



SECTION 7

7.0 Summary

High Court Justice Humphreys states:

“It is a matter of political judgement as to whether and to what extent to hold off all legal or constitutional change until after the achievement of the reunification of the island of Ireland.”⁶⁹²

In this section of the report we highlight the analysis of High Court Justice Humphreys work in ‘Countdown to Unity’ on the constitutional, legal and other changes that could or should take place before or after unification. The ratification and the implementation process of the referendum result is outlined. The issue of the continuation of the Northern Assembly after a referendum under the Good Friday Agreement is analysed, as are some of the flaws of the Good Friday Agreement as seen by Justice Humphreys. Development of the institutional architecture of the Good Friday Agreement after a referendum is examined, as is North-South and East-West infrastructure. Three different options are outlined by Justice Humphreys as to how to deal with the issue of pre-existing Northern Ireland legislation in a post- referendum Ireland.

The replacement of pre-existing legislation with Britain, including the Act of Union, by a new comprehensive treaty is outlined by Justice Humphreys. Also outlined are the legal changes with the EU and the consequences for international treaties signed by Ireland and the UK.

The challenge of uniting people as explained by John Hume is chartered by Justice Humphreys with the necessity of confidence measure by the Irish side. These include broadening the constitutional definition of citizenship to include the British identity on the island, giving rights to vote and to run for elected office to citizens who choose a British identity as provided for in the Good Friday Agreement, and the need to remove the legal sectarianism of the British state, among which would be the Coronation Oath Act. Justice Humphreys’ findings of unionists’ views of representation for Northern Ireland politicians in the current Dáil Éireann are outlined. The merits of ‘Gesture Politics’ on issues such as the Irish Language, the National Flag and Anthem is considered not necessarily to be a bad thing, Humphreys argues, if the gesture can be shown to have achieved something. Dr Martin Manseragh has described an

⁶⁹² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.180.

approach whereby the traditions of both communities are accommodated as such: “we need not lessen our loyalties as we broaden our sympathies”.

In the online appendix to this section, we have included:

Union of Ireland Act 1800

Government of Ireland Act, 1920

Treaty of 1921

The Republic of Ireland Act, 1948

The Sunningdale Agreement 1973

New Ireland Forum Report 1984

Anglo-Irish Agreement 1985

Downing Street Declaration 1993

The Good Friday Agreement 1998

7.1 Recommendation

The Government needs to carry out an audit in relation to the legal and constitutional changes pre- and post-unification.

7.2 Legal and Constitutional changes before and after a referendum

High Court Justice Humphreys states:

“By and large, however most of the legal changes dealt with in this study are ones which can be put in place at the present time, well in advance of any concrete proposals for unity. However, there are some changes of a fundamental character which could only be contemplated in the post-reunification context or at the very least in the context of comprehensive all-party negotiations dealing with the reunification scenario, if such negotiations were to take place prior to reunification itself.”⁶⁹³

“Changes which are appropriate to the post-unification situation are discussed in the following sections, broadly they relate to two areas which involve negotiation with unionism and those areas fundamental to the Irish Constitution. It does not seem feasible or appropriate to deal with either of these in terms of legal or constitutional change in advance of unification, given that the unionist population will be unlikely to engage in negotiations thereon. But what can be done is that the willingness to engage in relation to these aspects can be signaled in advance. It is on that basis that the areas that follow are raised for discussion. Hogan has pointed out that in considering change to, for example, Article 7 or Article 8 on the flag and language, ‘we are probably close to the very limits of what southern Irish society will yield up in order to reach reconciliation with its Northern neighbours.’⁶⁹⁴

“Fundamental changes in relation to matters such as flags, language, or the overall social and political culture of the state will meet a degree of resistance that will surprise many.”⁶⁹⁵

⁶⁹³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.180.

⁶⁹⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.180,181.

⁶⁹⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.181.

However, Humphreys also states that:

“There would in consequence seem to be a strong case for a revision of the Constitution- if not a new text altogether- on an agreed and cross-community basis in the context of a united Ireland.”⁶⁹⁶ “Subject to Irelands international obligations, the negotiations on a new constitution would effectively start on a blank piece of paper and with full openness to the view and proposals to be put forward from the unionist side. It is difficult to see how more than that could be proposed in advance of any concrete proposal of unification.”⁶⁹⁷

“Given that any likely constitution to emerge for a new united Ireland would involve the establishment of executive, legislative and judicial branches of government and a catalogue of human rights, one might well indeed conclude that such a hypothetical constitution would be similar to the existing one.”⁶⁹⁸

“However, it is hard to envisage that the negotiations on such a new constitutional text could realistically take place until such time as reunification was actually achieved as there would be not particular incentive from the unionist minority to engage with the issue prior to that point.”⁶⁹⁹

“Bertie Ahern ‘saw no great public demand for change’ ‘while ready to discuss different symbols for a new Ireland, he saw no need to launch a major debate until unionist came to negotiate’”⁷⁰⁰

“The forum for Peace and reconciliation which established a subcommittee on obstacles to reconciliation but never produced a final report. A draft report was, however, prepared but never formally published. The draft forum report dealt with a number of topics including;

⁶⁹⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.181.

⁶⁹⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.194.

⁶⁹⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.195.

⁶⁹⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.195.

⁷⁰⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.194.

Constitutional change

Symbolism

Education

Health

Anti-discrimination

And the acknowledgement of the British-Irish dimension⁷⁰¹

Importantly, High Court Justice Humphreys states the decision as to whether changes should be made now or later to the constitution were part of previous debates.

“When Taoiseach Garret FitzGerald proposed his 'constitutional crusade' in September 1981, a major factor in Fianna Fail's response rejecting this idea was the concept that changes such as those proposed by FitzGerald should not be considered until the unionists were 'around the negotiating table'. Clearly this is a matter of political judgment in each individual case in respect of any particular proposed legal or constitutional change. One recalls the long debate about the form of Articles 2 and 3 of the Constitution where, notwithstanding the case that was made for unilateral change, the strategy of awaiting change until such time as there was a prospect of comprehensive political and constitutional agreement between the two governments and the Northern Irish parties was arguably vindicated. That 'wait and see' approach permitted the regularization and amendment of Articles 2 and 3 to be balanced by appropriate measures from the British government and the parties. As against that, it is arguable that in order to marshal a majority in favour of unity there must be clarity about what unity would involve - and therefore a case for legislating for inclusion in advance to make clear that only the most inclusive form of unity will be proposed.”⁷⁰² “However, there would appear to be a tangible value in making clear that the constitution in its entirety would be on the table for renegotiation in the event of a united Ireland.”⁷⁰³

⁷⁰¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.180.

⁷⁰² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.180.

⁷⁰³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009 p.158.

7.3 Ratification of the decision for a united Ireland

As Humphreys points out:

“The standard procedure adopted to implement an international agreement involving legislative change in two dualist jurisdictions tends to be along lines involving

Firstly signature of a bilateral agreement,

Secondly the introduction and enactment in both jurisdictions of such legislation as may be necessary to implement it,

Thirdly the execution and delivery of instruments of ratification,

Fourthly the commencement of the agreement either by way of the delivery of the second instrument of ratification or the expiry of a certain period of time from that date, or the happening of some other specified event.

