

The Constitutional Question: Value and institutional framework

Northern Ireland Women's Coalition

Private and Confidential

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If anything in this document is unclear, Kate (772227), Barbara (640249) or Robin (382421) will be happy to talk to you. Please bear in mind that it is a draft document, and that some portions are more thought out than others.

Preamble

All talks processes involving the Northern Irish parties and or the British and Irish governments at various times over the past 25 years seeking a 'historical compromise' have been structured on the same on the same essential formula, albeit in different formats, and with different priorities. This is the three stranded approach which, in its current form is comprised of :

- a) Relationships within Northern Ireland
- b) Relationships between 'north and south'
- c) Relationships between 'east and west' commonly taken to mean the relationship between the British and Irish governments, and stated as the relationship between Dublin and London.

It is our contention that this framework is inadequate. We believe an additional two sets of relationships should be considered, and those are relationships within the—now reconstituted—UK, and our relationship in the European Union. It seems sensible, given the recent referenda in the UK to take account not only of Dublin-London relationships, but also of relationships between Belfast, Edinburgh, Cardiff, London and Dublin. With sovereignty increasingly being pooled off to supranational bodies such as the European Union it also seems sensible to examine how we might influence that process.

Introduction

The settlement process is about the search for the 'honourable draw'. It will involve both internalist and externalist elements, and will be structured around the three sets of relationships referred to above. Effectively, what is currently being negotiated is A New Framework for Agreement, one of the Framework Documents.

This paper takes the view that Northern Ireland will remain part of the UK for the foreseeable future. What it argues is that a settlement should make the force of the border irrelevant: that Northern Ireland will become 'greener', the border will become more porous, and that new relationships between other regional capitals within the UK will be engaged with and explored.

Our starting point is that Northern Ireland is internationally recognised as a legally constituted political entity. In doing so we recall the pragmatic stance of Taoiseach Liam Cosgrave in 1974: "The factual position of Northern Ireland is that it is within the United Kingdom, and my government accepts this as a fact." We are thus concerned with the here and now: focusing on the future to help us to solve the problems of the past. In doing so we do not preclude the possibility of Northern Ireland being treated as a special region within the UK and as a special region within the Republic of Ireland. Nor do we think that any one strand should be considered to be of greater importance than another. In fact, there is no reason why they cannot all bear equal weight and influence on the course of our lives. In particular we put forward for consideration the notion that the greater degree of autonomy in Northern Ireland, the greater the degree of north-south relationships.

Thus our paper works along five strands, based around five sets of relationships which require resolution. These are:

- (i) Relationships within Northern Ireland
- (ii) Relationships between the UK regions
- (iii) Relationships between the British and Irish governments
- (iv) Relationships between Northern Ireland and the Republic of Ireland
- (v) Relationships between Northern Ireland and the European Union

We have considered some of these strands in greater depth than others in this draft, and we welcome your comments as to how we could further advance our thinking.

Multi-level governance

More and more states are moving to decentralised forms of government as a means of extending democracy. We noted particularly that the UK and Ireland appeared to be anomalies, certainly in the European Union, in terms of how centralised government was.. The UK and Ireland seem not to have developed the concept or operation of democracy in the same way as they have developed other innovations of the nineteenth century. It doesn't have to be this way.

In informing our thinking we have looked to many international examples of how governance is conceived of, particularly where there are competing claims on sovereignty. We have added, as an appendix to this paper, outlines of a number of these.

The paper, taking a pragmatic view, contends that the honourable draw will involve both internalist and externalist elements to any settlement, and to any future new society.

This paper initially discusses the shape of the internalist element, and the externalist elements, and makes some suggestion as to how the order and interrelationships of these might be arranged.

Values

Whatever political structures evolve they must be underpinned by strong values of participatory democracy, human rights, inclusion, pluralism, multi-culturalism, justice, fairness, and responsibility to these.

Internalist (Strands 1 and 2)

(Strand 1: Relationships within Northern Ireland)

We propose a differentiated approach, in three phases, extending over 30 years.

Years 1—10 (2000—2009)

(I) A new constitution for Northern Ireland

Bill of rights incorporated here; South African constitution; Canadian; Vanuatu
Judges to be interpreters of the constitution

(II) Northern Ireland's Preparatory Congress

We note that, in preparation for the Scotland's Parliament, a Scottish Constitutional Convention met to discuss in detail the shape of that body. We take the view that any settlement accord is only the start of the process to peace and stability. There needs to be a well-defined, recognised, transitional period. Below we outline some ideas as to how this concept might be thought about.

