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# **The Belfast/Good Friday Agreement and Brexit**

A briefing note

Dr Andrew McCormick

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## **Author biography**

Dr Andrew McCormick retired last year as Director General of International Relations for the Northern Ireland Executive Office. He was the Executive's lead on Brexit, including between 2017 and 2020 when there were no ministers. As a result, he regularly attended ministerial meetings, including JMC(EN) and EUXT (P). Until May 2021, he represented the Executive at the Specialised Committee on the Protocol.

Dr McCormick has had a long and distinguished career as an official in the Northern Ireland Civil Service, playing a support role in the Mayhew talks of 1992-93 and working on the implementation of the north-south institutions established by the Belfast/Good Friday Agreement in 1999.

## Introduction

Nearly six years after the referendum, the Northern Ireland aspect of Brexit is still causing controversy, and a recurrent theme is the significance of the Belfast/Good Friday Agreement of 1998. As part of their opposition to the Protocol, some unionists are saying that the 1998 Agreement is no longer acceptable to them. At the same time, some commentators (from a range of backgrounds) are saying that the growing numbers of non-aligned voters mean that some of the fundamental assumptions behind the Agreement need to be revisited.<sup>1</sup>

This note seeks to draw attention back to some fundamentals of the Agreement that are sometimes glossed over because few genuinely want to highlight the deep compromises that are at its heart. However, these fundamentals are still highly relevant today and go to the heart of the current controversy, as they highlight important issues in relation to democratic legitimacy and the interaction between the UK constitution, the 1998 Agreement as a constitutional settlement, and the UK/EU Withdrawal Agreement.

Having played a small part in the long journey of constitution and institution building in Northern Ireland, I hope that focusing on how that historic settlement was reached will help those concerned (in London, Dublin, and Brussels as well as in Northern Ireland) with finding solutions in the current context – solutions that, like the 1998 Agreement, could address apparently incompatible views of society and of history, and lead to sustainable agreement.

## Compromises on both sides

The 1998 Agreement has many dimensions, because there were three or four different issues being settled at the same time, and the negotiations coincided with the Blair government's devolution of power to Scotland and Wales. But two aspects remain central:

- **power sharing** – because so many of the parties' 'offer' to the voters is focused on their stance on the constitutional issues, division is entrenched – and the Agreement actually reinforces that entrenchment. But unless and until the operation of the devolved legislature and executive are driven by other issues, the need remains for the protection of minorities from dominance by parties who are focused on protecting the interests of one part of the community. Evolutionary steps towards options such as voluntary coalition are potentially very important, but the foundational point is that, in 1998, a very large majority of the electorate supported power sharing in the referendum. Hence, it cannot be claimed that power sharing is anti-democratic. Unionists have been reluctant operators of compromise-based government, but for now, there is no alternative;
- **north-south cooperation** – power sharing was broadly understood as essential well before 1998. The enormous compromises by both sides were on the relationship between the two parts of Ireland. The 'Irish dimension' was a major factor in the resistance to the Sunningdale Agreement in 1973-4; and the Anglo-Irish Agreement of 1985 was opposed with fury by unionists. So, for the UUP to accept markedly stronger north south institutions in 1998 was an enormous concession. But, from the point of view of Irish nationalism and the republican movement, their concessions were just as great – accepting a change in the Irish constitution that

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<sup>1</sup> See, for example, Coulter, Gilmartin, Hayward and Shirlow, 'More than two communities: those who are both, neither, other, and next', *Northern Ireland a generation after Good Friday* (Manchester: Manchester University Press, 2021).

explicitly accepted the status of Northern Ireland; and (in fact, if not in words) acquiescing with partition. Both sides accepted (again in fact, if hardly ever in words) that their concession was worthwhile for the gain that they secured – for unionists, the removal of any possible legitimate basis for opposing the existence of Northern Ireland as part of the UK; and for Irish nationalism and republicanism, explicit acknowledgement of the Irish identity in Northern Ireland, and its expression in north south institutions.

