil – The Dáil is home to a higher number of independent TDs than all other western democracies put together.⁹⁴ According to Liam Weeks, this is in part due to the PR-STV system:

'The single transferable vote (STV) also worked in a manner to support Independents, but only in conjunction with a number of other factors ... including an established

⁹¹ While there may be some instances of a coalition, it is accepted there may be at least some governments formed with no Unionist involvement.

⁹² The Alternative Vote system effectively precludes a Unionist president from achieving the necessary number of votes.

⁹³ Matthijs Boggards 'Consociationalism and Centripetalism: Friends or Foes?' (2019) 1 *Swiss Political Science Review* 1, 2.

⁹⁴ Diarmaid Ferriter, 'Diarmaid Ferriter: Why has Ireland so many Independents?' *Irish Times* (12 August 2017) <https://www.irishtimes.com/culture/books/diarmaid-ferriter-why-has-ireland-so-many-independents-1.3172499> Accessed 15 April 2020

tradition of votes for Independents, small constituencies in terms of geography and voters, a local and personalised political culture, favourable electoral rules, as well as chance of influence in government'.⁹⁵

However, while this may be the case in the Republic, the experience of Northern Ireland has been much different. Under PR-STV, the more hard-line DUP and Sinn Féin parties have gained support year-on-year in Northern Ireland. As a result, there seems to be a contradiction in the outcomes under PR-STV; the North has seen an increase in support for the more extreme parties, whereas the Republic's political system is effectively stale and devoid of major ideological or ethnic policy disputes. The simple answer to this is two-fold: the Republic is a relatively homogenous society, and it features a centripetal parliamentary system. The first part to this answer is self-explanatory; the second part is worth considering further.

It may in fact be the contradiction between Northern Ireland's moderate-centripetal electoral system and its consociational parliament that has resulted in greater support for the more extreme parties, and may negatively impact the success of government as a whole. The experiences of Fiji and Cyprus in this case are instructive. The Fijian 1997 Constitution featured a centripetal AV electoral system, but a consociational proportionally representative parliament and a power-sharing executive. This, in Horowitz's view, undercut the incentives for parties to campaign on more moderate policies and crosscut cleavages; the parties were already guaranteed a spot in government under the power-sharing provisions.⁹⁶ John McGarry and Neophytos Lozides identified a similar issue in Cyprus – the 2008 negotiations between Greek and Turkish Cypriot leaders proposed a power-sharing presidential system which would be elected on a centripetal weighted cross-voting system. However, 'moderates were able to agree on a centripetal proposal in negotiations but lacked the necessary dominance to steer it through the adoption process in the face of outbidding by hardliners'.⁹⁷

On the face of it, it would appear that governmental systems which feature contradictory electoral and parliamentary systems may impede the effectiveness of both institutions. As a result, the Republic's centripetal electoral and parliamentary system may actually be a positive factor in encouraging stability. Following this, the argument could be made that if the new united Ireland was to retain its centripetal parliamentary structure, it should also retain its PR-STV electoral system in order to maintain centripetal consistency.

⁹⁵ Diarmaid Ferriter, 'Diarmaid Ferriter: Why has Ireland so many Independents?' *Irish Times* (12 August 2017) <https://www.irishtimes.com/culture/books/diarmaid-ferriter-why-has-ireland-so-many-independents-1.3172499> Accessed 15 April 2020

⁹⁶ Horowitz, D. (2002b). Domesticating Foreign Ideas in the Adoption of New Institutions: Evidence from Fiji and Indonesia. In Montgomery, J. and N. Glazer (eds.), *Sovereignty under Challenge: How Governments Respond*. New Brunswick: Transaction Publishers (197–220).

⁹⁷ John McGarry and Neophytos Lozides, 'Power-sharing in a re-united Cyprus: Centripetal coalitions vs. proportional sequential coalitions' (2016) 13(4) *ICON* 847, 862.