Part of the problem with proposing any greater degree of autonomy for Northern Ireland is that, invariably we would only replicate that which we have already, and end up with the same people that we have at the minute. The NIWC specifically does not want another Forum. We need, therefore, to present institutions which will attract people, particularly women and other excluded minorities, who have shunned public life in Northern Ireland for the past 27 years. We thus need to boost the role of civil society. We also need to consider how the current parties will realign post-settlement. They will all have to reorganise and restructure, and it is important that the body of governance offers them the space to do so. Taking these two considerations on board, we thus propose a unicameral body of governance which would perform not only a governance role, but a role as the custodian of the settlement, and the new society: a **Preparatory Congress**. The NIPC would be composed of directly elected representatives as well as representatives from the Social Partners and the NGO's. A model for this composition could be the current Northern Ireland Partnership Board, or the National Economic and Social Forum in the Republic. The directly elected representatives could be elected, for example, from a single multi-member Northern Ireland constituency, elected by, list system. This would return 100 seats. Other methods of election, such as 18 5-member constituencies returned from a list system ; PR could also be used. Members returned from this portion of the congress would be the full-time parliamentarians. Political parties would be responsible for allocating geographical constituency to their members of the Preparatory Congress.

75 seats would be returned from indirect electoral colleges. These colleges could be drawn from the business community, from the voluntary sector, the community sector, from the cultural and the arts sector, from industrial and technical; from agriculture; from the two universities. It would be the role of members from this sector to partake in and assist decision-making processes, as well as lending expertise to particular elements of governance.

These two sectors might compose two parts of a unicameral body. The distance between them can be deliberated upon, but the role we envisage for the electoral college members would be one of assisting with decision-making.

Some thought might also be given to the ancient Greek idea of a literal 'civic service': a kind of National Political Service something similar to jury service, whereby members of the public would be randomly selected to partake in decisions for say a 6 month period. Such political service should be compulsory???

There would be 2 or 3 co-chairships directly elected from the NIPC (as with FWD?) who would take responsibility for ensuring measures were passed according to the sufficiency of consensus principle, currently applicable at the Talks process. In the case of no agreement being reached, decisions would be referred to the central parliament. (or decided by the two governments??) The NI Secretary of State would advise the Westminster Cabinet, who would retain final say over Northern Ireland's affairs.

In keeping with the separation of powers ethos, members of the Preparatory Congress could not hold any other elected office. This frees up places for new personalities to enter politics, and means that the quality of time and effort directed to a particular position is maximised.

The NIPC would have:

- (a) Powers of scrutiny (for example on appointment to quangos etc.)
- (b) Strategic planning (for example on social and economic development; the allocation of EU structural funds etc.)
- (c) A duty to liaise with regional academic institutions and business to ensure that innovations and technological advances made in universities are exploited by creators of wealth. This should extend to the whole academy in the Atlantic Region of the EU.
- (d) Discuss the nature and scope of its relations with the emerging regional governments in the UK (Edinburgh, Cardiff, London) and with the rest of Ireland (Cork, Galway and Dublin)
- (e) policing
- (f) judicial procedures
- (g) all other powers except those retained by Westminster (more than powers of defence and foreign policy: taxraising, +)
- (h) education policy ???
- (I) health policy ??

As with the 1920 Government of Ireland Act, and in addition to the powers to administrate human rights, concerns of foreign policy, defence and taxation should be retained by the central UK government. (Much altered in nature and scope)

Years 10—20 (2010—2019)

Northern Ireland's Government

It should be assessed whether or not this arrangement (the Preparatory Congress) has resulted in a realpolitick or an approximation of a realpolitick. If it has then its powers should be upgraded, and, after this time the NIPC should metamorphose into a

exclusively directly elected body: **Northern Ireland's Government** (GNI) with the previously second tier becoming a satellite, advisory group to the government, functioning in the same manner as the e.g. NESF in the Republic. If a realpolitik has been established, elected politics should attract candidates of high calibre.

We note what Stephen Tindale (IPPR, 1996) says on a similar question: "A directly elected regional council would have the advantage of greater democratic legitimacy, but would be more likely to be acquisitive of power and functions. An indirectly elected body would be less acquisitive, but less legitimate."