Before 1998, the question was (and still is for some) whether Northern Ireland is a legitimate entity. In 1918, the last occasion when there was a ‘whole island vote’ a clear majority across the island voted for an independent united Ireland – and hence there was a clear ground to challenge the view that Northern Ireland should be the so called ‘unit of determination’. When my grandparents were growing up, the thought would not have occurred to them that there would be an international frontier separating six counties of Ulster from the rest. Unionists saw partition as justified and necessary, and many, including me, were brought up to think of it as permanent and normal. However, the Irish Constitution of 1937 asserted that the national territory was the whole island – while, by the 1980s, successive Irish governments had adopted the principle that the consent of a majority in Northern Ireland was needed for reunification, that was contrary to the formal constitutional position. Also, the republican movement and others asserted that the partition of Ireland was illegitimate, and a justification for the armed struggle.

Hence, it is highly significant that the 1998 Agreement was supported in simultaneous referenda on 22 May 1998 – providing, in a sense, an island-wide vote. The large ‘unit of self-determination’ agreed that the smaller ‘unit of self-determination’ would have the prerogative of deciding whether or not Northern Ireland would remain as part of the UK. Unionists do not appreciate the enormity of that concession – but, on the other hand, Irish nationalists and republicans have a limited appreciation of how big a step it was for unionists to accept the ‘Irish dimension’, as from their point of view it seems so obvious and natural that many in Northern Ireland identify with their heritage in the island of Ireland.

The ‘exchange’ at the heart of the 1998 Agreement was ‘constitution for institutions’. By 1998, a ‘talking shop’ ‘Council of Ireland’ as envisaged in 1920 and 1973 was not enough for constitutional Irish nationalists – they insisted on institutions with ‘executive authority’. Unionist agreement to the creation of the north-south institutions, with executive authority and decision-making powers in relation to aspects of government across the whole island, was, explicitly and clearly, the condition for agreement to the amendment of the Irish constitution. However, it was agreed that the north-south institutions would operate ‘...*in accordance with the rules for democratic authority and accountability...in the Northern Ireland Assembly and the Oireachtas respectively.*’ – this was a step back from the aspiration that they would be free-standing (and hence have a much stronger symbolism as the embryo of all-island administration).

### **Ongoing implications of the Belfast/Good Friday Agreement**

Several key points follow from this. Northern Ireland is part of the UK – but on the basis of the 1998 Agreement. Indeed, the **only** definition of the constitutional status of Northern Ireland which has been endorsed by the electorates north and south is that set out in the 1998 Agreement. Unionists cannot say that Northern Ireland is ‘as British as Finchley’. But, also, nationalists and republicans can no longer say that partition is illegitimate, because the two

referenda approved the Agreement. Their commitment was and is to express their opposition to partition by constitutional means. It is understandable, if regrettable, that the republican movement avoids any explicit acknowledgment of the place of Northern Ireland in the UK, but unionists should observe that their behaviour effectively accepts it. That is not to give credit for the end of the ‘armed struggle’. But stability and confidence are more secure with the Agreement than without it.

Secondly, the land border is a valid reality – it does not **appear** ‘hard’, because: the improved security situation since the 1990s reduced its significance in relation to law enforcement; and because the EU Single market and Customs Union removed the need for controls and checks on the movement of most categories of goods. But for the services economy (which is much larger than the ‘goods’ economy), for legal systems, for taxation, for public service delivery, etc., etc. – the border is very real and becoming harder. Brexit has made it more significant on many of those dimensions. So Irish nationalists and republicans cannot claim there is no border. But unionists also need to recognise that there is **only** a working consensus on the border on the basis of the 1998 Agreement.

Thirdly, the 1998 Agreement was negotiated primarily between the UUP, the SDLP, an Irish government led by Fianna Fail, and a Labour government in the UK. The republican movement was and is less interested in the north-south institutions, which is not surprising as their creation has the effect of stabilising a settlement that acquiesces with partition. So, while Sinn Féin emphasises its support for the 1998 Agreement, it has not sought to expand or develop the scope or influence of the north-south institutions, but focused on the idea of pursuing reunification by peaceful means (which is of course legitimate under the 1998 Agreement).