“It is likely that the same sequence will apply in the event of an agreement for the handover of Northern Ireland. Indeed, the Good Friday Agreement itself envisages firstly an agreement between the two states and secondly the introduction of legislation to give effect to that agreement, with both governments committed to introduce and support in their respective parliaments legislation to give effect to that wish.”⁷⁰⁴

“Accordingly, following the new British-Irish handover agreement envisaged by The Good Friday Agreement. and the introduction and enactment of appropriate legislation in both the British and Irish parliaments to give effect to that agreement, including if necessary a bill to amend the Constitution which would need to be submitted to referendum if that had not already been provided for by anticipatory amendments to the Constitution, both governments would then execute instruments of ratification and deliver these instruments in a specified manner. The agreement would then commence in accordance with its terms on a specified date, which would also be the date on which the

⁷⁰⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.194.

relevant British and Irish legislation would come into effect. The happening of the legal event to trigger such commencement, normally the mechanism specified in the agreement being operated possibly combined with the making of a commencement order for the legislation, would constitute the act bringing into effect the reintegration of the national territory.”⁷⁰⁵

“‘Ratification’ of the agreement to transfer Northern Ireland to Irish Sovereignty will take place, in accordance with international law, in the ordinary way by execution of instruments of ratification on each side. The coming into force of the agreement and the formal transfer of Northern Ireland will then require revision of political structures on each side but particularly on the Irish Side. In crude terms the British structure will be ‘slimmed down’ by the removal of the Northern Ireland dimension, while the Irish structures will be expanded so that a new thirty-two-county Dáil and Seanad will be put in place, the local assembly and executive recognized, local government structures recognised or created for Northern Ireland and provision made for statutory agencies. At its most basic level two new states and parliaments will be constituted, or perhaps more accurately reconstituted for Ireland and Britain.”⁷⁰⁶

⁷⁰⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.145.

⁷⁰⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.156.

7.4 Continuing the Good Friday Agreement after unification

As Humphreys points out:

“The agreement expressly imposes obligations on both governments into the long term. In the sense it is intended to apply both to the current United Kingdom and to a possible future United Ireland. In the absence of any amending agreement, it would therefore be a legal obligation on Ireland to continue to give effect to the agreement after Irish Unity. This simple conclusion has profound consequences for the way in which the whole question of reunification is to be approached. In particular, it means that the strong protections for which ever community does not command a majority within Northern Ireland would endure in the absence of any further agreement so as to benefit unionism following a united Ireland.”⁷⁰⁷

“There was also a pragmatic argument for maintaining the Good Friday Agreement institutions – it would provide certainty and stability and there by assist in making the case for a united Ireland. The SDLP also proposed that a referendum on unity should be held once the agreement institutions have bedded down and are operating stably, a call which has been made at various times by Sinn Fein, the UUP and the DUP the document stated. However, in the context of a referendum, the SDPL committed themselves to seeking the agreement of all the island’s parties that the agreement endures regardless of whether one is in a United Kingdom or a united Ireland.”⁷⁰⁸

“The SDLP has published a set of proposals in relation to unity which pin their colours firmly to the mast of the Good Friday Agreement. This document, A United Ireland and the Agreement, was published on 21st March 2005, although an earlier version had appeared in November 2003. The key message of the document is that in the united Ireland to which we are committed, all the Agreements’s principals and protections would endure”.⁷⁰⁹

⁷⁰⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.104.

⁷⁰⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.118.

⁷⁰⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.117.

“The SDLP proposed that the Assembly would continue ‘as a regional Parliament of a united Ireland’. The executive would also continue as would the agreement’s equality and human rights guarantees and the rights to identify oneself as British or Irish or both and to hold passports accordingly. Going somewhat beyond the letter of the agreement, however, the SDLP proposed corresponding protections for unionism to those currently in existence for nationalism:

“East-West Co-operation would continue. In particular, just as the Irish Government has a say in the North now, the British Government would have a say in the North in a United Ireland.

“Just as there is a northern representation in the Seanad at present, those in the North who want it should have representation in the House of Lords in a United Ireland.

“The arguments in favour of such protections were trenchantly made:

‘unity must not be about entrapment of a new minority in a united Ireland we will still need to find a way of sharing our society as equals every bit as much as we do today’⁷¹⁰

The document also envisages that unity would bring changes to the Good Friday Agreement itself in the way envisaged by the agreement, namely through a review.

“Finally describing the agreement as a covenant of honour (surprisingly rather than a law) the SDLP made the point that the best protection for unionists in a united Ireland would be through the mechanism of the agreement.

“For unionist to ‘smash the agreement’ would be to forgo not only their say in Northern Ireland of today but their guarantee position in a future united Ireland

“Launching the document the SDLP chairperson, Patricia Lewsley put the SDLP proposal in the context of the ‘true republican ideal of uniting Catholic, protestant and dissenter’.

“The thesis that there would be practical advantages to preserving the Good Friday Agreement post a united Ireland was also advanced by the Unionist Commentator Roy Garland. Reacting to the November 2003

⁷¹⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.118.

version of the SDLP proposal, he described them as ‘welcome and innovative’ It would fulfil a unionist proposal to ‘insist on Northern Ireland remaining an administrative unit, even if Irish Unity were achieved and therefore ‘has some potential to appeal to unionists.’”⁷¹¹

⁷¹¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.119,120.

7.5 The constitutional & legal changes in Ireland

In his book Humphreys argues that;

“It is clear that the form of united Ireland envisaged by the Good Friday Agreement is one which would involve the continued existence of the Northern Ireland Executive. The absence of any provision for a devolved executive in the constitution would need to be rectified in anticipation of such an eventuality, and the extension of the existing terms of Article 15 which provides for devolved legislatures to also cover devolved executive authority would seem to be a worthwhile and permissible amendment even at this stage, well in advance of any proposal for a united Ireland. It is noteworthy that the 1937 Constitution as drafted had no difficulty in envisaging the future reunification of the island, making appropriate provision for that eventuality – in particular by allowing the recognition of subordinate parliaments and by allowing membership of the Commonwealth. Given the change in circumstances brought about by the Good Friday Agreement, it seems appropriate that this provision now be updated so as to be capable of operating in the event of the Good Friday Agreement provision for reunification being put into effect.”⁷¹²

⁷¹² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.139,140.

7.6 Downing Street Declaration

Consequently, both Governments commit themselves to the principle that institutions and arrangements in Northern Ireland and North-South institutions should afford both communities secure and satisfactory political, administrative and symbolic expression and protection. In particular, they commit themselves to entrenched provisions guaranteeing equitable and effective political participations for whichever community finds itself in a minority position by reference to the Northern Ireland framework, or the wider Irish framework, as the case may be, consequence upon the operation of the principle of consent.