2. Unitary State: Good Friday Retention

The existence of a 32-county unitary state does not preclude the implementation of most of the Good Friday Agreement. In fact, the Good Friday Agreement was arguably written in such a way as to presume its existence post-unity. Without any external forces acting upon it, a united Ireland with retention of the Good Friday Agreement is the most likely form that unity would take. The key aspects of this model include:

- Maintaining the status of Northern Ireland as a devolved six-county administrative unit
- Subsistence of a devolved Northern Ireland Assembly to an all-island Dáil
- Preserving the current Stormont legislature and executive
- Ensuring the execution of executive functions in Northern Ireland through cross-party consent
- Preserving the rights of Unionists as a minority as outlined in the Agreement, including guaranteeing British citizenship

In Northern Ireland, the SDLP have come out in support of such a model, stating:

‘Our vision of a United Ireland respects the same commitments that lie at the heart of the Good Friday Agreement. In the United Ireland to which we are committed, all the Agreement’s principles and protections would endure.’⁹⁸

This model represents the model of least change in comparison to the current functionality of Northern Ireland. Life on the ground in Northern Ireland would see very little change; under the Good Friday Agreement, many aspects of British identity such as citizenship, language rights and identity considerations are protected – this would not change under this model. This model represents a balance between the centripetal nature of the first 32-county single parliament of the previous structure (Model 1), and the consociational power-sharing regime of the final structure (Model 3). This is achieved through maintaining the executive power-sharing regime in Stormont for the benefit of the Unionist population, while still retaining an all-island parliament which features no such provisions. The PR-STV system would still remain, which is arguably a moderate-centripetal system, but can be used in both a centripetal or consociational regime.

2.1 State Structure and Foundational Documents

Under this system, the Republic’s 1937 Constitution would remain supreme, its jurisdiction extended to the entire island. However, the Stormont Assembly would still retain power over some matters in the Northern Ireland administrative unit, probably along the same lines of what it is currently exercising. While this model would make the island a unitary Irish state, strict adherence to the Good Friday Agreement may upset some ardent Nationalists – such a model would naturally preclude a ‘purely nationalist, “four green fields” version of a united Ireland’.⁹⁹ There has been some debate on whether or not the Agreement was intended to automatically continue post-unity, but a reading of the text of the Agreement suggests that it was always intended to survive the unity vote that it provides for. Without any positive actions to the contrary, not only does this mean that Stormont will still exist, but so will the numerous institutions such as the NSIPA, the BIC and the BIIGC. Richard Humphreys describes it as such:

‘[t]here is nothing in the Agreement to the effect that the internal institutions fall away because of unity. If Strand One institutions remain in being, there would be a continued need for strand Two institutions to co-ordinate the work of the Oireachtas and the devolved

⁹⁸ Social Democratic and Labour Party (SDLP). (2005). ‘A United Ireland and The Agreement: A Better Way to a Better Ireland’, (21 March 2005).

⁹⁹ Richard Humphreys, *Beyond the Border, The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018) 93

institutions. So even Strand Two would not fall away post-unity. Likewise, the Strand Three relationships continue to exist across the two islands and there is no reason why those elements should be regarded as redundant post-unity'.¹⁰⁰

Structurally, a system where the devolved powers of Stormont sit below a larger all-island Dáil is not too dissimilar to a federal system. According to the New Ireland Forum, a 'federal state' was a possible model for Irish unity to follow. And according to Richard Humphreys, 'a federal arrangement, is "in" – it is the constitutional arrangement envisaged by the 1998 Agreement'.¹⁰¹ However, the precise form that federation takes is up for debate. The two most obvious ones are a devolved six-county administrative unit in the North that is subservient to a 32-county Dáil, or a structure where a six-county North and twenty-six-county South are both subservient to an all-island parliament. The latter option is true federalism; the former is more accurately described as a unitary state with a devolved government. This model describes the unitary state situation, and the next model (Model 3) describes a true federation.

There may be some constitutional change necessary in order for this devolved system to function properly. Transplanting Stormont into a 32-county scenario is not constitutionally impossible, depending on the level of power afforded to it. Under Art 15.2.2 of the Irish Constitution, 'Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures'. The extent of the power that may be subordinated to such a legislature isn't clear, however. While it may be possible to establish a regional legislature in this unitary state, there is no mention in the Constitution of this parliament having any executive power. Furthermore, the scope of this legislative power is also up for debate – it is an accepted constitutional norm that the Oireachtas cannot delegate issues relating to finances, for example.¹⁰² Similarly, the Irish executive may not cede its executive power in a way that is inconsistent with other constitutional provisions.¹⁰³ Following this, if this Article were to be used to establish a sort-of Stormont, it would probably be a Stormont without an Office of the Executive. Failing that, a simple referendum could afford all necessary power to Stormont.