We recommend that, as with the earlier body, defence and foreign policy would remain with Westminster. Human Rights responsibility would also be maintained by Westminster. Normally tax raising powers would remain here also: we do not envisage a Northern Ireland's government as having tax raising powers—one of the definitions of a full Parliament. And NI'sG would not be in an economic position to raise taxes. But it may be possible to do this in conjunction with one or more of the other regions in the Islands (for example the Republic of Ireland) for a specific project, for example tourism, or the setting of the level of corporate tax, where it is economically viable and productive to do so. It would have to argue its case with Westminster for doing so.

Years 20—30 (2020—2030)

Review of structure. Referendum. More powers and responsibilities as appropriate.

Strand 2: Relationships between regions of the UK

Belfast and Edinburgh, Belfast and Cardiff, Belfast and London

Externalist (Strands 3.4.5)

Strand 3: Relationships between North and South

The Framework Document envisages three types of North-South body, arranged by the type of power they'd have: executive, co-operative and harmonisation. One example of an executive body (having joint administrative power) is the Foyle Fisheries Commission, founded in 1952. Thus precedent exists. Unionists tend to take the view that a North South body will herald a slide into a united Ireland. Nationalist representatives feel that for nationalists in the north to be given full cultural and political

expression they must have a north south body with executive powers. (ie. a form of joint authority).

It is possible that, in real terms both of these views are wrong. One North-south body with executive powers would probably turnout to be a giant quango. And, at the time the Council of Ireland was proposed it was estimated that it would take 44,000 civil servants to run it. Because there are so many different areas that north-south relations pertain to, it may be better to concieve of a situation in which the envorinment is created whereby cross-border bodies could develop responses to their own needs at their own pace, thus weaving a multi-stranded fabric—a sort of 'consensual integration' as opposed to the more elite driven rolling integration—which would make the border less and less relevant. More on this??

We feel that, concomitant to any modernity of the UK, there is also room for movement in the Republic. On this we would highlight two aspects:

(i) The possibility of the NIPC providing commentary on Southern developments. This could happen via various mechanisms, either informally, at a Maryfield level, or possibly, by the reservation of a fixed number of seats in Seanad Eireann which would be appointed by NIPC.

(ii) The Republic might also consider devolving greater power to its regions, developing three regional capitals with greater powers of governance over the provinces.

Strand 4 Relationships between the British and Irish governments

Strand 5 Relationships between the region and the European Union

This paper sets out the basic principle and some suggestions as to how the principles might be conceived of practically. An agreement to do further exploratory work would involve a lot more detail about the interrelationships of various bodies herein proposed, and a more systematic approach to examining federated and non-federated regions in Europe and the US (and elsewhere) would have to be undertaken.

Consent

Appendix

Governing Regions -- how some other countries have coped.

These notes relate to government structures only. They do not make comment on how the structures are implemented or on the ideologies that support them.

Democratic government is believed to have begun in the city states of ancient Greece, and particularly the city of Athens which, with a total population of around 50,000, was able to practice direct and universal participation in government -- except for women and slaves of course! Democracy comes from the Greek, *kratos* (rule) and *demos* (by the people).

But the directness of this rule could only be because it dealt with such a small number of people. Very few states are small enough to practise full participation in their democratic processes today. One virtually unique example is the Most Serene Republic of San Marino, an enclave in Italy.

Most states which claim to be democratic do so on the basis of representative rather than direct democracy. Examples of direct democracy in a representative system would be if a referendum was held, the public would be voting directly on policy. Usually, in a representative system, such decisions are taken on the people's behalf by the government.

Modern states find it necessary to have institutions to administer to the needs of particular localities as well as the whole population. A nation state is one which claims sovereignty (authority, not constitutional monarchy) over the whole of its territory. In other words, everyone within its boundaries is subject to its laws. If a government decides to divide its sovereignty within its boundaries and pass it on to local bodies, it means the devolution of some of its law making powers. When these powers belong to a locality within the nation-state as of constitutional right, the nation state is said to have a federal structure of government. The prime example of this type of arrangement is the United States of America. Only 24 states in the world govern in this way. Other examples include Australia, Canada, Brazil, Mexico, Germany and Argentina.

If central government retains the right to override these devolved powers, the state is not truly federal in nature. This not to say that the state cannot reserve some powers (for example, foreign policy and defence), but to note that the powers of the government in the centre and the localities must be clearly defined. Usually this is written in a state constitution.