Downing Street Declaration

“Logically it seems to follow from this commitment that it was intended that the structure to ensure cross party participation in Government, now set out in the Good Friday Agreement, would endure after the advent of a united Ireland. To some extent the commitment in the Joint Framework document were provisional in nature in that they were subject to subsequent negotiations, and the Joint Framework Document was not as such a legally binding instrument. Nonetheless, this commitment is an important element of the travaux préparatoires in indicating the intention of the government in negotiating the Good Friday Agreement as to whether the agreement was intended to be simply a transitional one pending a united Ireland or rather as the Joint Framework Documents would suggest, an ‘entrenched’ agreement which would endure regardless of the shifting numerical composition of the Northern Ireland electorate.”⁷¹³

⁷¹³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.64.

7.7 Developing the institutional infrastructural architecture of the Good Friday Agreement

“It is obvious that one of the critical ways to bed down the Good Friday Agreement itself is to ensure that the agreement is fully implemented in all of its aspects. This is a process which requires action on the part of the two governments as well as all of the parties. Certainly insofar as making more real the roadmap set out in the agreement towards a united Ireland is concerned, the full implementation of the agreement by the Irish and British governments and the parties is a major desideratum. While large sections of the agreement have already been implemented, there are a number of areas where there is considerable progress to be made, including areas within the competence of the governments. It is noteworthy that on the first suspension of the institutions on early 2000, the Taoiseach stated that ‘there is no reasonable alternative to the full implementation of the Good Friday Agreement and, pending the re-establishment of the institutions, we will continue to implement resolutely all the outstanding elements of it within our responsibility.’”⁷¹⁴

“Indeed, the putting in place of strong rights protection including a Bill of Rights for Northern Ireland has been a feature of the political agenda long before even the Good Friday Agreement. Overall it is clear that there is still a substantial political agenda to be achieved in terms of implementing the agreement in areas such as equality, human rights, examining past collusion between the security forces and loyalist paramilitaries, promoting the Irish language, winding down the British security presence, and working towards better justice and policing.”⁷¹⁵

⁷¹⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.159.

⁷¹⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.159.

7.8 Developing North-South & East –West infrastructure

“Another critical aspect to be considered is the widening and development of the six county, North-South and East-West institutional architecture to strengthen all of the relevant relationships. One might consider all of these sets of possible institutions in the form of a matrix with two axes, one being different sets of relationships and the other consisting of the forms of institution required, legislative, executive, judicial, administrative and related to civic society. The matrix of relationships can be considered in tabular form as set out in Table 1.”⁷¹⁶

Matrix of Institutional Architecture by Strand

Type of Institution	Strand 1 NI	Strand 2 N-5	Strand 3 E-W
Legislative	Assembly	None. N-S parliamentary structure envisaged by Joint Framework Document and April 2003 and December 2004 proposals	Pre-existing British-Irish Interparliamentary Body continues – agreement envisages development of this
Executive	Northern Ireland Executive	North-South Ministerial Council – Joint Secretariat.	British-Irish Council (involves devolved institutions and other administrations in the islands). Secretariat to British-Irish council provided by two governments British-Irish Intergovernmental Conference (two governments).
Judicial	No new institutions. Pre-existing courts continue.	None.	None.
Administrative	Some new institutions under Good Friday Agreement: Northern Ireland Human Rights Commission, Equality Commission.	North-South implementation bodies in specified areas Joint Committee bringing together North and South Human Rights Commissions.	None.
Civic Society	Civic Forum	None.	None.

Table 1

⁷¹⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 160.

7.9 Flaws in the Good Friday Agreement

“The Good Friday Agreement is flawed and incomplete at a very basic level in that it fails to make express provision for a whole range of contingencies, the central one being the unwillingness or inability of parties representing a majority on either side of the community to operate the agreement. By failing to provide a fall back mechanism, the agreement certainly leaves the door open to direct intervention by the Westminster parliament of the kind made by the Northern Ireland Act 2000. By the same logic, however the agreement, being a partial agreement only, could equally leave the door open to other forms of agreement or agreement designed to cater for an absence of working institutions. This aspect of the agreement may hold out some possibilities in terms of ensuring that there is political progress in Northern Ireland if, in future, unionist politicians decline to work the agreement. Given the partial nature of the agreement, it would be no breach of the Good Friday Agreement for the parties who are prepared to operate it and the governments to work out alternative fall back mechanism, other than simply that of direct rule from London.”⁷¹⁷

⁷¹⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 97.

7.10 Pre-existing Northern Ireland Law in a United Ireland

“There would seem to be the following three basic options for dealing with the question of the status of pre-existing Northern Irish law:

Option 1

“The first option would be to disapply such law in its entirety and to apply the law of Ireland to the entire 32 county entity. Such an arrangement would have the advantage of simplicity and uniformity, but there is one very powerful argument against it. The uniform application of the law of the 26 counties would set aside years of effort by the devolved legislative assembly in enacting legislation on a cross community basis. It would seem that a legislative solution which undermined these efforts would be unacceptable politically and would hinder efforts to promote reconciliation and mutual understanding. In addition, a significant legal vacuum would be created insofar as law exists in Northern Ireland to deal with local, personal and private matters not catered for by the law of the 26 counties.

Option 2

“A second option would be to apply the law of Ireland insofar as it related to non-devolved matters, while continuing the law in force in Northern Ireland relating to devolved matters. Obviously the law on non-devolved matters would change in any event in the context of a united Ireland; for example, the law relating to succession to the crown would not have a corresponding body of legislation in this state. This solution would preserve the legislation enacted in relation to devolved matters while allowing for the application of general law of the 26 counties to Northern Ireland in relation to other matters. However, there are some difficulties with this also. The major complication is that Westminster remains, under the Good Friday Agreement a body which has legislative competence for Northern Ireland on all matters, notwithstanding devolution. Accordingly, some devolved matters will have been affected by legislation enacted at Westminster even after the Good Friday Agreement as well as Westminster legislation before devolved. As a result, the law of Northern Ireland relating to even

devolution matters is a complex patchwork of native and Westminster legislation

Option 3

“A third option would be to carry over the law of Northern Ireland in its entirety insofar as it stood on the day immediately preceding the reintegration of the national territory, with such modifications as may be necessary and insofar as it was consistent with the law and Constitution of Ireland. This option would allow maximum continuity and would minimize any delay that might be occasioned by, for example, the specific identification of devolved and non-devolved matters, as a process which could take a considerable period of time and cause some degree of uncertainty. Obviously, as far as future measures are concerned, following reunification the Oireachtas would be a 32 county entity and would have the power to legislate for the whole island on any matter, much as Westminster enjoys that power in relation to Northern Ireland at the present time. Such a power would be exercised sparingly in relation to devolved matters where a functioning devolved legislature existed. As regards the second and the third solutions, which would continue in force at least some if not most of the pre-existing Northern Irish law, such scenarios would need to be accompanied by extensive modification of enactments, changing references to UK matters so as to apply to the corresponding institutions in the new state.”⁷¹⁸

⁷¹⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.144, 145.