Functionally, this arrangement may operate similar to the UK's model, with Leinster House operating in a capacity similar to Westminster. This would have the effect of Northern Ireland being able to legislate for itself on some matters, but can also send representatives to the Dublin parliament. Conversely, Dublin would be able to step in and modify/dissolve any aspect of Stormont's power under this arrangement, due to the Oireachtas remaining supreme. This arrangement brings up the 'West Lothian' question that has intermittently reared its head in British politics. Under the British system, Welsh, Scottish and Northern Irish MPs have the same voting rights in Westminster on issues pertaining to England that English MPs have. Basically, MPs who have no real involvement in some area of the country are able to influence the passing of its legislation, but the parliamentarians of that country cannot return the favour. Similarly, taxpayers in the south may be putting money towards

Under this system, Northern Ireland politicians will have the right to decide on matters in both Northern Ireland and the other twenty-six counties, whereas politicians from the former Republic in the Dáil will not be able to decide on Northern Ireland's devolved matters. This could be an advantage or a disadvantage depending on one's outlook. It automatically gives Northern Ireland more political heft on the island due to its membership in both parliaments,

¹⁰⁰ Richard Humphreys, *Beyond the Border, The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018) 125

¹⁰¹ Richard Humphreys, *Beyond the Border, The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press, 2018) 122.

¹⁰² Irish Constitution, Articles 20-23

¹⁰³ Conor Casey, 'Under-explored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40(1) *Dublin University Law Journal* 1

which would have the effect of giving the minority Unionist population proportionally more sway. It is also the case that while the all-island Dáil would inevitably legislate for issues relating exclusively to the south of the country, it would also legislate for all-island issues.

2.2 Executive, Legislature and Local Government

Transplanting the Good Friday Agreement into a united Ireland does not necessitate fundamental change to the operation of the Oireachtas besides the increased number of TDs that would sit in an all-island Dáil and Seanad. Using the numbers from the last model, the all-island Dáil would now have an extra 94 fillable seats, bringing the total seats from 160 to 254. The Good Friday Agreement does not necessitate any special involvement of Northern Ireland politicians in the Dáil post-unity. In fact, the Agreement itself remains silent for the most part on any particular model that Irish unity should follow, besides the apparent continuation of Stormont as a devolved institution. As a result, without any constitutional change to the contrary it would be the case that Northern Ireland would not receive any special treatment in the all-island parliament; referendums would be required to make way for consociational arrangements in Dáil formation, governmental election or changes to the Seanad.

Currently, Northern Ireland politicians receive no special status in Westminster – there is no power-sharing agreement, no minimum seats for Northern Ireland parties etc. The reason for this is partly due to the fact that (a) Irish nationalist interests comprise of too small an amount of Westminster’s makeup to feasibly offer them default executive control, and (b) Sinn Féin’s policy of refusing to take their seats in Westminster has meant there has been no significant nationalist presence in Westminster calling for special representational powers. In the event of a united Ireland, this may of course change, due to the higher proportion of Unionists living on the island of Ireland than Nationalists living in the entirety of the United Kingdom. Stemming from this, many Unionists currently living in Northern Ireland may be upset at the prospect of a model for unification that does not include some sort of extra power-sharing mechanism at the national legislative level. However, as previously stated, such a change to the Dáil’s functionality would require a referendum.

Even without constitutionally enshrined power-sharing, the precedence of Unionist voices in the national parliament may have significant effects regardless. While Unionists and Nationalists are often opposed on issues of statehood and identity, there is also a relatively clear left-right split on many social issues. According to Anthony Costello:

‘The addition of a Unionist voice in the Oireachtas would challenge policy-making and governance in Dublin to some degree. The Oireachtas would inherit a degree of right-wing ideology apparently long faded from the politics of the South. The addition of Unionism to the fold could potentially make coalition building a more tedious task to execute.’¹⁰⁴

The day-to-day operation of Stormont, on the other hand, should not change that much. Under this model, Stormont would still be responsible for the areas which it already legislates for: agriculture, education, the environment, health, enterprise, social services, justice and policing. Legislation on this matter would be passed in the same way which it currently is, with proposed bills coming from a Ministerial department which then requires support of the Assembly. Under the Good Friday Agreement, all power-sharing incentives and veto mechanisms would still be in place, such as the Petition of Concern. This would have the combined effect of ensuring parity of representation in Stormont under a united Ireland, which would arguably come under heavier scrutiny due to the administrative unit having shifted control from one country to the other. The importance of such mechanisms in at least the early years of a united Ireland cannot be understated.