It also follows that walking away from the 1998 Agreement would have consequences. Unionist rejection of the core of the Agreement (power sharing and the north-south institutions) would send a message to Irish nationalists and republicans (and indeed to the wider international audience) that they need no longer feel any sense of obligation to acknowledge and accept Northern Ireland as part of the UK. While that obligation is rarely acknowledged in word, it is continually applied in effect, by participation in the institutions created by the 1998 Agreement. So, departure from the Agreement would probably lead to a new impetus for other ways of securing recognition of the Irish identity of the many people in Northern Ireland for whom that is inherent and fundamental. The 1998 Agreement made the Assembly and the north-south institutions interdependent: under direct rule, the north-south institutions cannot operate as intended, because, by definition, they reflect an ethos that it is for the people of the island of Ireland to determine how they are governed, so alternative authorities from the UK government can do no more than keep them on life-support.

Brexit disturbed the balance achieved by the 1998 Agreement, which barely mentions EU membership, because the possibility of the UK withdrawing was not contemplated. It is wrong to say that the 1998 Agreement in itself guaranteed that the border would be invisible – but at the time, there was no perception of a risk to the then status quo, or to the increasingly invisible border that was taken for granted between 1998 and 2016.

### **New challenges: issues of constitutional legitimacy and consent**

There are new and very significant challenges from all points of view now. On the one hand, unionists cannot legitimately claim that the consequences of Brexit have to be addressed only on their terms, because the whole basis of the 1998 Agreement was recognition of the

legitimacy and relevance of different viewpoints on the issues of identity in Northern Ireland. The 1800 Act of Union has in effect been overtaken many times – for example, by the *Government of Ireland Act 1920*, the *Ireland Act 1949*, the *Northern Ireland Constitution Act 1973* and the *Northern Ireland Act 1998*.

And the concept of consent has an interesting history. No one could conceivably assert that the Act of Union itself had the consent of the people of Ireland in 1800. While the exclusion of the six counties from the home rule parliament proposed in 1912 was a response to the very clear opposition of Irish unionists, the ideas of county-by-county consent, or of plebiscites, to determine the boundary of the area to be excluded, were rejected, with the six-county solution emerging as an imposed compromise. The conditionality of the union became explicit in the 1949 Ireland Act, and was reinforced in the 1973 Act, but in both cases on the basis of simple majorities (in 1949, in the Parliament of Northern Ireland, and from 1973 onwards, by popular vote).

Specifically, the Withdrawal Agreement of October 2019 and its Protocol on Ireland/Northern Ireland make provisions for consent by the Northern Ireland Assembly that are novel and unique. As international relations have always been an ‘*excepted matter*’ in relation to the Northern Ireland Parliament and Assembly (under Section 4 of the Government of Ireland Act (1920), Schedule 2 of the Northern Ireland Constitution Act (1973) and Schedule 2 of the Northern Ireland Act (1998)), there is no basis for the argument that cross-community voting should be required for the application of the consent provisions in the Protocol – indeed the fact that that Withdrawal Agreement envisages a different effect from cross-community consent makes it explicitly clear that the UKG and the EU considered the implications of the *absence* of cross-community consent, and made a clear agreement that the Protocol would continue to apply even if only a simple majority in the Assembly approved. There is no possible foundation for any argument that cross-community consent is required for constitutional change – either on the functioning of the union itself, or on Brexit, or the Protocol.

Such evidence as there is would strongly suggest that the Protocol does have the consent of a simple majority both of the electorate in Northern Ireland and the Assembly: in the general election of December 2019, there were 444,227 votes for the parties<sup>2</sup> which, in the Assembly debate of 30 December 2020, voted for the implementation of the Protocol, and against the use of Article 16, and 337,874 votes of the parties<sup>3</sup> that oppose the Protocol (a 56 per cent/ 42 per cent split). So, it is reasonable to infer that, had consent been sought in October 2019, there is a very strong likelihood that the Assembly would have approved the Protocol.

### **New challenges: issues of confidence and trust**

On the other hand, Irish nationalists and republicans need to recognise that stability and security for all communities depend on confidence. Even if it can be argued that unionists should have seen more value in the 1998 Agreement, realpolitik should acknowledge that the unionist community has limited (and for some at least, diminishing) confidence in the settlement, and that the Protocol represents a very real challenge to their confidence. It cannot be denied that Brexit and the Protocol created and create very challenging sets of issues, and neither was explained properly.