7.11 New treaty with Britain

Replacing the Act of Union 1801, Treaty of 1921 and others

Humphreys states:

“The opportunity could be taken in the context of any such new international agreement – if not before then- to review and perhaps rationalize and update the overall status of bilateral agreement between the two government. There are a considerable number of bilateral Anglo Irish agreements having constitutional implications which might be appropriate for review in the context of the international agreements between the two states giving effect to a future referendum on a united Ireland, or indeed possible review even in advance of that.”⁷¹⁹

“One item for examination in this regard is the 1921 Treaty itself and the various agreements amending it. The Treaty, while still in force in international law between the two states, has ceased to be a definitive statement of the relationship constitutionally between these islands and between North and South. In consequence, it appears that there is a case for a new international agreement to be entered into between the two governments at this stage formally abrogating the 1921 Treaty and replacing it with provisions that do reflect the current relationship between the two states.”⁷²⁰

“While discussions of an exploratory nature could take place between the governments well in advance, it would seem unlikely that fully fledged negotiations on a new treaty could commence until such time as the prospect of a majority in Northern Ireland in favour of a united Ireland became more imminent, Nonetheless, it would seem desirable that such negotiations could commence as soon as that prospect appeared on the horizon, as to leave the commencement of such negotiations until after a poll would run the risk of significant delay.”⁷²¹

⁷¹⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.

⁷²⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.

⁷²¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.132.

“If a devolved administration within a united Ireland did collapse for a period of time and satisfactory alternative proposals could not be put in place, it might be argued that it would be important to retain a formal structure for consultation with the British government, particularly on non-devolved matters, if for no other reason than to provide a disincentive to continued stagnation.”⁷²²

⁷²² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.131.

7.12 Legal Changes with EU

“As with the reunification of Germany, it is clear that any change to the extent of the national boundary of Ireland will require changes in European Union law across a range of issues.

“Judging by the volume of European Union Law affected by any change in the boundaries in the union by enlargement, it is likely that the technical exercise of adjusting European Union law to accommodate Irish reunification will be an extensive one and may take a considerable period of time.

“However, it is to be noted that in the context of German reunification, the European Union facilitated the re-integration of the German national territory by promptly adopting the necessary legal instruments.”⁷²³

7.13 Consequences for international treaties signed by Ireland and the UK

“Of some significance the question of any necessary or appropriate ramification for international legal instruments to which Ireland or the United Kingdom, or both, were parties. It is likely that at least some of the international treaties to which the two states or either of them are parties will require some form of adjustment in the event of Irish reunification. However, it is likely that this matter can be dealt with on a case by case basis.”⁷²⁴

⁷²³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.144, 145.

⁷²⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.139.

7.14 Confidence building measure on the Irish side

The Downing Street Declaration included:

“In recognition of the fears of the unionist community ... the Taoiseach will examine with his colleagues any elements in the democratic life and organisation of the Irish state that can be represented to the Irish government in the course of political dialogue as a real and substantial threat to their way of life and ethos, or that can be represented as not being fully consistent with a modern democratic and pluralist society, and undertakes to examine any possible ways of removing such obstacles. Such an examination would of course have due regard to the desire to preserve those inherited values that are largely shared throughout the island or that belong to the cultural and historical roots of the people of the island in all their diversity.”

725

Justice Humphreys notes:

“One can see in this declaration considerable scope to retain in place, whether in modified or unmodified form, legal or constitutional provisions which might not be acceptable to unionism, but which nonetheless reflect majoritarian values - either for that reason alone or because unionism fails to engage in the 'course of political dialogue' that is a precondition for change. Indeed even in the event of political dialogue taking place, it would be unwise and inappropriate to give any absolute commitment to reshape any and all legal and constitutional provisions that might find their way on to the negotiating table pursuant to unionist complaint. However, when one poses the question as to what precisely has been done to implement this commitment in the Downing Street Declaration; it is difficult to identify much in the way of tangible progress. This may be perhaps justify on the very basis that the deceleration is phrased in terms of matters brought to the attention of the Irish

⁷²⁵ Downing Street Declaration

government ‘in the course of political dialogue’ a dialogue which has not been engaged in by unionism in any organised way perhaps for the understandable reasons from their particular point of view.”⁷²⁶

⁷²⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.179, 180.

7.15 Uniting people as well as territory

“John Hume frequently commented that the task of the peace process was to unite people rather than territory. And it is true that the new Article 3.1 of the Irish Constitution speaks literally of seeking ‘to unite all the people who share the territory of the island of Ireland’. However, it must be said that the people are in turn defined by reference to the territory, and the reference to the application of law in Article 3.1 by reference to ‘area and extent’ makes it clear the unity involves a territorial extension of the state as well as uniting hearts and minds. It might therefore be more precise to say that the new Articles 2 and 3 seek to unite both the peoples of these island and ultimately, the territory of the island of Ireland itself.

“The study will examine legal aspects of the efforts to build confidence between the two communities and unite the peoples who share these islands, as well as preparing for unity in way compatible with, albeit not strictly required by, the Good Friday Agreement.”⁷²⁷ “The breakdown as between changes which suggest themselves prior to unity, possibly even at this juncture and changes which arise closer to or after the process of reunification.”⁷²⁸

“While it is a matter for political debate and judgement to a considerable extent as to whether appropriate confidence building measures or similar measures should be put in place well in advance of reunification, or alternatively only at the time of reunification, certain suggestions can legitimately be advanced in this regard.”⁷²⁹

“The agreement envisaged the creation of new institutional architecture, as well as other institutions which are sketched out as possible developments but have never been summoned into existence.”⁷³⁰

“Over all a significant programme of institutional construction could be

⁷²⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.157.

⁷²⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.157.

⁷²⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.157

⁷³⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.175.

grounded upon the opportunity presented by the agreement. Such a programme, combined with vigorous confidence building measures on the British side and measures to promote an all-island identity, could play a major role in recognizing the complex identities of those who share the island of Ireland and in seeking to unite the peoples of the island and not just the territory.⁷³¹

⁷³¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.175.

7.16 Citizenship

“A fundamental difficulty with the existing text of the Constitution, however, arises in relation to the application of its provisions to citizens of Ireland in the first instance, with only limited rights being conferred on non-citizens. The Good Friday Agreement envisages that the right of all of the people of Northern Ireland to Irish or British citizenship or both would be preserved in a united Ireland. In essence there is a central contradiction in the Constitution as it now stands.”⁷³²

“The contradictory concepts continue to sit uneasily side by side in the current text, awaiting resolution by expressed amendment or possibly creative judicial reasoning.”⁷³³

“In many respects, measures to give effect to a future bilateral treaty on unity, and to ratify it, are of a technical character. The greatest legal challenge will be posed for the Irish constitutional order, which will need to readjust a number of concept, particularly, that of limiting political participation to citizens. There is of course nothing stopping the Irish States from contemplating these questions well in advance of reunification, and making the necessary accommodation in a less fevered atmosphere.”⁷³⁴

recognise the birth right 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.

735

“One can then envisage a situation in which a very substantial number of people who reside within the new state (i.e. the 32 county united Ireland)

⁷³² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.140.

⁷³³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.157

⁷³⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.