¹⁰⁴ Anthony Costello, ‘Architecting a United Ireland: A Federal Solution?’ *Irish Politics Forum* <https://politicalreform.ie/2017/09/25/architecting-a-united-ireland-a-federal-solution/> Accessed 22 April 2020

2.3 Electoral System

In this model there is no particular need to radically alter the electoral system. While the opportunity for referendums that would follow from a unity vote would allow for electoral system change, there's no reason to suggest that a change would be beneficial. Under this model the PR-STV system which been used in both states up until this point could still be used. The only notable change to how voting would work in this new state is that instead of voting for a PR Stormont and an FPTP Westminster, Northern Ireland residents would now be voting for a PR Stormont and a PR Dáil. As previously mentioned, the major issue that crops up in this scenario is the 'West Lothian' question.

3. Federation

Moving away from a unitary state solution offers the possibility of a true federation. A federation differs from the unitary state options due to its recognition of state governments. A federal system on the island of Ireland would make explicit reference to the entity of Northern Ireland and grant it a moderate level of governmental autonomy. The former-Republic could also be divided into similar entities, possibly along the provincial lines of Connaught, Munster and Leinster. Alternatively, a federation could exist comprising of a national government, and then two provincial governments – one in the North and one in the South – which mirror the current geographical makeup of Northern Ireland and the Republic as they currently exist. This would require a new Constitution, and would offer an opportunity for a constitutional convention to draft a foundational document that may better represent the pluralistic nature a the 21st century united island.

The key aspects of this model include:

- Drafting a new Constitution
- Establishing 2 (26 and 6) or 4 (provincially demarcated) federal units
- Constructing a federal parliament that controls issues such as foreign affairs, defence, etc.
- Enshrining Power-sharing mechanisms at a regional (in the North) and federal level
- Explicitly protecting Unionist rights through constitutional recognition

While the above aspects are what first come to mind when envisioning a federal united Ireland, the drafting of a new Constitution allows for virtually any system of government. As a result, analysis of this model shall at times consider slight deviations from this structure, such as the possibility of a confederation, alternate ways of organising the national government, and different electoral systems. However, the majority of the analysis shall stick to the aforementioned aspects.

The idea of a federal United Ireland has been mooted in the past in the New Ireland Forum, but has seemingly failed to gain contemporary support. Anthony Costello has endorsed such an approach:

‘A Federal Republic of Ireland seems to be an enticing option that would diminish some of the consequences associated with unitary United island and instil confidence within the Northern region. A Federal Republic derived from a new national constitution could create a strong and stable Republic, politically providing for the unique geo-political and socio-political differences on the island. Northern Ireland’s status would be elevated from devolution to state-hood—thus providing constitutional guarantees and confidence for those in Ulster to manage their own affairs (social and otherwise) without interference from Dublin.’¹⁰⁵

3.1 State Structure and Foundational Documents

While this model would grant Northern Ireland a level of autonomy that it hasn’t before enjoyed on the island, it is not the case that this structure is not a ‘united’ Ireland in a unitary sense. Similar to Germany, Canada or the United States, a federal Ireland would exist as a sovereign unit. This differs significantly from a confederal solution, which is oftentimes mentioned in the same breath as or used interchangeably when discussing federal models. A confederal model in this case would involve the granting of Northern Ireland its sovereign statehood independent of the Republic or the UK, and then requiring it to consent to a confederation with the Republic. Additionally, to this, any decision made by a confederal

¹⁰⁵ Anthony Costello, ‘Architecting a United Ireland: A Federal Solution?’ *Irish Politics Forum* <https://politicalreform.ie/2017/09/25/architecting-a-united-ireland-a-federal-solution/> Accessed 22 April 2020

government would require the consent of the regional government for it to be binding on it, unlike in a federation where power is exercised in a top-down approach. Confederations are few and far between in 21st century constitutionalism, with many former confederations eventually turning into federal regimes, such as Switzerland. Confederate solutions oftentimes find themselves giving way to more centralised governmental structures after a period of time, and have been found to only be workable in situations where both (a) there are more than two states involved and (b) there is a relatively even division of power. In the Irish case, neither of these conditions are present. That is not to say that a confederation has never existed on the island; for a brief period in the 17th century, two-thirds of Ireland was in fact governed by the Catholic Confederation who swore fealty to Charles I of England and ruled from 1642 until the invasion of Cromwell in 1649.

Accepting that a federation is much more likely to succeed than a confederation, there is still a question of how many states should constitute this federal regime. There are two obvious contenders:

- 2-State federation, split 26-6 along the current border between the Republic and Northern Ireland
- 4-State federation split along the current provincial borders, or maintaining Northern Ireland as a unit and moving Donegal into a Connaught province, Cavan and Monaghan into a Leinster province.

