

THE CONSTITUTIONAL STATUS OF NORTHERN IRELAND

CONSENT, ACQUIESCENCE, SUBJUGATION, INDIFFERENCE

Andrew McCormick

THE
CONSTITUTION
SOCIETY

First published in Great Britain 2024

The Constitution Society

Top Floor, 61 Petty France

London

SW1H 9EU

www.consoc.org.uk

© The Constitution Society

ISBN: 978-1-913497-18-7

All rights reserved. Without limiting the rights under copyright reserved above, no part of this publication may be reproduced, stored or introduced into a retrieval system, or transmitted, in any form or by any means (electronic, mechanical, photocopying, recording or otherwise), without prior written permission of both the copyright owner and the publisher of this book.



**THE CONSTITUTIONAL STATUS OF
NORTHERN IRELAND**

CONSENT, ACQUIESCENCE, SUBJUGATION, INDIFFERENCE

Andrew McCormick

THE

CONSTITUTION

SOCIETY

Andrew McCormick

Dr Andrew McCormick retired from the Northern Ireland Civil Service in August 2021 after almost 41 years' service, of which the last 19 were at Permanent Secretary level. Dr McCormick's final role before retirement was as the lead official on Brexit for the devolved Northern Ireland Executive. He was awarded a CB in the Queen's Birthday Honours List in 2021.

As Director General for International Relations, The Executive Office, from 2018 to 2021, he was responsible for international relations, EU relations, and the North South Ministerial Council. He was the lead official for the NI Executive on all aspects of Brexit. He represented the Executive at JMC(EN) and other Ministerial Brexit meetings in the three-year period when there were no Ministers in post in Northern Ireland. In 2020 and 2021, he represented the Executive at the Ireland/Northern Ireland Specialised Committee on the Withdrawal Agreement.

The Constitution Society

The Constitution Society is an independent educational foundation. It works to promote public understanding of the UK constitution and to encourage informed debate between legislators, academics and the public about proposals for constitutional change. The Society is a registered charity and entirely independent, with no connection to any political party. We rely for our funding on individual donations and grants from educational trusts and foundations.

You can learn more about the work of the Constitution Society at www.consoc.org.uk.

Contents

Introduction	6
Summary	7
The 1998 Agreement and its Implications Post-Brexit	10
Nationhood, Sovereignty, Self-Determination and Consent	12
Nationhood, Sovereignty, Self-Determination and Consent in the United Kingdom and Ireland	15
The Significance of Consent in the Present Context: (a) Post Brexit Issues	20
The Significance of Consent in the Present Context: (b) The Constitutional Question	22
The Constitutional Status of Northern Ireland	26
Unionist Concerns about Consent	28
Is there Subjugation of the Unionist Identity?	31
The Significance of Neutrality or Indifference on the Constitutional Question	32
Possible Future Constitutional Change: Acquiescence or Resistance	33
Questions, Thoughts and Analysis	35
Conclusion – Agreement based on Compromise is Needed	38

Introduction

A key theme in the debate about the governance of Northern Ireland is the interpretation of the concept of consent, which lies at the heart of the 1998 Belfast/Good Friday Agreement. Consent is fundamental to any stable form of government, and what was secured in 1998 was a unique accommodation of diverse views that had appeared to be incompatible. Across the world, there are a multitude of examples of actions taken by governments in divided societies which do not have the consent of all groupings. In such societies it often appears impossible to secure a consensus over issues or actions.

I remember thinking that when John Hume began to talk in the 1990s of “a chance for peace” that he could only mean one thing: that there were possible circumstances or conditions which, if met, would lead to the Irish republican movement acquiescing with the partition of Ireland. That might be jarring for some, but what else could have led to peace? – certainly not the imposition of a united Ireland which would then (as in 1912, when unionists opposed Home Rule for the whole of Ireland) have led to violent unionist reaction.

Since that point, the concept of consent, though often little understood, has become central to the establishment of lasting peace. This paper seeks to step back from the fraught present context and look at consent and some related concepts in a wider perspective.

Throughout this paper, I propose to use “**consent**” to mean positive and willing support for a condition or a proposition; “**acquiescence**” for reluctant acceptance; and “**indifference**” in the natural sense of passivity, with no implication of support or opposition. Of course, it is possible to consent to something while preferring (and hence actively supporting) a different position; and it is also necessary to refer to “opposition” in some places, as a natural antonym for consent.

Summary

From that starting point, and applying lessons from the wider use of the concept of consent to the specific context of Northern Ireland, the detailed discussion below sets out how we might come to understand the following:

- **Continuous consent** is a defining feature of governance in any stable democracy. In nation-states, there is an acceptance of the legitimacy of the executive and legislative actions supported by a majority in the Parliament or other legislature. This is because there is sufficient underpinning of the nation-state by a **desire to live a common life**;
- It is less clear how there can be stable and effective governance in a society where some of these conditions are not present, notably if there is no common shared identity and there are disputes about the rights of majorities and minorities. An alternative is if a compromise agreement can be developed based on **sufficient consent from a majority** in society and their elected representatives **and sufficient acquiescence** from those in the minority.
- The Belfast/Good Friday Agreement was that kind of agreed accommodation, in that it achieved a balance between two points of view. The Agreement ensured a respect for the majority view that Northern Ireland should remain part of the United Kingdom, while giving unique and unprecedented constitutional and institutional recognition of the Irish identity held by a substantial minority in Northern Ireland. As such the Agreement secured wide support in 1998, though there was significant unionist opposition, which only abated in the progress made by 2007 on key issues such as arms and policing, and by the modifications to the detailed terms of the Agreement.
- In relation to the constitutional status of Northern Ireland, the 1998 Agreement adopted a particular definition of consent based on a simple majority of the population of Northern Ireland (derived from the approach taken from 1921 onwards). **It is wrong to say that cross community consent is required for constitutional change**;
- *De facto*, simultaneous continuous consent by both of the main communities in Northern Ireland was and is necessary for the operation of the Executive. But the 1998 Agreement does not make provision for any party to prevent the institutions from functioning. Indeed, part of the new commitment made in 2007 was that there should be no return to Direct Rule. This amounts to an **implicit commitment to keep the institutions operating**.

- Throughout the period of operation of the Executive and the Assembly, there were occasions when “**simultaneous** continuous consent” broke down. Examples of this situation are Sinn Fein’s refusal to implement UK Government decisions on welfare reform in 2015 and DUP concerns over the McGuigan murder, also in 2015. The breakdowns in 2017 and 2022 are more extreme examples where the foundational assumptions agreed in 1998 were insufficient to keep the institutions functioning.
- Looking at the situation now, **there is no foundation for the claim that the Protocol/Windsor Framework breaches the principle of consent in the 1998 Agreement** (indeed Article 1(3) of the Protocol/Windsor Framework reaffirms Northern Ireland’s constitutional status and the related principle of consent). This is because the specific and defined application of consent has been honoured because there has been no change in Northern Ireland’s status as subject to the sovereignty of the Crown in Parliament qualified by the unique compromises agreed in 1998.¹
- Nonetheless, despite this, the requirement for **simultaneous continuous consent from both communities is real**. Finding a way ahead requires a return to a place where minorities in Northern Ireland are prepared to acquiesce to something they do not like. Just as realpolitik was key to the acquiescence of republicans with partition, **the hope has to be that realpolitik shows that unionists can accept what has been determined by the UK and the EU in the Windsor Framework**.

The material below is structured as follows:

- Comment on the fundamentals of the 1998 Agreement and how it is now perceived post-Brexit;
- Discussion of the concept of consent in the wider historical and international context of nationhood and self-determination, first in nation-states and secondly in relation to majority and minority rights;
- Application of these general concepts to the evolution of the constitutional issue in Ireland and Northern Ireland;
- Consideration of the current significance of consent first in relation to the post-Brexit trading arrangements and secondly on the constitutional question;

¹ Including especially: power sharing; continuously operating North South institutions; and the fact that the principle of consent means that the Union is contingent not absolute.