155

⁷³⁵ GFA

would not in fact be citizens of that state but would rather be British citizens maintaining their right to assert their British identity as guaranteed by the Good Friday Agreement itself. One can see in that context that it would be wholly unacceptable to maintain the current constitutional position where by the right to engage in important aspects of state activity would be confined only to Irish citizens for example the right to vote in referenda or presidential elections it would be unacceptable to maintain the position that human rights guaranteed by the constitution itself are expressly stated to be conferred only on Irish Citizens, as almost all of the rights set out in article 40,44 and 45 are.”⁷³⁶

“The existing text of the Constitution, insofar as it by and large confines constitutional rights to citizens, is not only inherently objectionable but would become wholly untenable in the context of a united Ireland – and certainly in the context of a united Ireland which permitted and recognized the rights of its inhabitants, who would otherwise in ordinary course be citizens, to hold affinity with the United Kingdom.”⁷³⁷

⁷³⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.140.

⁷³⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 141.

7.16.1 Recognising Irish identity on the island

It is unclear if there is the readiness in the South to address and to come to terms with the demands that will be made on it to accommodate the unionist identity. The state has been accused of being partitionist in its mentality, a point articulated by Humphreys below. Unity and progress towards it will be a major challenge for the nationalist and republicans, perhaps especially in the south.

The 26 county state, Humphreys argues:

“Has become, if not parochial, then at least partitionist in mentality and perhaps naturally has become attached to its own identity as an Irish 26 county state in a manner that would not be sustainable were the Irish state to be extended to the remaining 6 counties. This process has the potential to pose a major challenge to nationalism and perhaps even more so to republicanism. There seems to be a lack of evidence that the south or even the nationalist and republican North, has psychologically come to terms with the demands that may be placed on its mind set in the context of the negotiations on accommodation for the unionist minority that will accompany (or more likely follow on from) national reunification. In that transcending, historic context it is hard to avoid the prospect that all of the partitionist aspect of the 26 county identity must be put on the table for negotiation, review and replacement when necessary. While article 2 and 3 of the Constitution were put on the table during the 1996 to 1998 talks, the momentous process of national reunification might involve the entire 1937 constitution including national symbols such as the flag and non-constitutional symbols such as the national anthem and other public badges of cultural identity.”⁷³⁸

Humphreys is “not necessarily suggesting that there is anything inherently wrong with the 1937 constitution, its institutional provisions or its protection for human rights.” However Justice Humphreys goes on to suggest that:

“The unionist minority have little or no sense of ownership of the constitution and unless the possibility of such a sense of ownership is

⁷³⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.xxiii.

developed there is every prospect that they will feel as isolated in the 32 county republic as the members of the nationalist majority of the island of Ireland who live in Northern Ireland have felt during the worst years of the Stormont government.”⁷³⁹

“Republicans will also be challenged to accommodate the British identity in ways that may initially appear unpalatable and to accept that unity will not of itself usher in Utopia but rather will be an opportunity for the exercise of self-determination in whatever way commends itself to the all island majority.”⁷⁴⁰

⁷³⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.10.

⁷⁴⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.10.

7.16.2 Measures to promote Irish identity

“‘Irish Identity’ can be a difficult thing to define. Christopher McGimpsey referred to the task of such a definition as being ‘as simple as nailing jelly to a wall’. In tandem with recognising the British Identity in Ireland, it is equally important to recognise the Irish identity of those in Northern Ireland who assert such an identity. This is not entirely a matter for the British government, as it has ramifications for the law and the practice of Ireland also, and can be considered under a number of headings.”⁷⁴¹

“Other means of recognising the Irish Identity of the nationalist community in northern Ireland have also arisen for discussion in the past, centering on the question such as availability of Irish Television in Northern Ireland and so on. Clearly this is an agenda that will require ongoing attention and is not something which can be neglected until there is a firm proposal for a united Ireland. The Irish identity of nationalist in Northern Ireland is something which is put centre stage by the Good Friday Agreement itself and, subsequently, it seems appropriate and proper to provide due recognition and protection for this identity at this stage such measures include anything tending to promote the nationalist sense of purpose and identity, including promotion of culture and language. Clearly such measures need to be balanced by measures acknowledging the British or Ulster Scot identity, where appropriate.”⁷⁴²

“However, cross-border relationships between, for example local authorities could be one area where some measures of legal facilitation may be appropriate.”⁷⁴³

⁷⁴¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 170.

⁷⁴² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 174.

⁷⁴³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.175.

7.16.3 Recognising the British identity on the island

The issue of accommodating and recognising the British identity is a key area raised by Humphreys and need to be addressed.

Recognition must also be given to the British identity, to which a very large number of inhabitants of the island subscribe as being their primary cultural signifier. However, above and beyond the self-categorisation of unionists (principally), as a related question is the extent to which there is also a need to recognise the inherent British identity on the island of Ireland as a whole. The British dimension reflects itself in many areas and facets of life, often without express recognition. One view that warrants examination is that by acknowledging openly the British dimension to the Irish cultural identity it may be possible to enhance and bolster the case for reunification, and making clear that the British identity will be respected within the context of a new 32 county entity.

“A significant aspect of the problem lies in the question of national identity which is at the core of the clash between the two versions of the constitutional future for Northern Ireland. The unionist case is one of attachment to the British identity, an identity which it is perceived cannot be celebrated and achieved with in a united Ireland. The challenge for nationalism therefore is to identify legal measures which would recognise the legitimacy of the British Identity and the British dimension to Irish Life.

“It may seem an unusual or possibly surprising concept to some, but it is clear that there is a significant British dimension to the Irish experience:

The primary language

The broad outline of our public institutions Common law experience
British Culture permeates Irish society

The British experience is very much part of life for significant numbers of people in the state, whether through family relationship, travel, work, emigration or media.

“Indeed it should plausibly be contended that the average person in the 26 counties is significantly close culturally to London than to Belfast.”⁷⁴⁴

However in making the case for Irish unity, Humphreys argues that it is essential to be

⁷⁴⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 190.

in a position to contend that the British identity of unionists would be protected, recognised and cherished in a hypothetical 32 county republic. It would seem to follow that the best way of ensuring that this would be the case, and would be seen to be likely to be the case, would be to see ways, including legal measures if appropriate, to recognize and cherish the British identity within the 26 county state. To date there are few tangible legal instruments and measures to which one can point which can be regarded as acknowledging the British dimension.”⁷⁴⁵

7.17 Elections & Referendum

Voting in a Presidential election

“The question of voting rights in presidential elections or referenda where the franchise is confined constitutionally to citizens is a more complex one. On the one hand, a coherent argument could be maintained that the extension of voting rights to British citizens in connection with Presidential elections and referenda could be postponed until a united Ireland appeared on the horizon, as there is not the same pressing case of natural right to vote for non-citizens in the state as presently constituted. A strong case can be made in the interests of promoting reconciliation and allowing recognition for the British dimension of the Irish Community and cultural experience for making provision, by way of an enabling provision, for the extension of the franchise. Any constitutional amendment to extend the franchise for presidential elections and referenda would be likely to be modelled, at least at this stage, on the terms of Article 16.1.2.ii inserted by the Ninth Amendment of the Constitution Act 1984, which enables British citizens to vote in Dáil i.e. that the constitutional right would be conferred on Irish citizens with provisions being made for such other persons in the state as may be prescribed by law to exercise the franchise in due course, if so provided for by law.”⁷⁴⁶

⁷⁴⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 191.

⁷⁴⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p. 141,142.