Both have their advantages and disadvantages. The 2-State option has a number of obvious benefits; it features two states that have existed over the last nearly-100 years, and they both already have working parliaments. Similarly, the 4-State solution is somewhat intuitive, with the four provinces of Ireland carrying at least some cultural and historical significance, though it has admittedly not been as prescient as the North-Republic divide over the last 100 years. The tiebreak may come in the analysis of Desmond Fennell, who considered this exact issue in relation to a federal Ireland:

‘Firstly, like any federation it would need to be a viable federation construct. Since federations with two or three units have proved unstable and transitory, it would need to contain at least four units. None of the units should be of such a size or weight as to be actually or potentially dominant. Ideally, they should correspond to historical social entities; failing that, they should be capable of becoming coherent social entities which would attract the adherence of their populations.’¹⁰⁶

Germany has 16 Länder, Switzerland 26 Cantons, and the USA 50 States. Following this, the obvious 2-State conjunction of the former Northern Ireland and Republic may not be as attractive as initially thought. Of course, the nature of a 4-State federation would result in much more bureaucratic red-tape. However, the necessary increase in bureaucratic bloat has to be accepted by default when replacing a unitary state with a federal system. There is also the uneasy truth that while a 4-State solution does sound on paper to be more stable, it is still the case that 3 of those 4 states are relatively culturally homogenous. That is, in terms of voting patterns, one would much more readily see the 3 states of the former Republic sharing more ideological similarities than that of the former Northern Ireland state. In reality, if there is a divide between the people of the Republic, it is along economic lines and is split between the East/South-East of the country, and the rest of the country.¹⁰⁷ However, countering this point

¹⁰⁶ Desmond Fennell, ‘Solutions to the Northern Ireland Problem: A Federal Ireland and Other Approaches’ (1995) 21(1) *Canadian Journal of Irish Studies* 1, 5.

¹⁰⁷ Michael Kilcommons, ‘Regional Innovation Report (Border, Midland and Western Region, Ireland) To the European Commission Enterprise and Industry Directorate-General Directorate D – Industrial Innovation and Mobility Industries’ (2012) <https://ec.europa.eu/growth/tools-databases/regional->

of view is the assertion from many Nationalist voices that such a view of the country is ‘Dublin-centric’, and despite the relative social cohesion between various provinces there is a strong case to be made that division along provincial lines is not ‘contrived’ and ‘administratively cumbersome’, which is how Fine Gael described a four-state solution in its federal proposal.¹⁰⁸ According to Fennell, a four-state solution is in fact ‘something that springs naturally to mind if a federal organization of Ireland is being considered’.¹⁰⁹ In the face of such political and academic disagreement, this is an issue that may benefit from public consultation.

A federal Ireland may only end up being negotiated with a number of concessions being made by the Republic to the Unionist minority. While some of these may be obvious (and uncontested, such as affording minority rights to Unionists), some issues such as recognition of Britishness and Ireland’s relationship to the UK may have to be reconceived. For example, a new federal Ireland may be part of the Commonwealth of Nations, or may recognise the monarch of the UK in some significant way. This would be a departure from the Republic’s constitution which confers no titles of nobility, nor does it recognise a special place of any monarch. The UK government may also play some transitory, if not permanent consultative role in the affairs of a federal Ireland. Much like how the Republic’s government is entitled to support and advocate for the interests of Irish people in Northern Ireland, it stands to reason that there may be special provision made for the UK’s involvement in protecting the interests of British people in a united Ireland. Similarly, the national flag, national anthem, official languages and titles of government positions and buildings may have to be reconsidered. The extent and benefits of such measures are difficult to quantify, and are probably more appropriately dealt with by the public and their elected officials.

3.2 Executive, Legislature and Local Government

Under this federal system, the national government could feature a bicameral or unicameral parliament. Taking instruction from the situation in the Republic, such a parliament could take the form of the Seanad and Dáil that features today. However, if the goal of this federal government is to be representative of all traditions on the island in a way that the current government could not, it may be constructive to reorganise both the Upper and Lower House.

No analysis in this paper so far as paid much heed to the Seanad and its functions, but drafting a new federal constitution may offer the perfect opportunity to repurpose the Upper House. The Seanad as it currently functions is relatively ineffective, its powers limited to the delaying of bills, unable to actually stop them from passing. It is also comprised of Senators for the most part chosen by parties with a large presence in the Dáil. As a result, as an Upper House it is neither particularly strong nor independent. In drafting this new Constitution, it may be worth retooling the Seanad¹¹⁰ to make it a worthy counterweight to a federal Lower House.