- Building on these sections, the central part of the paper considers the constitutional status of Northern Ireland as agreed in 1998, and what that means for the areas that are in dispute at present;
- This is followed by short sections focusing on unionist concerns, on the question of “subjugation” and the significance of the views of those who are **not** focused on the constitutional issue;
- This leads to comment on the implications of possible constitutional change, and of the difficult questions that arise from the detailed analysis in the central sections of the paper;
- The concluding thoughts point forward to the need for recognition of what can be a fair and balanced compromise, based on the principles agreed in 1998.

Thus, the detailed development of this analysis as set out below addresses the fact that our post-Brexit reality gives rise to new and complex questions. That said, what is needed in the present context is not new. We need leadership that can commit to and secure a shared basis for co-existence, and a process that respects and honours the diverse views within Northern Ireland society.

The 1998 Agreement and its Implications Post-Brexit

To begin with, then, we should consider some points about the constitutional accommodation that was reached in the Belfast/Good Friday Agreement.

The Agreement did involve the acquiescence of Irish nationalists and republicans with partition and the continuation of Northern Ireland as part of the United Kingdom, but on unique and specific terms. Both the constitutional legislation of the United Kingdom and the Irish Constitution were amended to reflect a delicate and profound compromise. The status of Northern Ireland as part of the United Kingdom was affirmed as part of a complex set of governance arrangements that sought to turn the concept of parity of esteem into a workable basis for administration. Nationalists and republicans supported the Agreement, though at least some who speak from that perspective would say that this did not amount to consent to partition, or the continuation of the Union.

Part of the point of the 1998 Agreement was that neither “side” won or lost, but that it was an accommodation between worldviews and identities that had seemed irreconcilable. The phrase “loser’s consent” should not be relevant in that context.

What was and is very striking about the Agreement is that nationalist/republican voters in both parts of Ireland did not just acquiesce in, but strongly supported, the referenda of May 1998. The Irish Constitution was thus amended to include the principle of consent, and nationalists and republicans swallowed their objections to participation in the structures of government within a territorial unit based on partition. In that sense, the Agreement included an indisputable gain for unionists in the formal recognition of the Union of Northern Ireland and Great Britain on the part of Irish nationalists and republicans, and it put that issue beyond doubt in the international context. Nevertheless, the Unionist community was (and remains) deeply divided on the Agreement.

Many unionists in 1998 were concerned at the terms of the Agreement, feeling that the concessions given to secure republican acquiescence were too large. The issues around prisoner releases and decommissioning were central at that time, but these only have relevance today as past concessions that are remembered with resentment, not pieces on today’s chessboard. However, it was apparent then, and is clearer now, that many unionists feel that they lost in 1998.

Beyond the 1998 Agreement, this speaks to broader majority/minority dynamics and to the ideas, traditions, and narratives which these dynamics impose and reflect. The enduring issues that affect unionist attitudes to political developments show a tendency to see the Union in absolute terms, and that unionist interests must then be acknowledged and protected on a basis that they themselves determine.

Tension between the views of different groups in a diverse democracy is not unique to Northern Ireland, and it is important that there is thoughtful consideration of how to move forward here. Preventing our advance to this shared future, at present many unionists interpret the concept of consent as if cross-community support were required for an issue of international relations. That understanding is then used to justify undermining the basis of governance in Northern Ireland. This is highly problematic and beyond what was envisaged within the 1998 Agreement.

There are difficult issues at stake here, but ones which require delineation: in essence the relationship between the arrangements for regulating trade and more fundamental concepts of the integrity (or otherwise) of a state that were not foreseen at the time of the design of Northern Ireland in its original form, nor in any of the agreements from 1998 onwards that secured a legitimate basis for government.

The international nature of the post-Brexit arrangements mean that it is not possible to focus only on the question of consent within Northern Ireland when the formal agreement of both the UK Parliament and the EU (Council and Parliament) was required for any deal to be made. The concept of consent as defined in relation to the constitutional status of Northern Ireland should not and cannot mean a prerogative for a minority to dictate a basis for governance, still less to negate hard-won international agreements. Realpolitik requires recognition of what can and cannot be changed. Additionally, reaffirming a basis for shared and inclusive government within Northern Ireland, complemented by strong relationships North South and East West has more chance of serving the interests of all of society including, specifically, the best interests of unionists.

Hence now, as in 1912, 1921, 1973/74 and 1985 as well as in 1998, the fundamental issue is how to address the issues that arise in a divided society, and find an acceptable balance between the respective interests of “majorities” and “minorities” whoever those may be and however they may evolve. And, as always, neither the UK nor the Irish Government are or can be without direct interest in the outcome.

Nationhood, Sovereignty, Self-Determination and Consent

The issues that are central to the problems of governance in Northern Ireland relate to sovereignty, self-determination, and what makes (and unmakes) a sustainable nation or union of nations. Sovereignty, in Rochau's *Foundations of Realpolitik*, is determined by strength, "not a natural right (for "the people" or the king), but a reflection of power".² Today, we tend to idolise peaceful, democratic processes that base nationality and related concepts on the will of the electorate. In reality that ranges from consent, through acquiescence, to indifference and is increasingly complex in multi-cultural societies. However, power (economic as well as military) cannot be ignored in the present day and remains central to interpreting the past. In a whole host of contexts, acquiescence with a position that would naturally be rejected is the corollary of a people group recognising the realpolitik that opposition is pointless, because the stronger party has the power and the will to impose its view. This was, perhaps, the norm in most examples of imperialism over many centuries, including many parts of the British Empire in Victorian times, and in the nations of eastern Europe during the Soviet era.

Ernest Renan, in his celebrated Sorbonne lecture of 1882 "*Qu'est ce qu'une Nation*", demonstrated that consent is the fundamental defining characteristic of a nation. His words have fascinating relevance not only to the current issues in Northern Ireland, but to other contemporary conflicts:

"A nation is a great solidarity reiterated in the present by a tangible fact: consent, the clearly expressed desire to continue a common life. A nation's existence is (please excuse the metaphor) a daily plebiscite, just as an individual's existence is a perpetual affirmation of life. ... In [this] scheme of ideas ... a nation has no more right than a king to say to a province: "You belong to me, I am taking you." For us, a province is its inhabitants and, if anyone in this affair has the right to be consulted, it is the inhabitant. A nation never has a true interest in annexing or holding territory that does not wish to be annexed or held." (Emphasis added.)

Drawing on Renan's analysis, Hannah Arendt points out that the nation-state is "*based upon a homogenous population's active consent to its government (le plébiscite de tous les jours)*".³ She goes on to discuss how European imperialism involved territorial expansion with no regard whatsoever for the consent (or otherwise) of conquered peoples.

In practice, generally speaking, stable governance depends on a *sufficient* degree of *acquiescence* with the authority and actions of the government. What is in practice "sufficient" is also dependent on the willingness or otherwise of the State to enforce its

² Published in 1853 and summarised and explained in: John Bew, *Realpolitik* (Oxford, 2016), p.32.

³ In Part 2 of: Hannah Arendt, *The Origins of Totalitarianism: Imperialism* (London, 2017).

rule by whatever means may be necessary. This can be illustrated by examples ranging from brief political crises (such as the Poll Tax issue in England and Wales in 1990, and the Irish Government's withdrawal of legally-imposed water charges in the face of public opposition), to momentous events (such as the consequences of the taxation of the American Colonies in the 1770s): in these, and many other examples, the action of a government did not command sufficient consent to be sustainable. In the Poll Tax case, there was a brief upheaval in the UK, where, unusually, a government pursued a policy that was rejected by the populace. In America in the 1770s, the rejected policy was a factor in breaking the fundamental consent of the people of the 13 colonies to be identified with Great Britain. However, there are many counter-instances (for example in Cold War Eastern Europe) where ruling powers have been prepared to take extreme measures to subjugate the absence of sufficient public support.

But issues of nationality and governance are much more complicated in a context where territory is shared by groups who feel very differently about the state in which they live, and do not all consent to the same definition of the state. The issues of minority rights and the dangers of the tyranny of the majority have been major themes in the theory and practice of constitution building from ancient times through the foundations of the US constitution, to many more recent examples.