The new Ireland Forum as well as outlining the makeup of the structure of federal or confederal state set out many innovative proposals included the election of head of state.

“The functions of Head of State could be carried out by a President, the office alternating between persons representative of the Northern and Southern states.” New Ireland Forum Chapter 7.4

7.17.1 Voting right for British Citizens in Ireland

“One attempt in this regard was the bill to confer voting rights on British citizens which was introduced by Garrett Fitzgerald’s government in the mid-1980’s and subsequently held to be unconstitutional. That was followed by the Ninth Amendment of the constitution act of 1984, signed by the President on 2 August 1984. The amendment provided for a new Article 16.1.2 of the Constitution which permitted not only all citizens but in addition ‘such other persons in the State as may be determined by law’ to have the right to vote at an election for members of the Dáil Éireann. Pursuant to this provision, legislation was enacted permitting British citizens to vote in Dáil elections, a provision now contained in the Electoral Act 1992. Under the constitutional amendment, this measure is confined to Dáil elections and does not apply to referenda or presidential elections, notwithstanding the more ambitious initial proposal in the original bill, certainly, following a united Ireland, a provision preventing a million British citizens on the island of Ireland of Ireland from voting in referenda or presidential elections would be untenable.”⁷⁴⁷

7.17.2 Run for Presidency & Dáil

“There is also the question of extending entitlement to run for the office of President or member of Dáil Éireann to non-citizens, and again similar considerations might apply. The current constitutional arrangement whereby these offices are confined to citizens would be untenable in a united Ireland and arguably on democratic grounds some case could be made for an extension even in advance of that eventuality.”⁷⁴⁸

“In many respects, measures to give effect to a future bilateral treaty on unity, and to ratify it, are of a technical character. The greatest legal challenge will be posed for the Irish constitutional order, which will need

⁷⁴⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.142.

⁷⁴⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.142.

to readjust a number of concepts, particularly, that of limiting political participation to citizens. There is of course nothing stopping the Irish State from contemplating these questions well in advance of reunification, and making the necessary accommodation in a less fevered atmosphere.”⁷⁴⁹

⁷⁴⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.155.

Seanad Éireann

The Seanad was designed to ensure that all facets of our community be reflected in the House.

Deeply aware of the special relationship that has always existed between the Seanad and Northern Ireland the Working Group gave much consideration as to how this might be strengthened and deepened in a reformed Seanad.

The ties between the Seanad and Northern Ireland are very much cross community. Various Taoisigh have included among their nominees people from Northern Ireland. Arising from that the Seanad has been greatly enriched over the years by the contributions of extraordinary caliber of Senators from the North. The list including, among others, Sam Mc Aughtry, Brid Rodgers, Gordon Wilson, Maurice Hayes, John Robb, Seamus Mallon is long and impressive. The contributions of those from a Unionist background have helped broaden understanding in the Republic of their culture.

The special relationship between the Seanad and Northern Ireland is reflected in a number of developments over the years. The Working Group found it significant and informative that thousands of Trinity College and National University of Ireland graduates from Northern Ireland continue to vote in Seanad General elections for seventy plus years now. This is a politically unique cross community engagement.

Indeed the very first Chair of Seanad Éireann was Lord Glenavy, a Trinity graduate whose family roots were in Glenavy Co Antrim.

It is often forgotten that a number of the Nominating Bodies are all Island institutions. Given the range of issues such as energy, environmental protection, animal health and emergency planning which have an all-island dimension, it would be open to nominating bodies to nominate suitable candidates from Northern Ireland.

Arising from that the Working Party recommends that Northern Ireland vocational bodies be encouraged to apply for registration as nominating bodies.

Encouraged also by the spirit of the Good Friday Agreement especially in the confirmation of the Principle of consent and the commitment "... to partnership, equality and mutual respect as the basis of relationships between North and South,..” the Working Group considered the extension of voting rights to those citizens of Northern Ireland who wished to engage and participate. The constitutional status of Northern Ireland having been confirmed, the Good Friday Agreement goes on to vindicate the right of residents there to identify themselves as Irish, British, or both, and to express freely their chosen identity. Some years ago Mr Drew Nelson, Grand Secretary of the Orange Order surprised many by accepting an invitation to address Seanad Éireann it was a significant milestone in the relationship with the Unionist community. Even more significant was Mr Nelson’s statement that he saw his engagement with the Seanad as a “springboard for the future rather than as a shackle to the past”. Speaking to the media that day Mr Nelson, in words that resonate with the proposal in the Good Friday agreement to establish a Civic Forum, said “I am thankful .. that there is coming into play in mainstream civic society in the Republic a recognition of a value of the minority Protestant community..”

That statement, the historical experience, the special relationship, the positive outcome of NI graduate voting and the principle of consent articulated in the Good Friday Agreement greatly encouraged the Working Group to take an inclusive and generous approach in the matter of extending the voting franchise for Seanad elections to those normally resident in Northern Ireland who would wish to participate.

The fact that the Seanad does not have authority over taxation and finance matters ensures that this recommendation does not threaten or undermine our democracy but gives a freedom which could never be exercised or contemplated in a lower house. Allowing citizens of Northern Ireland to vote in Seanad General Elections provides for another clear distinct feature of the Seanad.⁷⁵⁰

⁷⁵⁰ Report of the working group on Seanad Reform 2015

“It is interesting that, in October 1922, the leader of the Labour party, Tom Johnson, proposed that when the Senate was being established, steps be taken to provide that organisations representing ‘the northern parts of Ireland’ would be included. He suggested, for example, the Trades Councils of Belfast or Derry”⁷⁵¹ “It might be argued that the Seanad is politically a more convenient venue for representation of this type. There certainly is a risk that an arrangement whereby the parliamentary institutions of the state are extended to Northern Ireland could be seen as cutting across the architecture of the Good Friday Agreement.”⁷⁵²

7.17.3 Representation in the current Dáil Eireann

“It was suggested in the report of the All-Party Oireachtas Committee on the Constitution that there may be constitutional difficulties in providing an unlimited right of audience to individuals who are not members of the Oireachtas”⁷⁵³

“Northern MP’s are permitted to attend meetings of the Joint Committee on the Implementation of the Good Friday Agreement. The argument in favour of some kind of alternative arrangements such as representation in the Seanad, is that Northern nationalists are not only members of the nation but citizens of the state as a matter of Irish law and therefore have a legitimate case for participation in the political life of the nation.”⁷⁵⁴

“One option which has not as yet been considered is the question of extending the speaking arrangements to also include the east-west dimension, to include an organized audience in a special committee by parliamentarians in Westminster above and beyond those in Northern

⁷⁵¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.155.

⁷⁵² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.172.

⁷⁵³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.172.