There are a few ways that this can be done. David Kenny notes that combined with the 11 nominations from the Taoiseach the overrepresentation of major parties in the Seanad has resulted in the Seanad being ‘firmly controlled by the government parties’.¹¹¹ Following this, removing such a mechanism of election may make sense. The current system also sees Senators

innovation-monitor/sites/default/files/report/border_midland_and_western_region_rim_report_120412.pdf
Accessed 7 May 2020.

¹⁰⁸ Desmond Fennell, ‘Solutions to the Northern Ireland Problem: A Federal Ireland and Other Approaches’ (1995) 21 *The Canadian Journal of Irish Studies* 1, 11.

¹⁰⁹ Desmond Fennell, ‘Solutions to the Northern Ireland Problem: A Federal Ireland and Other Approaches’ (1995) 21 *The Canadian Journal of Irish Studies* 1, 12

¹¹⁰ It is likely that in a federal Ireland which is trying to avoid unnecessarily antagonise Unionists, the Seanad may not keep its name due to it being in the Irish language. For the sake of simplicity, however, the word ‘Seanad’ will be used to describe the new Upper House.

¹¹¹ David Kenny, ‘The failed referendum to abolish Ireland’s Senate: Defending bicameralism in a small and relatively homogenous country’ (LUISS Guido Carli University, May 2016), 5

reluctant to interfere with the Dáil's will, due to many senators being aspiring Dáil members themselves who many not wish to incur the wrath of more senior party members in the Lower House. While the issue of politicians wanting to toe the party transcends constitutional design for the most part, it may be beneficial to impose an arbitrary 'cool-off' period from being elected to another house if the candidate has just completed a term. This change may aid in the disentanglement of the Seanad from the Dáil in a way that lets both houses operate on a slightly different mandate.

The majority of the other Seanad seats are currently filled by the vocational panel system. While this system is in theory capable of electing candidates that are markedly different to those who run for the Dáil, it has been instead used as a tool to blood newer party members and prepare them for higher office; very few Senators appointed to particular vocational panels possess any of the constitutionally mandated 'knowledge and experience'¹¹² required of them.¹¹³ As a result, reimagining a suitable electorate for these panels may be necessary. Considering the precedence of new political voices who represent a now-anxious minority, a new system may benefit from guaranteeing a certain amount of representation to this Unionist group. A new Seanad could do this in a few ways; legally enshrine it with minimum number of seats awarded to Unionists, and/or guarantee it practically by changing to a country-wide popular vote system that ensures Unionist representation. For the sake of differentiation from the Dáil, it may be worth instituting a process that is significantly different to that of Dáil elections.

The functionality of the federal Dáil itself may also need to be reconsidered. The drafting of a new Constitution allows much more flexibility in how the Lower House is organised, which makes consociational power-sharing arrangements a possibility. Firstly, it is worth considering the effect that the introduction of Unionist voices may have on Dáil discourse. Anthony Costello has noted:

'The addition of a Unionist voice in the Oireachtas would challenge policy-making and governance in Dublin to some degree. The Oireachtas would inherit a degree of right-wing ideology apparently long faded from the politics of the South. The addition of Unionism to the fold could potentially make coalition building a more tedious task to execute.'¹¹⁴

Considering the relatively stable and homogenised nature of Irish political disputes, this influx of parties who are diametrically opposed to some of the norms of modern Irish society may encourage a culture of politicking based on policy as opposed to parochialism; the former being prevalent in Ireland under the current system. Of course, the counterargument also exists that the introduction of these voices into the Dáil may also encourage division and sectarianism. Until it happens, it's difficult to tell what is more likely to occur.

The first constitutional model that was considered in this analysis, that of simple absorption, outlined a centripetal approach to national government. This model had the net effect of allowing the Dáil to function as normal without any minimum seat allocation, any guaranteed representation, or any necessary sharing of executive power. The efficacy of such a solution is difficult to quantify. While a proponent of such a solution would hope that the parties who take a stronger political line such as the DUP or Sinn Féin would take the opportunity to appeal to the other side of the political divide and moderate their own policies to win seats, there is not enough evidence to suggest that would work in a united Ireland. One

¹¹² Irish Constitution, Article 18

¹¹³ Michael Gallagher, 'The Oireachtas: President and Parliament' in Coakley and Gallagher Politics in the Republic of Ireland (5th ed, Routledge, 2010)