John Stuart Mill wrote in 1861 that "*Free institutions are next to impossible in a country made of different nationalities.*"⁴ In some cases, the problem arises where, contrary to Renan's ideal, a state claims control of territory where the local people do not give consent. The apparent triumph in 1918 of the principle of self-determination has been hollow in many cases and contexts, though the imperialist model of territorial expansion without any regard for the consent of conquered peoples is now obviously much less prevalent than in the nineteenth century. Following the Paris Peace Conference of 1919-20 in some cases self-determination was pursued by using plebiscites to finalise the borders where these were in dispute.⁵ In other cases, it was impossible to create new states that fulfilled Renan's ideal description, or to provide for universal self-determination, and hence the Great Powers saw a need to act to protect the interests of the many minority groups within the new boundaries created following the collapse of the Russian and Austro-Hungarian Empires. Hence, they imposed Minority Treaties on many of the new states created in Eastern Europe as part of the post-war settlement.⁶ The application of these ideas was selective, and (as Margaret McMillan records), Queen Marie of Romania protested to President Woodrow Wilson that there

4 John Stuart Mill, *Considerations on Representative Government* (1861), Chapter XVI.

5 Schleswig (Germany/Denmark); Upper Silesia (Germany/Poland); Carinthia (Austria/Yugoslavia) and Sopron (Austria/Hungary).

6 This term is used to refer to several groups of agreements signed between 1919 and 1924, related to the conditions for membership of the League of Nations. These include: articles in the "Little Treaty of Versailles" and in the Treaties of St Germain-en-Laye, Paris, Sevres, Trianon, Neuilly-sur-Seine and Lausanne, relating to Poland, Austria, Czechoslovakia, Yugoslavia, Romania, Hungary, Bulgaria and Turkey; unilateral declarations by Albania, Latvia, Lithuania, Bulgaria and Greece; and the German-Polish Accord on East Silesia.

were no similar protections “*for the blacks in the United States or the Irish in Britain.*”⁷ Arendt concludes, citing quotations from Aristide Briand and Austen Chamberlain, that “*The representatives of the great nations knew only too well that minorities within nation states must sooner or later be either assimilated or liquidated.*” Unsurprisingly, the Minority Treaties proved ineffective, and after World War II, many minorities were displaced ruthlessly, and more nation states without significant minorities emerged, though self-determination was rarely fully respected.

⁷ Margaret McMillan, *Peacemakers: The Paris Peace Conference of 1919 and Its Attempt to End War* (London, 2001), p.497.

Nationhood, Sovereignty, Self-Determination and Consent in the United Kingdom and Ireland

Placing the constitutional history of Northern Ireland in the context of wider issues of self-determination and consent helps to explain why the present context is so challenging, but also why any way forward has to be based on genuine respect for the views of the distinct groups within Northern Ireland society.

In 1861, Mill wrote optimistically about the possibility of the Irish becoming as content to be part of the United Kingdom as Bretons and Alsatians are content to be French, but he also recognised that “...until of late years, they had been so atrociously governed that all their best feelings combined with their bad ones in rousing bitter resentment against the Saxon rule.”⁸ Mill’s analysis of the different possible forms of government through which different nationalities can co-exist can be read as showing how great a challenge the Belfast/Good Friday Agreement faced (and faces) in seeking a stable and enduring form of government.

Neither Northern Ireland, nor, arguably, the United Kingdom, meet Renan’s ideal definition of a nation. Some like to think of the United Kingdom as a nation state, but the elements of identity are manifested differently in the four parts of the Union: Micheal Keating has helpfully expounded the aspects of politics and government in light of those differences, drawing careful attention to the ways in which the United Kingdom differs from nation states through not having full unity of “historical meanings and destiny...” or of “shared meanings and values” as well as being by definition a union of more than one people group.⁹ He also distinguishes the ways that the UK differs from a federation, in that it has fundamentally an English constitution, and *sui generis* unions with Scotland (1707) and Ireland (1800) which are perceived in very different ways by key groups across the United Kingdom. Differences of culture and religion, and, at least for some, of nationality remained.

Hence, it is possible to look at the concepts of support, consent and acquiescence in the unusual context of Northern Ireland in relation to:

- first, the United Kingdom, which is not a homogenous nation state – as Keating demonstrates, it has some features of a nation, but also diverse perceptions of identity. Even leaving aside the issues relating to Scotland and Wales, Northern Irish unionists may feel that they are clearly expressing a “*desire to continue a common life*” with the rest of the UK, but it is hard to see this being reciprocated by more than a small minority in Great Britain; and

⁸ Mill, *Considerations on Representative Government*, Chapter XVI.

⁹ Michael Keating, *State and Nation in the United Kingdom: The Fractured Union* (Oxford, 2021).

- second, Ireland, which if “united” would not be a homogenous nation-state, as it would contain at least two communities with entirely different historical narratives.

In particular, Keating highlights the “confusingly different” ways in which the devolution settlements began in 1998 to address the issue of consent. The issues arising from Brexit exposed the limitations of the Sewel Convention: the actions of the UK Government showed that the Convention¹⁰ (even after it had been placed on a statutory footing in the Scotland Act (2016) and the Wales Act (2017)) had serious limits as “*a means of safeguarding the devolved legislatures against Westminster encroachment*”, to quote one of the interpretations of Sewel cited by Keating.¹¹

Returning specifically to the issues affecting Northern Ireland, it is notable that, in an important sense, the Troubles were at least partly about self-determination, or more specifically, the fact that the “unit of self-determination” was disputed. The IRA rejected the alleged legitimacy of the “six-county” unit, and unionists rejected the all-Ireland alternative.

Even at a constitutional (non-violent) level this dispute was unusual: Will Kymlicka points out that “...*disagreement [between unionists and Irish republicans] has led to political paralysis, and even to violence, not because of a disagreement on the principles of liberal democracy, but because of disagreement on the unit of liberal democracy.*”¹² Kymlicka goes on to argue that this dispute is unusual because in most cases, Western democracies have secured sufficient consensus about the issues of identity and consent to achieve stability. However, outside of this “Western” conception, and excluding the tension in Spain in relation to Catalonia, in South East Europe there are still a number of profoundly challenging examples where this point is far from resolved (Bosnia and Herzegovina, and Kosovo in particular). Such examples demonstrate that unit of self-determination issues are not unique to Northern Ireland.

So, looking at the constitutional history of Ireland, it can be said that:

- The Williamite settlement after 1690, and the Act of Union of 1800, were imposed without any regard for a concept approaching consent (not an unusual feature of the history of those times). As Arendt specifically points out, “*British empire builders, putting their trust in conquest as a permanent method of rule, were never able to incorporate ... the Irish into ... either the British Empire or the British Commonwealth*”;

10 That is the constitutional convention that the UK Parliament would not normally legislate on devolved matters without the consent of the relevant devolved legislature.

11 Keating, *State and Nation*, p.65.

12 Will Kymlicka, “Nationhood, Multiculturalism and the Ethics of Membership”, in “*Majorities and Minorities and the Future of Nationhood*”, Orgad & Koopmans (eds), (Cambridge, 2023).