⁷⁵⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.171,172

Ireland. Even the Northern Irish representation in a committee is limited to MPs and not members of the upper house, so there is perhaps room for a more inclusive form of arrangement.”⁷⁵⁵

“On balance it is hard to conclude that a standing right of audience in a special committee of the Dáil for a class of individuals who are not members of the Dáil would be unconstitutional. Standing orders of each house at present give a standing right of audience to ministers of state who are members of the other house and, perhaps more significantly the government by executive decision has made arrangements for ministers of state, including the chief whip and the Minister for Children, to have a right of audience at cabinet meetings despite not being members of the government. Even the attorney general’s right to attend cabinet is not of constitutional origin. Unless such arrangements are also unconstitutional it is hard to see how the ‘thicker end of the wedge’ that would be represented by a right of audience for six county parliamentarians would be unconstitutional.”⁷⁵⁶

7.17.4 Unionist reaction to representation in Dáil Eireann for Northern Ireland MP’s

“The Ulster Unionist Party strongly rejected the proposal for speaking rights in the Dáil, describing it as a ‘an embryonic All-Ireland Parliament’ and said that ‘if it is pursued by Dublin we will no longer be obligated to our support for North-South institutions. The British Conservative Party was also warned against the creation of a ‘32 county Dáil in shadow form’ which would ‘undermine the principle of consent’. Such a move is very unhelpful in terms of fostering genuinely good relations with Northern Ireland.”⁷⁵⁷

⁷⁵⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.172.

⁷⁵⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.173,174

⁷⁵⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.172.

7.18 Gesture politics

“There is something of a balance to be struck between on the one hand removing the more egregious sources of unionist complaint which cannot be logically defended and on the other hand avoiding any more general kind of review of the law and constitution of the state which, at the present time, would be unlikely to engage the interest of unionists. ‘Gesture Politics’ is not necessarily a bad thing if the gesture can be shown to have achieved something.”⁷⁵⁸

The unionist attitude to change in the 26 county state has been described as follows:

“While unionists might applaud the emergence of a more pluralist society in the Republic, they do not see any necessary connection between such developments and better relationships on the island of Ireland. Certainly, they see no connection at all between such changes and the claims of Irish political unity. Unionist politicians have made and continue to make unfavourable comments about the Catholics and Gaelic ethos of the south and it is possible to examine the nature of their criticisms. However, this does not mean that they or those who they represent are prepared to discuss the conditions for the removal of these elements in the life of the southern state. To do so, as they see it, would implicate themselves in negotiating their place in a united Ireland.”⁷⁵⁹

“On the basis of such views, it might be argued that the constitutional and legal changes, such as for example the amendment of Article 44 of the Constitution, amount to little more than ‘Gesture Politics’ or a fruitless attempt to appease or mollify sections of the unionist community who do not wish to be appeased. It might be further contended that such changes have in the past achieved little or nothing in terms of changing unionist attitudes towards the state or towards the

⁷⁵⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.185, 186.

⁷⁵⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.185.

prospect of a united Ireland.”⁷⁶⁰

“Irish Nationalism may be viewed as in tension between two competing objectives. On the one hand is the desire to cherish all that is distinctively national, such as the flag, the anthem, the constitution, the Irish language, the national symbols. On the other hand is the imperative to accommodate the over one million people of a British identity on the island. Perhaps the most significant provision of the Good Friday Agreement in terms of accommodating identity is the express recognition that individuals in Northern Ireland can go on to the future seeing themselves as Irish or British or both. The provision is fundamentally incompatible with a traditional view of unification where by citizenship of the Irish State is to be thrust upon those of another tradition. However, a strong case can be made that the implications of this cultural gear shift have yet to be worked through. Much of the Constitution remains stranded in the previous, paradigm, and to that extent the original hope that the Constitution could accommodate a united Ireland without express amendment seems forlorn. Reviewing these provisions can of course be postponed sine die, until unification is imminent. However, there might be advantage in seeking to initiate such progress of review in calmer times.”⁷⁶¹

⁷⁶⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.185.

⁷⁶¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.199,200

7.18.1 The National flag

The National Flag is a tricolor of green, white, and orange.

Article 7 of the Constitution

Justice Humphreys states that:

“One approach in the unity context might be to leave over any reforms that would require to be revisited following unity, such as a new national flag.”⁷⁶²

“One strong reason from a government point of view why there might be no question of changing the flag or other such national symbols in advance of unity is that to do so would make a gift of the existing flag or other symbols to [dissident] republicanism, which would in all likelihood be happy to take possession of the vacuum created by the withdrawal of the state recognition. The current Irish National Flag has the noble republican aspiration of uniting orange and green with the white of peace, its provenance is such that the original message has not made itself entirely clear to the unionist community”⁷⁶³

Reverend Michael Cavanagh (Church of Ireland) is the chair of the Thomas F Meagher Foundation which partnered with the Government in the 1916 Rising Centenary commemorations. The Foundation promotes pride in and respect for the Irish flag and its meaning for peace between all communities on this island.

The Foundation has done much to foster an understanding of the origins of the flag as described by Thomas F Meagher, who flew a tricolour flag for the first time from 33 the Mall in Waterford on 7 March 1848.

⁷⁶² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.158.

⁷⁶³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.197.

The White in the centre signifies a lasting truce between Orange and Green and I trust that beneath its folds the hands of Irish Catholics and Irish Protestants may be clasped in generous and heroic brotherhood.

764

“An alternative might be the ‘two flags’ approach, where symbols of both communities would be adopted for various public purposes.”⁷⁶⁵

Dr Martin Mansergh has described such an approach as follows:

“We need not lessen our loyalties as we broaden our sympathies.”

⁷⁶⁴ Department of an Taoiseach

⁷⁶⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.170.

7.18.2 National Anthem

“If the anthem were to be changed it would not of itself change unionist attitudes towards Irish Unity but it would be an interesting symbolic statement about how the republic seeks to represent itself today. It might contribute to a more positive ‘mood music’ which might in turn contribute to more relaxed political atmosphere throughout the island.”

766

“A new set of national languages was adopted on an inclusive basis covering the languages of the different South African communities, and a new multilingual anthem was adopted.”⁷⁶⁷

“Fundamental change in relation to matters such as flags, language, or the overall social and political culture of the state will meet a degree of resistance that will surprise many”⁷⁶⁸

But what can be done is that the willingness to engage in relation to these aspects can be signaled in advance.⁷⁶⁹

Dr Martin Mansergh’s approach can again be cited in that:

“We need not lessen our loyalties as we broaden our sympathies.”

⁷⁶⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.196.

⁷⁶⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.197.

⁷⁶⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.181.

⁷⁶⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.181.

7.18.3 Irish language

“The constitutional priority for the Irish Language might also fall for reconsideration in the context of a new political dispensation. Apart from the question of recognising Ulster Scots as a further official language, and apart from the question of whether priority for one of the official languages over the other or others would be a sustainable proposition, the need to protect individuals in the state against discrimination on the grounds of lack of facility in Irish would also arise. In that context the question of compulsory Irish for students, lawyers and others would be a matter of consideration. In so far as language is concerned, given that Ulster-Scots has acquired a semiofficial status under the agreement, and in view of the fact that this is recognised to some extent through statutory basis from the cross-border language body, the question arises as to whether Ulster Scots should be recognised by statute in Ireland as a further official language in addition to Irish and English. On the one hand this could be done in a purely formal way without making the extensive provision for the rights of the user of that language which is provided for in the case of Irish under the Official Languages Act 2003 but it would at least provide a measure of official recognition for the language which would make clear an intention to create an inclusive state on a 26 counties basis initially, as part of making the case for an inclusive thirty-two county state.”⁷⁷⁰

Dr Martin Mansergh’s approach is appropriate

“We need not lessen our loyalties as we broaden our sympathies.”