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<sup>2</sup> Alliance, Sinn Féin, SDLP, Green and People before Profit.

<sup>3</sup> DUP, UUP and UKIP.

However, responsibility for the Withdrawal Agreement of 2019 and the Protocol lies fairly and squarely with the UK government. It is hard to imagine anything (other than Brexit itself) with greater democratic legitimacy under the UK constitution than something that was the very centre of the manifesto on which a government secured a clear majority in a general election. There is little credibility in any argument that the UK government either did not anticipate the implications of what it had agreed, or was constrained and unable to choose any other option. The facts and choices had been spelt out clearly over the whole period from 2016 onwards and the detail of the provisions (notably most of the applicable EU law contained in Annex 2 to the Protocol) were known at latest in autumn 2018. And the time constraint to ‘get Brexit done’ was entirely self-imposed. Indeed, as some have pointed out, the UK government could not explain the Protocol without having to explain properly the wider consequences of Brexit.

One of the most difficult aspects of the Protocol is the treatment of agri-food products. However, as was clearly explained in the UKG paper of 2 October 2019, the unique and long-established status of the island of Ireland in relation to animal and plant health was very significant, and that remains the case. Checks and controls designed to prevent diseases entering Northern Ireland from Great Britain existed long before Brexit – so it cannot be argued that such controls are a fundamental breach of constitutional principle. The UK government’s commitment to have the freedom to diverge from EU standards creates a new risk, and the Protocol addressed that by envisaging the application of the full panoply of relevant EU regulation, which are very onerous. The question is not whether some such controls are necessary in principle, but the practical question of how the degree of risk arising from UK divergence can be managed proportionately within a framework that addresses the actual consequence of this aspect of Brexit for the EU.

An honest and responsible approach to this and the other real difficulties arising from the Protocol would have been for the UK government to have made clear in October 2019 that:

1. their policy imperative was to leave the EU Single Market and Customs Union;
2. as a consequence, checks and controls on goods, especially the health-based requirements in relation to agri-food products were needed somewhere;
3. there was no practicable method of applying such controls at the land border in Ireland, and the commitment against a ‘hard border’ was necessary – as all parties had acknowledged from 2016 onwards, including the then First Minister and deputy First Minister in their letter of August 2016;
4. hence it was necessary to manage the movement of goods at the ports and airports of Northern Ireland;
5. there was a need for detailed work by the UK and the EU to fulfil the commitments in the Protocol to minimise the adverse consequences of this compromise.

The backdrop for this clearly should have been a joint commitment of the UK and Irish governments as co-guarantors of the 1998 Agreement to support such an outcome (recognising that the views of the Irish government were represented in the withdrawal negotiations by the European Commission). It is hard to see any basis for tolerating the unwillingness of the UK government ministers to invest fully in a fact-based, problem-solving approach to a highly complex and sensitive task. This exacerbated the issues of confidence that arise from Brexit

when the clear responsibility of London and Dublin was (and is) to build confidence. But that requires honesty.

## **Conclusion**

Much depends on what the UK government does next. Precedents where a UK government has faced down unionist opposition (such as over the Anglo-Irish Agreement of 1985) are no more inspiring than the occasions when a UK government allowed a unionist minority view to prevail (notably the opposition to power sharing and an 'Irish dimension' in 1974). Surely the most positive precedent is 1998, where the UK government (alongside the Irish government and with US and EU support) facilitated a process where no side had a veto, and where an agreed outcome (however imperfect) was sought – and secured.

In summary, the 1998 Agreement depended on radical compromises. The change of context as a result of Brexit required – and still requires – a determined engagement based on recognition that no party or grouping has an absolute right of decision on the way ahead. For unionists to conclude that the Protocol is a reason to reject the 1998 Agreement is potentially much more harmful to their future than to the future of Irish nationalists and republicans. In nearly six years of work, no credible solution that is better than the Protocol has been identified and hence its collapse would create uncertainty and instability – which cannot be in the interests of those who want Northern Ireland to succeed.