- Only gradually during the nineteenth century did the UK State accept that British rule in Ireland did not represent a sustainable constitutional model, and that it would have to have regard for the absence of acquiescence (still less consent) from a large majority of the people of Ireland. Some opposed British rule in any form, though, up to the early part of the twentieth century, the focus of Irish opinion for most was to seek Home Rule rather than full separation. There was a spectrum from “consent” through “acquiescence” to some degree of opposition, which was expressed politically throughout the period, and from time to time by violent means. This culminated in the 1916 Rising and the War of Independence. At that time, the UK proved unwilling or unable to suppress violently either Irish nationalism or Ulster unionism, in contrast to previous centuries when its sovereignty was secured and defended militarily;
- In 1912, many unionists (including my grandfather) placed their own perception of their rights above the will of the sovereign UK Parliament. They refused to consent to the proposals for Home Rule for Ireland as a whole but did not want either partition or devolution. The former became an inevitability, as the State did not have the strength of will to impose a unitary Home Rule settlement. Resolving the tension between “Home Rule”, “self-determination” and the need to address unionists’ determined resistance to an all-island Parliament required compromise.
- Once the principle of Home Rule prevailed, it was quickly followed by a recognition by most (if not all) political leaders in Great Britain that all parts of Ireland had clear differences from its neighbour. The insistence of the UK Government on the creation of a separate Parliament for Northern Ireland was driven by a number of factors, but explicitly these included their view that the principle of self-determination would have been infringed if “*Great Britain is ruling [Northern Irish] nationalist minorities against their will*” as would have been the case had Northern Ireland been treated as an integral part of the United Kingdom, without a devolved parliament.¹³ Also, by 1921, most political leaders in Great Britain had the hope and expectation that at some stage ahead, Northern Ireland would be willing to join with the rest of Ireland. For different reasons, both the Irish State and the Unionists acquiesced in the outcome, the former as they had neither sufficient motivation nor sufficient capacity to challenge it – “acquiescence as realpolitik”. For unionists, acquiescence came because it was in practice acceptable, and soon became their preference. In Northern Ireland,

13 *Long (Cabinet) Committee First Report on the Irish Question* (4 November 1919), addressing specifically the question of whether or not the counties that would be “excluded” from the new Irish Parliament would have a separate parliament.

the Government of Ireland Act (1920), Section 5 sought to prohibit discrimination, and the STV electoral system should have provided for fair representation of non-unionists in the Stormont Parliament. These provisions resembled the terms of the Minority Treaties applied in parts of Europe around the same time, and proved just as ineffective: the UK did not act in any way to ensure the rights of the nationalist minority.

- The 1921 settlement did not seek or secure the specific consent of those affected as to where the border was drawn, and hence was at best highly questionable as an example of self-determination. The UK Government accepted what the Ulster unionists saw as the largest sustainable unit where a Protestant majority could be expected to endure, despite the fact that Tyrone and Fermanagh had Catholic majorities. The Boundary Commission could have recommended significant adaptations of the border to reflect local views – indeed Lloyd George led Michael Collins to expect such an outcome in a private meeting in the days just before the Anglo Irish Treaty was agreed, but this did not come to pass.¹⁴ The near-contemporaneous precedents in Silesia and Schleswig-Holstein were ignored. Nor was there any attempt to take the same approach as in Eastern Europe of imposing something like a “Minority Treaty”. The Northern Ireland Government even refused to nominate a member for the Boundary Commission, despite the fact that the UK Government had agreed in the Anglo-Irish Treaty to the creation of the Commission, and that the supposedly sovereign Parliament had legislated accordingly. The statutory obligation to take account of “the wishes of the inhabitants” was subjugated to the determination of the Ulster Unionist Party to yield “*not an inch*”. The Government of the Irish Free State had no realistic alternative to acquiescing in this outcome;
- The Sunningdale Agreement of 1973 had the support of constitutional Irish nationalists and a substantial proportion of unionists. But its unionist opponents practiced civil disobedience and the UK Government effectively allowed the lack of consent from that minority (but a majority of unionists) to override the wishes of the majority of the population of Northern Ireland (and a settlement acceptable to the Irish Government of the time). This could be described as a case when the absence of loser’s consent was decisive, though as in 1998, the Agreement had elements of “win-win” for all. At that stage, there was no prospect or possibility of acquiescence in the Sunningdale arrangements from the republican movement, which was engaged in a campaign of violent opposition to partition in any form;

¹⁴ Charles Townsend, *The Partition* (London, 2021), p.206.

- There was no unionist consent at all for the 1985 Anglo-Irish Agreement, but the Thatcher Government held fast to it, and the opportunity to supersede it became, in effect, a goal for unionists in the talks process from 1990 onwards. One difference from 1974 was that the opposition did not escalate to highly disruptive civil disobedience, but this was a third example (after 1912 and 1974) of unionists opposing the will of the Westminster Parliament, despite the fact that being unionist by definition implies acceptance that Parliament is sovereign over (Northern) Ireland. David Miller addresses this long term paradox of “conditional loyalty” in “*Queen’s Rebels*”: even the foundational statements of loyalty of the Orange Order are conditional on the continuation of the Protestant succession.¹⁵

In light of this sequence of points of tension over sovereignty, identity and self-determination, the present position can be stated as follows: a substantial minority in Northern Ireland only **acquiesces** to the status quo, but the evidence is that it has the **consent** of a majority and the **strong support** of a large group, perhaps a majority. Similarly, a possible future united Ireland would command the positive support of a substantial minority in Northern Ireland, but a significant number would remain opposed, though some might acquiesce. **Hence, a compromise model that accommodates different identities is essential.**

15 D.W. Miller, *Queen’s Rebels: Ulster Loyalism in Historical Perspective* (Dublin, 2007).

The Significance of Consent in the Present Context: (a) Post Brexit Issues

How is this analysis relevant to the issues affecting governance in Northern Ireland at present? Today, the concept of consent is under a sharper scrutiny than ever, in two contexts. First, Brexit: with hindsight, a possible assessment is that no-one, at any stage, developed a process to help all the relevant participants (the UK, the EU, the different parties in Northern Ireland and the Irish Government) to consider together how best the Northern Ireland issues arising from Brexit could be addressed, and how the principles of the Belfast/Good Friday Agreement, not least the application of the concept of consent, could be respected. It was perhaps difficult to reconcile the necessary dynamic of the main negotiations between the UK and the EU (where the Irish Government could not assert a separate role from the Barnier Task Force) with the unique considerations arising from the 1998 Agreement. In the absence of any separate forum, the narrative developed by Dublin and adopted by the EU as a whole that the Agreement required no physical controls on the island of Ireland in any circumstances became dominant. In fact that was at best an over-simplification of a much more complex situation, and ignored the “equal and opposite” argument that checks and controls between Great Britain and Northern Ireland could be seen as weakening links between the two. In turn, or so a non-consenting unionist argument might run, this weakening leads to an undermining of the agreed constitutional status of Northern Ireland. The strength of this unionist opposition to the Protocol increased markedly in February 2021, when first the DUP, and later, for a time, the UK Government, changed from reluctant acquiescence (“loser’s consent?”) to insistent political opposition.

The focus of unionists’ complaints is the “Irish Sea Border”, and while that is an element of the post-Brexit settlement, it is obviously wrong to say that that is *the* border. The clear fact is that, as well as leading to **elements** of border control at the Irish Sea, Brexit deepened the significance of the land border on the island of Ireland – but without the issue of visible controls. There are new barriers on the island of Ireland in relation to some important aspects of economic and social life previously subject to EU law. The regulation of the services economy in Northern Ireland is no longer directly affected by EU membership, and hence, for example, cross border activity in tradeable services is affected by Brexit in the same way as between Great Britain and the EU. The issue of mutual recognition of professional qualifications was a key issue for Northern Ireland during the negotiations on what became the Trade and Cooperation Agreement, not least because many professional bodies were accustomed to operating on an all-island basis. But the outcome on this point took no special account of the issues affecting Northern Ireland. Similarly, UK immigration policy applies in full to Northern Ireland: Northern Ireland’s access to the EU Single Market, is, uniquely, not bound up with the obligations of free movement of labour. Hence, many dimensions of Brexit applied fully in Northern Ireland. The existence of an “Irish Sea Border” is accompanied by a very real – though invisible – land border

on the island of Ireland, hardened by Brexit. The majority in Northern Ireland who opposed Brexit have given acquiescence (or even consent) to these losses, showing that unionists are not the only group that is being asked to compromise.

While unionists focused on their opposition to the Protocol and now to the Windsor Framework, this ignores the realpolitik that the issue is not solely about Northern Ireland's place in the UK, but part of a bigger issue, affecting all 27 EU Member States as well as the UK. Any model that would be radically different to the Windsor Framework would not be acceptable to that group, which is much larger and more influential than the Unionist community. **No-one has a monopoly on consent.** In settling an arrangement for the regulation of trade involving so many countries, the best practical outcome that could have been reasonably expected is a compromise that as many as possible can accept.