As High Court Justice Humphreys states:

“It is therefore suggested that as with the concept of a new constitution, all that can be done is to make clear that in the context of a united Ireland, these national symbols will also be on the negotiation table for review and amendment in the context of making a fresh start in a state which recognises the parity of esteem of the Irish and British identities.”⁷⁷¹

⁷⁷⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.197.

⁷⁷¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.198.

7.19 Commonwealth

Another issue which has been put on the agenda in recent years is the question of re-joining the Commonwealth.⁷⁷²

“Eamon O’Cuiv has recently floated the concept of re-joining the commonwealth at this stage.”⁷⁷³ But Humphreys’ book recounts that:

“Costellos Government never in fact withdrew from the Commonwealth – they merely took certain steps which ... led the British and the rest of the commonwealth to conclude that Ireland was not a member, so perhaps it may be contend that the state has been in law a member all long.”⁷⁷⁴

“For some, the move would be too radical to contemplate in advance of reunification itself and ultimately, this is a matter of political judgement.”

⁷⁷² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.192.

⁷⁷³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.192.

⁷⁷⁴ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.193..

7.20 Legal changes in the United Kingdom

“A vote on the island of Ireland for unity, and a subsequent bilateral treaty to give effect to that vote, is the trigger for the process of reunification, but further key steps are required. Both governments will be required to engage in a process not just of ratification but of legislative and constitutional implementation of the treaty, before or in tandem with the treaty coming into effect.”⁷⁷⁵

“A small indicator of the scale of legislative change required for major constitutional adjustments can be gleaned from the provision of the Constitutional Reform Act 2005. This measure, which originated in what was thought initially to be a straight forward reshuffle announcement by the Prime Minister, Tony Blair, on 12 June 2003, took nearly two years further to proceed through parliament and has involved the examination of dozens of statutes to identify and adjust references. It is likely that a similar exercise will be required in the UK to identify and amend all statutory references to Ireland/Northern Ireland.”⁷⁷⁶

Brian Crowley MEP recently stated that over 8,000 EU Directives and regulations have been incorporated to UK legislation, many will require amendment or repeal as a result of Brexit. “Again, however, there is a strong case to be made for rationalising many of the statutory references to Ireland/Northern Ireland in any event. Much of the governing legislation (including many provisions of the Act of Union 1800) is largely obsolete and would benefit from significant amendment and statute law revision in any event. A proper programme of statute law revision regarding the legislation relating to Ireland and Northern Ireland on the Westminster Statute Book would to some extent lay the ground for preparation of the future Bill to give effect to the referendum decision in favour of a united Ireland, but in any event would be a desirable process to be engaged in at this stage.

⁷⁷⁵ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.137.

⁷⁷⁶ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.137.

“Such a process might remove some of the more offensive pieces of sectarian anti- Catholicism that still have the force of English law. It would be for Nationalist and Republicans in the first instance to confront the British side with it own sectarianism and to urge the sort of radical legal changes that is required and that would contribute to an atmosphere of equal respect between the two traditions.”⁷⁷⁷

⁷⁷⁷ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.137,138.

7.21 Implementing the bilateral treaty completed by the agreement

Legal changes in the United Kingdom

“Apart from the merely technical changes to a wide body of UK legislation, the cessation of Northern Ireland status as part of the United Kingdom would have major constitutional ramifications for the United Kingdom itself. For Example the name of the state would inevitably revert back to the 1707 name of ‘United Kingdom of Great Britain’.”⁷⁷⁸

7.22 Legal and Constitutional change by Westminster

“The need for legal or constitutional changes in advance of Irish Unity primarily in terms of bilateral action or action by the British government will be considered under a number of headings

Firstly: The need for full implementation of the Good Friday Agreement as it stands

Secondly : The question of legal measures which could have the effect of ensuring that other parties, particularly the British Government are required to live up to the commitments in the agreement

Thirdly: The Need for confidence building measures by the United Kingdom government.”⁷⁷⁹

7.23 Confidence building measure on the British side

“Apart from measures to promote the objectives of the agreement and fully implement it, a number of legal steps are open to the British side to promote confidence in the process and build on the gains of the agreement. These include the question of removing legal sectarianism and other legal changes. Among the issues for negotiation and discussion in this regard might include:

⁷⁷⁸ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.138.

⁷⁷⁹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.158,159.

Firstly: the repeal of inappropriate UK legislation incompatible with the letter and spirit of the agreement.

Secondly: possible consolidation of remaining UK legislation dealing with constitutional structures of Northern Ireland into a Northern Ireland Constitution Act.⁷⁸⁰

7.24 Removing legal sectarianism

“There is much that can be done by the British Government towards putting in place a legal regime which is truly faithful to the objectives of the agreement namely parity of esteem and equality of treatment for all members of the community. In particular there are a number of blatantly anti-Catholic pieces of legislation still on the Westminster statute book and it is surprising that to date the British system has not been confronted with its own inherent sectarianism.”⁷⁸¹

“The repeal of discriminatory legislation would also put down a marker that equality of treatment is of benefit to all and likewise the unionist minority would not be discriminated against in the event of a united Ireland. “While the compilation of a comprehensive list of United Kingdom legislation which is incompatible with the broad thrust of the agreement presents some question of judgement, the following elements can be noted:

“Discriminatory Acts:

Coronation Oath Act 1688- embodies oath to uphold Protestantism

The Bill of Rights 1688- ‘suppression of papists’, certain rights are ‘protestant only’

Act of Settlement 1700- crown can only be held by Protestant

Union with Scotland Act 1706- ‘papists’ and people married to ‘papists’ are excluded for the crown.”⁷⁸²

⁷⁸⁰ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.158,159.

⁷⁸¹ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.168.

⁷⁸² Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.168.

7.25 Elected Authorities (Northern Ireland) Act 1989

The act requires candidates for local elections to make a declaration, set out in the Act, which would confirm that the councillor, if elected 'will not by word or deed, express support for or approval of.... a proscribed organisations....or ...Act of terrorism (that is to say violence for political ends) connected with the affairs of Northern Ireland'. No such provision exists for members of local authorities elsewhere in the UK or Ireland.

“As for as the Northern Ireland Act 1998 is concerned, it provides for a restricted level of legislative competence for Northern Ireland institutions which could be significantly expanded in keeping with the spirit of the agreement. As long as the mechanisms to promote cross community decision-making remain in place there is sufficient protection for the two sides of the community. It may be that review of the Northern Ireland (monitoring commission etc) Act 2003 is warranted in that the compatibility of the provisions regarding the exclusion from ministerial office with the agreement is a matter of debate.”⁷⁸³

⁷⁸³ Richard Humphreys, *Countdown to Unity: Debating Irish Reunification* (Irish Academic Press, Dublin 2009) p.169,170.

An Coiste um Fhorfheidhmiú
Chomhaontú Aoine an Chéasta

Committee on the Implementation
of the Good Friday Agreement