¹¹⁴ Anthony Costello, 'Architecting a United Ireland: A Federal Solution?' *Irish Politics Forum* (25 September 2017) <https://politicalreform.ie/2017/09/25/architecting-a-united-ireland-a-federal-solution/> Accessed 10 May 2020.

reason for this is the difference in demographics; in a united Ireland, there would be no even demographic split between Unionists and Nationalists. Instead, it would be a significant Nationalist ('Irish') majority outnumbering the Unionist population. This has the effect of disincentivising cross-cutting cleavages; if Nationalists already control an easy majority without appealing to Unionists, there is no incentive for them to dilute their policies. And vice versa. If anything, it may only aid in exacerbating the siege mentality of some Unionists – in a united Ireland, they would truly be outnumbered.

For this reason, a federal Ireland may want to consider at least some consociational structures in its national parliament. As it currently stands, government is formed either by the largest party solely taking up government due to controlling a majority of the Dáil, or by going into coalition with a number of smaller parties to reach a majority. In the Irish system, the latter is the norm. This results in the largest parties having the freedom to choose who to go into government with, and can exclude parties at will. Coalitions can also be formed by smaller parties while excluding the largest party; all that's needed is a majority. This happened in the latest Irish general election – despite winning the most seats, Sinn Féin has all but been excluded from forming a government due to the second and third largest parties (Fianna Fáil and Fine Gael) refusing to go into government with them. Without any measures to the contrary, this is likely to happen to the DUP or any similar Unionist party if they win seats in the Dáil; there is no incentive for any 'Republic' party to form a government with them. This may have the effect of effectively precluding a government being formed with any Unionist presence, save for circumstances in which the other parties have no other choice. The exclusion of such a large minority from government is likely to cause much discord in the Unionist population, and further strain tensions in this fledgling federation.

Following this, some power-sharing mechanisms may be considered. The Good Friday Agreement and the experience of Stormont may prove instructive in this case. The possibilities of power-sharing mechanisms can be broken down into two broad categories – the wielding of executive power and the passing of legislation. Executive power is for the most part exercised through the Taoiseach and her cabinet, known collectively as the Government. Stormont operates similarly with the First Minister, Deputy First Minister, and the various other ministers exercising executive control. Stormont's system of allocating ministerial portfolios based on the d'Hondt system might work in this scenario. Applying it to the Irish federal parliament, this would probably result in the allocation of 10-20% (if we assume approximately 1/6th of the electorate to be Unionist) of ministerial positions to a Unionist member of parliament. The option also exists to allocate the position of Tánaiste (or whatever the Deputy Prime Minister shall be known as) or even the presidency to the minority tradition, which would be Unionist. This would afford Unionism both practical (ministerial portfolios) and ceremonial (the presidency) representation.

The regional governments, either the 2 North-Republic ones or the 4 provincial ones, would likely be empowered to legislate on the same issues that Stormont currently legislates for. Similarly, these houses may also be unicameral. This makes the most practical sense; this federal system is predicated on preserving the legitimacy of Stormont and recognising its relative success, and applying it to the country as a whole. An issue crops up in terms of the regional legislatures that are not in the North. While Stormont may maintain a power-sharing system with its petitions of concern etc., there is probably no need for the other regional legislatures to follow suit. This is down to the simple reason that the populations of the other provinces will have no significant Unionist population, so there is no real minority to represent.

Local government may be similarly altered under a federal regime. With the establishment of regional legislatures across the country that are necessarily closer to ground-level in a governance sense, the responsibilities originally held by municipal councils may change. The specifics of which powers are granted to municipal councils vs which powers are

retained by regional governments is probably better left to legislation; different Provinces may require different approaches, and the level of detail required to flesh each one out goes beyond the competencies of this paper.

3.3 Electoral System

Finally, the electoral system can be considered. With a new constitution and new federal system, the opportunity arises to sketch out a new electoral system. The default position would probably be to retain PR-STV, unless another system would suit the new regime better. Basing it on the above suggestions, there would be three major elections to consider. These are regional parliaments, federal Lower House and federal Upper House. There are a few different routes to take. The first option would be to retain the PR-STV system for all elections. This would be the approach of least change, and arguably of least opposition. The Republic has used PR-STV since the enactment of the Free State, and Northern Ireland has been using it since 1998. As previously mentioned, it also suits both moderate consociational and centripetal systems, having functioned moderately well in both the Republic and Northern Ireland.