The long and complex negotiations since 2016, like any multi-party process, required accommodation of several points of view, and some degree of reconciliation and compromise between divergent aspirations, self-interests and positions of principle or opportunism. The clear fact that the UK Government agreed to the Protocol (indeed, it secured its democratic mandate in December 2019 explicitly on the basis of the Withdrawal Agreement which included, and was known to include, the Protocol) shows that there was a clear democratic mandate in the UK for the Protocol. Similarly, the Windsor Framework has clear democratic foundations at UK level. In fact, far more of those affected by the outcome (as now manifested in Northern Ireland's present position) have consented to it despite aspects that are contrary to their preferred position.

The Significance of Consent in the Present Context: (b) The Constitutional Question

The second context where consent is a live topic is on “the constitutional issue”. The absence of unionist consent for the Windsor Framework, in a context where all the other participants in the negotiation process have exhausted options and settled on an agreed position, needs to be considered looking to the more fundamental issue of the constitutional position. Indeed, the argument partly arises from the view that the Brexit settlement is itself a step toward a united Ireland, despite the rulings by the Supreme Court against unionist challenges.

The Belfast/Good Friday Agreement states the principle of consent as it relates to “*Northern Ireland’s status as part of the United Kingdom*”.¹⁶ In turn, the UK Supreme Court has focused on the sovereignty of the Crown in Parliament as the most essential feature of the UK constitution, a position of principle expounded fully by Dicey.¹⁷ On that basis, the essential meaning, in constitutional terms, of the status of Northern Ireland is that it is subject to UK sovereignty for as long as that has the consent of a majority of its population. That blunt phrase is made tolerable to the nationalist/republican view which is antipathetical to UK sovereignty through the express provision for a change of sovereignty if a majority so wishes and, in a more day-to-day sense, the checks and balances across the three Strands of the 1998 Agreement. These Strands ensure “parity of esteem” for the Irish identity, the strongly entrenched arrangements for North South cooperation and (to a limited defined extent) shared administration through the North South implementation bodies. The historic step taken by Irish nationalists and republicans to confirm formally their acquiescence with partition in 1998 was predicated on the established commitment that Irish unity would come to pass if a simple majority in Northern Ireland so agreed. That was always part of the 1921 settlement and was explicit in successive UK legislation from 1949 and 1971, as well as the series of declarations and documents that culminated in the Belfast/Good Friday Agreement. Change from that fundamental would be a deep contradiction of the 1998 Agreement.

Thus the 1998 Agreement was and is a unique resolution of the issues of self-determination and consent that were in dispute from 1921 onwards. While realpolitik (in which sovereignty is based on strength) has not been wholly superseded, the 1998 Agreement enjoyed strong support as a settlement, in which acquiescence in British sovereignty is at least partly based on unique cross-community balances.

Some very important points follow from this, all based on the fact that in the context of the United Kingdom, Parliament has supreme legal authority as to how its sovereignty is exercised:

¹⁶ *Constitutional Issues 1* (ii) and (iii)).

¹⁷ A.V. Dicey, *Introduction to the Study of The Law of the Constitution* (New York, 1915).

- The Crown in Parliament can make international agreements that place limits on the discretion of the executive and/or obligations on its subjects (for example in the European Convention on Human Rights), but these do not remove or dilute its sovereign power, including its power to withdraw from or revoke such agreements. Thus, sovereignty can be shared bilaterally or multilaterally if Parliament so chooses. Such international agreements can be amended or repealed (with or without the agreement of the partner country or countries, with consequences depending on the terms of each treaty, and on *realpolitik*), because no parliament can bind its successors;
- Administration can be delegated within the United Kingdom, but what Parliament delegates can be returned to the direct authority of the UK Government should Parliament so decide;
- The 1998 Agreement confirmed previous commitments by the UK Parliament that Northern Ireland's status was conditional on the consent of a majority in the Parliament of Northern Ireland. This was implicit in the Government of Ireland Act (1920) which provided for the creation of the northern and southern parliaments but gave them the power to unite into an all-island Parliament. Several months before the Anglo-Irish Treaty was agreed, Lloyd George in a letter to Eamon de Valera, made the point that any settlement "...must allow for full recognition of the existing powers and privileges of the Parliament and Government of Northern Ireland, which cannot be abrogated except by their own consent" (20 July 1921).¹⁸ The position became even clearer through the provision of Article XII of the Anglo-Irish Treaty that gave the northern Parliament the prerogative of opting out of the Irish Free State.¹⁹ The Ireland Act (1949) Section 2 further clarified the position. Later, the UK Parliament recognised that Northern Ireland's status was also conditional on the consent of a majority of the people of Northern Ireland voting in a referendum, as stated in the Northern Ireland Constitution Act (1973) Section 1. This was restated (amended by the constitutional language agreed as part of the Belfast/Good Friday Agreement, alongside the amendments to the Irish Constitution) in the Northern Ireland Act (1998) Section 1.
- The language concerning the conditionality of the Union of Northern Ireland and Great Britain is explicit, in strong contrast to the position in Scotland. There, under the Scotland Act (1998) the Union is a reserved matter, and a referendum was only possible through a very narrow and

18 *Correspondence relating to the proposals of His Majesty's government for an Irish settlement*, Cmnd 1502, (London, 1921).

19 Parliamentary sovereignty was in this case demonstrated through the votes in December 1921 by the two Houses of Parliament to present an Address to the King approving the Treaty, followed by the Irish Free State (Agreement) Act 1922.

specific agreement (the Edinburgh Agreement 2012, which led to the Section 30 Order of 2013) to delegate the power to hold a referendum in 2014. Nevertheless, the provisions for both Scotland and Northern Ireland are Acts of Parliament and hence neither involves any dilution of the fundamental principles of the sovereignty of the Crown in Parliament;

- Additionally, the 1998 Agreement does not involve any abrogation of the sovereignty of the Crown in Parliament over Northern Ireland, even though certain executive responsibilities are now under the North South Ministerial Council, and the North South Implementation Bodies. Those functions are entrenched in an international agreement (signed by the two governments on 8 March 1999), but *have effect* in Northern Ireland through the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999 of 10 March 1999;²⁰
- On the other hand, the 1998 Agreement does not give some or many unionists what they would most want – a cemented, unconditional union. But on that point the negotiations in 1998 only confirmed what had been the stance of successive UK governments of all complexions from 1912 onwards. There is plenty of evidence of the clear preference of all parties in London for a coming together of both parts of Ireland, balanced by some respect for the Unionist point of view, and a clear recognition that they should not and could not coerce unionists into Home Rule, or, later, the new entity created by the Anglo-Irish Treaty.
- It follows that there is no foundation for the argument that a change to the constitutional status of Northern Ireland should be subject to a UK-wide vote. The whole basis of the 1921 and 1998 settlements was self-determination *for Ireland* – that is explicit in paragraph 1 (ii) of the section of the 1998 Agreement on constitutional issues (“it is for the people of Ireland alone, without external impediment”). The very conditions that the UK Supreme Court cited in rejecting the arguments for self-determination for Scotland (drawing on the precedent in relation to Quebec) clearly applied in relation to Ireland (colonial status; past oppression; denial of meaningful access to government etc).²¹ If the majority of the people of Northern Ireland were to vote to leave the UK and enter a united Ireland, there would be no possible legitimate basis for the people of Great Britain to reject that vote: and in reality, there is also no possibility of such a scenario arising.

20 Schedule 2, Paragraph 3 of the Northern Ireland Act (1998) provides for the participation of Northern Ireland Ministers in NSMC, and for them to observe and implement international obligations and obligations under the European Human Rights Convention. Hence, even these exceptions to the normal exclusion of the devolved administrations from international relations were specifically approved by the Crown in Parliament.

21 Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, Judgement, 23 November 2022, UKSC 31, available at: < <https://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf> >.

- The analysis of the UK's relationship with the EU follows similar lines: joining the EU involved a sharing (or voluntary dilution) of the UK's "independence" or sovereignty. But the decision to join was itself an exercise of sovereignty by the Crown in Parliament, subsequently confirmed by referendum in 1975, and throughout the UK's period of membership, EU law applied governed by UK legislation that had been approved by Parliament. In this sense, the UK's sovereignty was on an identical basis to the other member states.
- It follows also that Brexit was both a return of (direct) sovereignty from the voluntarily shared or diluted status implied by EU membership, and also itself an exercise of sovereignty by the Crown in Parliament.