Possible alternative electoral systems include a majoritarian First-Past-The-Post system or alternative vote system with single member districting. The option also exists to move towards more proportional representation through adopting a Closed List PR system, at least at the federal level. Under such a system, the option to vote for candidates across multiple political parties would be removed; a voter would only be able to indicate their preference for a single party. This has the benefit of splitting the vote among partisan as opposed to personal lines, allowing in theory for a stronger federal legislature. Compared to the STV system, this would prevent voters voting for a candidate who they don't necessarily agree with politically, but like what they do for the local community. Such a move would satisfy Lijphart's recommendation of a Closed List system for the sort of power-sharing government that this federal parliament would feature, considering it'd grant more political power to the party leaders, and thus allow them to broker better deals. Considering the delicate state of political affairs post-unity, the relative strength that a Closed List PR system affords political parties may be appreciated. However, more recent appraisals of Northern Ireland's PR-STV system have suggested that PR-STV may be flexible enough to work in the case of a united Ireland, even at a federal level. On that point, Brigid Brooks Kelly agrees:

'If STV was introduced consistently, as in Northern Ireland, and accompanied by federalism in homogeneous units containing subdivisions, it may introduce proportional political empowerment and even great incentives for moderation that would be achieved by STV on its own.'¹¹⁵

Taking such an analysis to heart, it's difficult to recommend a moving away from PR-STV, at least based on the Irish experience. With a track record of relative stability on both sides of the border in two functionally different societies, it has appeared to operate relatively well. While a change to another system may offer similar results, it introduces another unknown variable which at a time of such seismic constitutional change may be an unnecessary risk.

¹¹⁵ Brigid Brooks Kelly, *Power-Sharing and Consociational Theory* (Springer, 2019) 354

Part V: Conclusion

In summary, it seems there are many forms which a united Ireland could take. Taking the historical approach, it has been the case that the most positive progress has been made when constitutional change is enacted through peaceful consent of the people both North and South. It is no coincidence that the Good Friday Agreement is informed by these principles. While talk of a united Ireland has been placed on the political backburner due to the focus of British Isles governments on making the Good Friday Agreement work, current events have appeared to accelerate the timeline in which a united Ireland may come about. It is for that reason that any conversation on the constitutional status of the island must be informed by the practical effects of such a decision.

This paper has attempted to chart the island's constitutional history with reference to the development of Northern Ireland as an administrative unit. The constitutional structures of both entities on the island – the Republic and Northern Ireland – were then sketched out. Finally, three possible models of a united Ireland were outlined. The first of these, the absorption model, would place an emphasis on regulating political conflict through centripetal incentives, which would be exacerbated due to the lack of any power-sharing institutions in the legislature or the executive. Furthermore, the model would dissolve Stormont, the inter-governmental institutions and the Good Friday Agreement as a whole. This model is recommended as the least favourable option due to its dissolution of the Good Friday Agreement and its lack of constitutional protections for a Unionist minority. The second model was a united Ireland which retained the Good Friday Agreement and preserved Stormont as the legislative head of a devolved six-county administrative unit in Northern Ireland. This model preserved the institutions of the Good Friday Agreement, and it maintains the status quo in most constitutional areas such as retention of the 1937 Constitution and requiring only limited amendment of some provisions. For these reasons, it is recommended as the most favourable option – and the most likely option – for a united Ireland to follow.

The final model, the federal Ireland, was then considered. This model necessitated the writing of a new Constitution, and entirely new parliamentary structures. This model offers unique advantages in comparison to the previous two models, due to the new Constitution allowing issues in the Republic's constitution to be fixed, etc. It can also grant explicit constitutional protections to particular aspects of Unionist identities – citizenship and representation in politics, for example. This model is theoretically preferable as one that a united Ireland should follow due to its structured federal approach, but is not recommended without qualification due to the practical difficulty in simultaneously writing a new constitution, establishing multiple new regional governments, and assimilating the population of a neighbouring state. Such an approach would need to be considered in depth with arguments more politically and economically astute than what this paper can offer, before it could be recommended.

In this time of uncertainty, solace can be found in good-willed cooperation and recognition of shared humanity – the same approach should be taken to constitutional design. In the words of Unionist commentator Newton Emerson:

‘So there are conversations to be had about the future of Ireland and the UK, which everyone can join and which could be the Holy Grail of any debate on a shared island: one without preordained conclusions, where some participants might actually change their minds.’¹¹⁶

¹¹⁶ Newton Emerson, ‘Newton Emerson: Unionists surprisingly interested in a ‘united island’ *The Irish Times* (Dublin, 23 April 2020)