The Constitutional Status of Northern Ireland

What does this mean for the status of Northern Ireland following Brexit, and in relation to the Protocol/Windsor Framework? To repeat the fundamental meaning of the Belfast/Good Friday Agreement, the status of Northern Ireland is dependent on the wishes of a majority, and currently those wishes result in its being subject to the sovereignty of the Crown in Parliament. That status commands the **support** (not just the consent) of unionists, the **consent** of a majority of the people of Northern Ireland (on past referenda, and the best available contemporary evidence) and the **acquiescence** (but neither the consent nor the support) of the vast majority of the people of the island of Ireland.

As is also the case in relation to Scotland, the views of the people of the rest of the United Kingdom are not seen to be relevant to such discussions. In the case of Northern Ireland, that arises because the principle of self-determination is applied to the population of the island, and the 1998 Agreement was the final outworking of a position that was not resolved in 1921. Also, for Northern Ireland and for the Scottish context, the assumption is that the people of the rest of the UK do not have a strong opinion either way, and indeed a key step along the path to the 1998 Agreement was the statement by the UK Government that it had no selfish strategic or economic interest in Northern Ireland.

The corollary is that the constitutional status of Northern Ireland is not and never has been: 1) Compromised by the commitment of the UK Government to consult the Irish Government under the Anglo-Irish Agreement of 1985. 2) Subject to illegitimate administration by a foreign government under the 1998 Agreement. 3) Subject to EU law in contravention of any constitutional principle or legislative provision.

In contradistinction to the above, Joint Authority *would* be a change of the status of Northern Ireland, and hence contrary to the 1998 Agreement unless a majority of the population of Northern Ireland give consent. However, commitments to consult the Irish Government do not and need not fetter the discretion of the UK Government's decision making over Northern Ireland. And even if it is argued that the North South institutions dilute the sovereignty of the UK, that approach was adopted with both the consent of the people of Northern Ireland (in the referendum of May 1998) and the approval of the UK Parliament.

Brexit was clearly a change in the constitutional status of the United Kingdom as a whole. It would appear to many that it follows that Brexit was also a change in the status of Northern Ireland, and one which was imposed despite the clear evidence from the referendum of 23 June 2016 that that change did not have the consent of a majority of the population of Northern Ireland. Such an argument would imply it was a breach of the 1998 Agreement. However, crucially it must be understood that Brexit was a sovereign act of the Crown in Parliament and made no change to the fact that Northern Ireland is subject to that sovereignty.

Similarly, the agreement on the post-Brexit relationship between the UK and the EU does not involve any dilution of the sovereignty of the Crown in Parliament over Northern Ireland, because all the provisions (including the application of EU law in Northern Ireland) flow from decisive votes of approval in the UK Parliament. It is tempting to argue that the Protocol/Windsor Framework should have been subject to the consent test through a referendum (either in 2019/2020, or 2023). However, like Brexit, both the Withdrawal Agreement (including the Protocol) and the Windsor Framework were sovereign acts of the Crown in Parliament, and hence do not involve a change in Northern Ireland's status. In that sense, the fact that all the available evidence suggests that the Protocol or the Windsor Framework have the consent of the majority in Northern Ireland, is not of decisive relevance.²² While, on this Diceyan logic, the conditions where consent is required do not arise, the evidence that consent exists remains an important reality.

It has been argued that there are aspects of UK constitutional law that should not be subject to the “whims of Parliament” – most strongly in the context of Section 6 of the 1800 Act of Union – but the agreement to the Protocol was manifestly not a mere “whim of Parliament”. On the contrary, it followed several years of detailed negotiation between the EU and the UK, and contestation within the UK Government and Parliament. It was only approved by Parliament after all the other options had been rejected in the 2017-19 Parliament, and after the Withdrawal Agreement of 2019 had been placed at the centre of the Conservative manifesto for the December 2019 general election. In a representative democracy, few things have or could have greater legitimacy.

22 This is based on the clear stance of those elected in the December 2019 Westminster election, the May 2022 Northern Ireland Assembly election, and the May 2023 Local Council elections, and on data from opinion polls.

Unionist Concerns about Consent

A key argument which was raised in the context of the Protocol Bill, and the ongoing unionist opposition to the Protocol/Windsor Framework, was that cross-community consent is required for such a settlement. Power sharing is one of the key differences between the constitutional position of Northern Ireland and that of the rest of the United Kingdom. However, in the 1998 Agreement, and all the legislative and administrative arrangements that have been adopted to apply it, cross-community consent is solely an issue within the Assembly and Executive. It is not applicable to excepted or reserved matters, and international relations, including trade agreements, are and always have been “excepted”.²³ Even within the Assembly and the Executive, there is no provision either to require or to provide for cross-community consent on anything that is a binary choice – that should be self-evident as it would imply a mutual veto that would create possible circumstances in which no outcome could be agreed.

The St Andrews Agreement of 2006, and the Northern Ireland (St Andrews Agreement) Act (2006) both place an obligation on the two largest political designations to nominate the First Minister and the deputy First Minister (“*shall nominate*”). The absence of any means of enforcing that obligation confirms the reality that simultaneous continuous consent is needed in practice for the institutions to operate. But that is a matter of realpolitik, not a facet of the 1998 or any subsequent Agreement.

A recurring theme is “selective or conditional loyalty”, in which there is a tension between unionists’ commitment to a constitution in which the Crown in Parliament is sovereign, and their rejection, to varying degrees, of a number of interventions by the UK Government, even when these had a clear parliamentary mandate (and in some cases majority support in Northern Ireland).²⁴ Their rejection of the will of Parliament on the Brexit settlement can be seen as a recurrence of the tensions that arose in 1912 and 1974.

The ambiguities and distortions of the last few years have deeply undermined confidence in and understanding of the true and legitimate meaning of consent. One significant distortion was the way in which the UK Government made tactical use of the difficulties around the Protocol in its negotiations with the EU between September 2020 (when the Internal Market Bill increased the tension in the process) and February 2023 (when it scrapped the Northern Ireland Protocol Bill); this exploitation of the Northern Ireland issue, with, at best, mixed messages for unionists, was a major step away from the long-standing position of successive UK Governments to behave neutrally and without selfish interest.

²³ Dicey, *Introduction to the Study of The Law of the Constitution*.

²⁴ See: Miller, *Queen’s Rebels*.

However, the fact that the United Kingdom eventually settled on a post-Brexit trading arrangement that does not command the consent (or acquiescence) of unionists does not mean that it either:

- breaches the constitutional settlement agreed in 1998, because the Crown in Parliament has both authority and responsibility in relation to international relations; or
- provides a valid basis for withdrawing the essential continuous consent that is needed from both of the main communities for the institutions of government in Northern Ireland to function.

Against this background, three vital points of *realpolitik* apply.

First, as discussed above, there are constraints on what Parliament can do. The cited Poll Tax example shows that in practice public acquiescence (or continuous consent) is the minimum requirement needed. The events of 1912, in relation to Home Rule for Ireland as a whole, (and less clearly of 1974, in relation to the Sunningdale Agreement) additionally show that Parliament can only sustain legislation which it is prepared and able to enforce effectively. That said, neither case involved a questioning of the existence or essential legitimacy of the State.

Outside the State, international law is a genuine constraint on what the UK State can do. It is always possible for Parliament to adopt a stance that is at odds with previous international commitments, but such an approach would lead either (benignly) to re-negotiation to secure a revised agreement, or (problematically) to confrontation. In this case the country or countries whose interests are affected by unilateral action can take remedial action against the state accused of the breach, which may be sufficient deterrent to sustain commitment to a given agreement or treaty. Brexit and subsequently the Windsor Framework both became examples of the benign approach, partly because in the end the UK drew back from, respectively, the “specific and limited” breach of international law proposed in the Internal Market Bill of 2020, and from the Northern Ireland Protocol Bill of 2022 which would have been (at a minimum) open to challenge under international law.

Second, building on the previous point, the UK retains power-based sovereignty (the first element of *realpolitik* in Rochau’s analysis) through its control of the financial position of Northern Ireland.

Third, unionist opposition is a reality that cannot be ignored. It does not have a foundation in the interpretation of the UK constitution, nor does it represent non-consent on a scale sufficient to change the hard-won agreements between the UK and the EU on the post-Brexit settlement. Despite this, though, it is not possible in

practice to establish stable governance arrangements for Northern Ireland without positive unionist participation, which cannot be forced or commanded by so-called “reform” of the institutions.

Hence, strong efforts are needed to re-establish a workable accommodation. The UK and Irish Governments need to step up to leading that work, which means, as in most of the period from 1992 to 2016, giving consistent and selfless commitment to solving these issues, to provide a clear framework for the process of engagement between the Northern Ireland parties.

Is there Subjugation of the Unionist Identity?

“Subjugation” can be defined for present purposes as when one state imposes control over a people group against or without regard to their wishes. There are strong and obvious arguments that the conquest and colonisation of Ireland, culminating in the Act of Union of 1800, was a form of subjugation, shown for example by the denial of the rights of the large majority of the people of Ireland, first imposed in the Penal Laws.

The claim of subjugation of the Union by the Protocol/Windsor Framework arises from language used in the legal challenges to these agreements by unionists. Most of the references to subjugation²⁵ in the judgements by the Court of Appeal and the Supreme Court on the cases brought against the Protocol are to new law subjugating old law, and all flow from “*the explicit will of Parliament.*”²⁶

Ironically, there is a sense in which the “subjugation” of some key provisions of Article 6 of the Act of Union (1800) was itself a consequence of the fact that the 1800 Act subjugated (Northern) Ireland to the sovereignty of the UK Parliament and removed any separate role for an Irish or Northern Irish legislature in matters of international relations. Thus, when Parliament’s resolved position was to leave the EU Single Market and Customs Union, *and* to avoid a hard border on the island of Ireland, it had the power and authority to take that decision. But in fact, this was very clearly not subjugation (neither by the EU nor the UK Parliament) in the fuller sense defined above, because Parliament’s decision to agree to the Protocol was in line with the preference of the majority of Northern Ireland’s elected representatives. That position also included explicit provision for a unique arrangement giving a role to the Northern Ireland Assembly in relation to the possible continued application of the trade provisions of the Protocol.

²⁵ Northern Ireland Court of Appeal Judgement, [2022]NICA 15, 14 March 2022, paragraph 202.

²⁶ Supreme Court Judgement, [2023] UKSC 5, 8 February 2023, paragraphs 12 & 66.

The Significance of Neutrality or Indifference on the Constitutional Question

The attitudes in relation to these constitutional issues include not only consent, acquiescence, and opposition, but, for a substantial proportion of the people of Northern Ireland, neutrality or indifference. Indeed, individuals can consent to, or acquiesce in, more than one position on the constitutional issues. This is relevant to consideration of the question of the ‘50% plus 1’ argument. If we reach a point where the Union is only supported in a border by poll by 50% plus 1 **of those voting**, the percentage turnout will be a significant consideration. If even 10% choose neutrally not to exercise the opportunity to vote (assuming some are unable to vote through illness or absence), that implies that they are either engaged but neutral or actually indifferent. In that sense, well over 50% of the population would be continuing to give consent to (or at the very least passive acquiescence with) the Union. Similarly, if the 50% plus 1 of those voting were to support Irish unity, that would imply that well over 50% of the population would acquiesce in that outcome if they were consciously neutral or passively indifferent. Silence (or in this context, consciously deciding not to vote as an expression of neutrality) gives consent.

If the process was affected by a boycott by a significant grouping, the interpretation of the outcome would be more complicated. There is a precedent in that, in 1973, nationalist and republican voters largely followed the urging of their political leaders to boycott the referendum on whether or not Northern Ireland should remain part of the United Kingdom. In practice, that did not lead to any ambiguity in the outcome, in that 57.5% of the electorate voted to remain. It is less likely that there would be a boycott in the present or any reasonably predictable future scenario, as, unlike in 1973, it would be clear that the balance of opinion would be much closer, and hence a boycott could determine the result. It would be impossible to distinguish between those not voting through neutrality or indifference from those holding a strong opinion for or against a united Ireland.

With the major changes in Northern Irish society since 1998, the role of the non-aligned voter is of increasing significance. When the Agreement was framed as an accommodation between two dominant communities, these individuals were fewer and their position was less accounted for. There is a strong and fact-based argument that the institutional arrangements agreed in 1998 give less weight to the views and votes of the non-aligned group in Northern Ireland. Despite this, it can be argued that such individuals self-define as **not** being a separate people group or nation, and do not therefore have clearly defined interests or identity. Hence, it does not follow to give those individuals a uniform separate power of consent. For as long as the tension between identities in Northern Ireland remains material, there will be a need for constitutional and administrative arrangements that provide checks and balances to protect the rights of minorities and ensure inclusive government. The concept of cross-community consent is more difficult to apply today, but it remains relevant.

Possible Future Constitutional Change: Acquiescence or Resistance

There remains much speculation on the possibility of a border poll despite the clear evidence from existing opinion polls of the majority against a united Ireland in the near future. However, unionist concerns about the post-Brexit settlement make it important to consider the implications of current and past behaviours for any change ahead.

The most extreme case of “conditional loyalty” is the most risky – if a border poll had a majority for Irish unity. To what extent would the PUL (Protestant/unionist/loyalist) community accept that the sovereignty of the Crown in Parliament would then be exercised to put that into effect, in line with the UK’s commitments in the 1998 Agreement? The profound issue is that even if well over 50% of the population of Northern Ireland was to vote for Irish unity, a significant minority would still oppose it. Just as a significant minority were motivated to oppose partition with violence between 1921 and 1998, and dissident republicans still do, it is very likely that some unionists would be unwilling to acquiesce in Irish unity if that became the view of a simple majority in Northern Ireland.

How that possibility is handled by governments, political parties and the international community, as well as by unionist leaders, is no small issue, as minimising the risk of escalation is vital. There has been some discussion within unionism (and elsewhere) of the possibility of moving to a higher percentage threshold or requiring cross-community support. This is directly contrary to the Agreement, would provoke nationalist outrage, and would be quite unworkable.

To avoid losing a referendum, and indeed to avoid having one in the first place, the most important thing the UK Government and unionism can do is show that Northern Ireland can function and thrive within the Union. This requires concerted efforts to make the place work, as the 1998 settlement has unprecedented legitimacy, and also requires action to minimise the suspicion (and indeed the reality) that some of those who aspire for reunification see Northern Ireland failing as advantageous to their cause.

In seeking to minimise the possibility of violent opposition to the achievement of a united Ireland through a successful referendum, it would be incumbent on the Irish Government and the nationalist majority to demonstrate full respect for unionist identity. This includes enduring Britishness, avoiding the tendency to project an Irish identity on those who do not want that. The Irish Government and nationalist majority must also offer a persuasive vision of economic and social progress; promote reconciliation based on real mutual respect; and seek to arrange the institutions of the reunified state in such a way as to best protect unionist interests and allow unionism to exert meaningful political influence. There can be no possible return to the assumptions made by the Great Powers in 1918-1921 that minorities can be

“assimilated or liquidated”. Like, for example, Belgium and Canada, a united Ireland would be, and would probably remain for many decades at least, a state without a single identity narrative. The best outcome that appears to be realistically available would, once more, be acquiescence based on *realpolitik*.

Questions, Thoughts and Analysis

Much of the discussion above amounts to asking: ‘To what do unionists give consent?’ The 1998 Agreement is based on simple majority consent in relation to the constitutional status of Northern Ireland. But if consent does not also imply acceptance of the final decisions of the sovereign Parliament, that verges towards rebellion (as it did in 1912 and 1974). In liberal democracies in the twenty-first century, we expect sovereignty to be exercised in a context of continuous consent (*i.e. plébiscite de tous les jours*). In the unusual (but by no means unique) context of Northern Ireland, that stable operation of the institutions requires, *de facto*, simultaneous continuous consent by two communities – the clearly expressed desire to continue a common life, to repeat Renan’s description. The resulting paradox is at the heart of the current impasse – because there are some issues where there is no available option that can command the consent of all of the relevant parties to the form of Brexit. Stability, and the implementation of the many compromise agreements reached in and after 1998, depend on the leaders of the main political parties persuading their communities to acquiesce in measures which they dislike, and may have strongly opposed. **Simultaneous continuous consent depends on continuous compromise.** The form of the post-Brexit settlement includes that challenging dimension, but is much more difficult, because, as well as needing compromise within Northern Ireland, it had to be acceptable to the EU and the UK Parliament as well as in Northern Ireland.

In 2017, Sinn Fein withdrew their consent to the operation of the Executive. The Renewable Heating Incentive debacle (and the ineffectiveness of the Assembly vote to require First Minister Foster to step aside) was probably more a pretext than a red line crossed. Factors such as the deep difficulties in agreeing a budget and the DUP’s attitude to the Irish Language contributed to a judgement or perception by Sinn Fein that their community was not being treated fairly, and power sharing was not working. From 2022 onwards, the DUP’s withdrawal of their consent reflects very strong feelings that, as a result of the introduction of the Protocol, the operation of the 1998 Agreement is at best questionable and at worst unacceptable to the point where street protests may arise.

This leads to some quite searching questions: was J.S. Mill correct to say that “Free institutions are next to impossible in a country made of different nationalities”? How should the consent, acquiescence or opposition of the centre ground (who do not identify as either unionist or nationalist/republican) be taken into consideration? And ultimately what is the best possible way forward?

There are some possible answers to these questions that would probably compound rather than resolve the difficulties. Neither repartition, nor the secession of Northern Ireland (on what unit?) are remotely possible real-world options. Irish unity would create a new state “made up of different nationalities”. Yascha Mounk addresses the difficulty highlighted by Mill in a hard-nosed analysis but presents some conditions

that could make diverse democracies work.²⁷ Notable among these are determined leadership, secure prosperity, the promotion of universal solidarity, mutual respect, and the development of effective and inclusive institutions. Looking at Northern Ireland today, these are high hurdles, but the alternative is pessimistic fatalism.

Realpolitik has not gone away, and the ‘law of the strong’ can be manifested in financial and economic terms as well as militarily: if the UK Government has the strength of will and commitment to its chosen course of action, (as happened in 1985) it clearly could proceed without waiting for ‘simultaneous consent’. The enormously significant decisions taken by the UK Government in October 2019 (to prioritise divergence for GB ahead of uniformity of regulation across the UK) and February 2023 (to agree a compromise based on the fundamentals of the Protocol) highlight fundamental issues of identity and sovereignty at UK level, and it has proved impossible to avoid really difficult consequences for Northern Ireland. In both cases, the UK Government backed away from confrontation with the EU, as that would have been more damaging to UK interests than any consequences of unionist opposition.

Despite or perhaps because of this, there is little or no alternative but for the UK Government but to hold to the new agreements reached with the EU in 2019, 2020 and 2023, even without unionist consent or acquiescence. While no unionist elected representatives have accepted the outcome, there is a minority of unionists on the spectrum from indifference to consent. While most non-unionists opposed the Withdrawal Agreement (as they opposed Brexit), there was clear positive support for the Protocol in a series of votes in the Northern Ireland Assembly in December 2020, outvoting unionist opposition.

But while the UK Government rightly makes clear that the compromises inherent in both the original Protocol and the (improved but still problematic) Windsor Framework are the best available outcome that has any chance of approval by both the UK Parliament and the EU, the UK Government continues to oversell the position it has agreed.

Drawing the threads of this analysis together, the question is how the concept of consent can apply in the post-Brexit context. Unlike the previous stages of the evolution of Northern Ireland’s governance (1921 to 1972; 1972 to 1998; and 1998-2016) the present position is that:

- Northern Ireland remains in the UK with the consent of a majority, but a smaller and less enthusiastic majority than existed before 2016. This consists mostly of the Unionist community of Northern Ireland, but includes some non-unionist opinion.

²⁷ Yascha Mounk, *The Great Experiment: How to Make Diverse Democracies Work* (London, 2022).

- Since 1998 a clear majority either support or acquiesce in three very significant differences between Northern Ireland and the rest of the United Kingdom, namely: **power sharing** as the fundamental feature of administration; an **Irish dimension** manifested by the North South administrative arrangements, and by much less separation than is normal for relationships with a neighbouring nation state; and the consent-based **conditionality of the Union**, which is, and has always been, a very unusual feature, looking at the constitution of the United Kingdom in a wide geographical and historical perspective.

- There is a clear but small majority for fundamentally different governance arrangements for Northern Ireland post Brexit. Crucially, the majority of Northern Ireland’s voters want special arrangements to compensate for the unique circumstances on the island of Ireland which have been altered by the withdrawal of Northern Ireland – without its consent – from the European Union. As the Supreme Court has ruled, this leads to a new facet of Northern Ireland governance which is different to the rest of the UK in respect of trade laws. A majority of unionists reject the special arrangements in the Protocol/Windsor Framework, despite the fact that they have not just the consent of the sovereign Westminster Parliament, but also, the consent of a majority of about 55 per cent of the people of Northern Ireland.²⁸

- It follows that the two governments and all democratic parties should respect the position that commands the most support and continue to uphold the approach established in 1998.

28 This is based on the clear stance of those elected in the December 2019 Westminster election, the May 2022 Northern Ireland Assembly election, and the May 2023 Local Council elections, and on data from opinion polls.

Conclusion – Agreement based on Compromise is Needed

The Belfast/Good Friday Agreement was a profound compromise – an agreement to disagree. It recognises that neither the Union in undiluted form (“as British as Finchley”), nor simply a united Ireland, have or can be expected to have anything like sufficient acquiescence never mind consent from all in Northern Ireland. Hence a unique, awkward and messy form of government is necessary, at least while Northern Ireland remains part of the UK and very possibly in a united Ireland too. Renewing commitment to that approach, with strong and determined leadership, is surely the only available way forward.

The Windsor Framework does seek a profound compromise from a unionist point of view, in that trade, customs and regulation are normally sovereign responsibilities of a nation. The post-Brexit settlement also involves profound compromises from others:

- From the EU, in that part of its external border is now managed by a former Member State; and in that a region which is larger than five of the EU27 enjoys access to the Single Market for goods without either accepting free movement of labour, or an obligation to contribute to the EU budget.
- From the UK, in that complex and unique arrangements are needed in respect of a UK region.
- From Irish nationalist and republican opinion (in both parts of the island) in that Brexit does apply to all other aspects of society and the economy except trade in goods. This, such that the land border has more significance than before, in relation to issues such as trade in services; and the movement of people not covered by the provisions of the Common Travel Area.

Northern Ireland needs both leadership that sees that finding a shared basis for co-existence is absolutely essential, and a process that respects and honours the diverse views within Northern Ireland society, without any group assuming dominance or being excluded.

The continuation or re-establishment of a form of government for Northern Ireland that can command sufficient consent to be stable and viable requires a new foundation, as the post-Brexit controversy has undermined the 1998 consensus. This needs strong and positive engagement by the political leaders of Northern Ireland, as even at their best, the UK and Irish Governments will always have other issues and considerations which limits their focus on these issues. Reaffirming a basis for shared and inclusive government within Northern Ireland, complemented by strong relationships North

South and East West, has more chance of serving the interests of all of the community including, specifically, the best interests of unionists. To misquote John Hume, agreement subjugates no one. Working together on how that can be applied maximises the possibility for securing the consent (or at worst the acquiescence) of as many as possible.

Maybe it is realpolitik which has the final word: the most pressing need is for unionists to see that operating the institutions established under the 1998 and subsequent multi-party agreements is in their best interests. The starting point of this paper was the observation that, in the 1990s, a “chance for peace” could only mean the republican movement acquiescing in something they had fought against for over 70 years, an action based on realpolitik. Unionists expect nationalists and republicans to continue to acquiesce to the realities of partition, despite that being against their wishes and their view of their best interests. For unionists now, the choice is, and will continue to be, between reluctant acquiescence in something they have rejected, or the loss of the agreed basis for the governance of Northern Ireland, based on the 1998 Agreement.

THE

CONSTITUTION

SOCIETY