When executive powers only (as opposed to legislative powers) are decentralised, a state is said to have a unitary structure.

It is possible to have unitary states with some decentralised features. Nine out of 15 members of the EU have established a democratic regional level. Among the larger states, the UK is unique in not having one. Below some of these are outlined.

France:

22 indirectly elected regional councils (*conseils regionaux*). They are said to be indirectly elected because they are made up from the regions' MPs from the national parliament, representatives from the local councils, a small number of 'experts' appointed by the national government, and the national government also appoints a Prefect to represent the state at the regional level. Below these councils are 96 departments or county councils.

Mayors of the conseils regionaux have control of housing, transport, education, law enforcement, and some tax-raising powers. Regions have the authority to intervene in any area 'which affects the region', unless specifically banned from doing so.

There is also a dual executive, both the President and the Prime Minister have clearly defined powers. The President, once elected, combines the formal posts of head of state and commander in chief of the armed forces, as well as being 'guardian' of the constitution. They also have the right to select the prime minister, preside over meetings of the cabinet, countersign government bill, negotiate foreign treaties, initiate referenda and dissolve the National Assembly and call fresh elections, subject to the qualification that only one dissolution is permitted per year.

Italy:

Has 15 'ordinary' regions (regioni) with elected councils, 5 'special' regions and 2 autonomous provinces. The regional development of the Italian state began in 1946 with the recognition of the Sicilian government, and the 1948 constitution provided for the creation of a regionalised but not a federal state. The ordinary regioni, less independent than the 5 special regioni, did not really come into practice until 1970.

The 5 'special' regions, for example, Sicily, Sardinia, and Valle d'Aosta are in a better off position financially than the ordinary regions. They receive a guaranteed proportion of national taxes collected in their territory and in theory they have full legislative control over most policy areas.

Each of the regioni has a directly elected single council from which the regional Giunta (cabinet) is elected. This is headed by a regional President. In each region, a state commissioner represents the central government and supervises regional acts and administration.

The two autonomous provinces are Trentino and Alto Adige. Each of these has most of the powers of a special regioni. The German speakers of Trentino waged a (sometimes violent) campaign for their own region as they claimed that the artificial construct of the Trentino-Alto Adige included a minority Italian population to allow the continuation of discrimination against German speaking Tyrolese.

Spain:

Is a constitutional monarchy (King Juan Carlos 1 since 1975). It is not a federal state, but is divided into 50 provinces. Each province has its own council (disputacion Provincial) and civil governor. It has 17 Autonomous Communities (autonomias). Each of these has an assembly and a president elected by that assembly. The Spanish engaged in a novel method of reform to resolve the various aspirations of different regions. The development of regional autonomy became autonomy. Autonomous regions would only be established where there was a clear desire for them. The amount of autonomy depended on the extent of support for it. Two routes for autonomy were written into the constitution (Arts 143 and 151), but effectively no longer exist, as all regions have either opted for or been given autonomy to some degree. Seven of the autonomias have high autonomy, 10 are low autonomy,

What all of these systems have in common is that they are limited in how much they can do by how much money they have at their disposal. What matters is financial security, which can be achieved through assigned taxes or agreed formulae for revenue sharing - but can also cause tension between regions, and between regions and national government.

Germany:

Has a federal system. Originally had 10 Lander (states), and since unification in 1990 there have been 16. Each has its own constitution and elected single chamber assembly (Landtag or Burschaft), except for Bavaria, which has 2 chambers.

Nationally, Germany is a parliamentary democracy with a bicameral (2 chambers) legislature comprising a directly elected lower house - the Bundestag (656 members) - and an indirectly elected 68 member upper house - the Bundesrat. Bundesrat members are sent by the individual Lander governments. The Bundestag usually initiates legislative process though all legislation relating to Lander responsibilities must receive Bundesrat approval.

Canada:

Combines a federal system with the Westminster parliamentary model. Historically bicultural and bilingual, Canada is increasingly multi-ethnic. The 1982 Constitution, with a Charter of Rights and Freedoms, recognises multi-culturalism and aboriginal rights, but aboriginal self-government remains a major unresolved issue.

General government: The British monarch is the official head of state, represented in absentia by an appointed Governor General, whose extensive formal powers are now largely ceremonial. Real executive power lies with the Prime Minister and Cabinet (chosen by the PM from the legislature). The federal legislature is bicameral. MPs are elected to the **House of Commons** on the Westminster system. Much of the work of parliament is done in committees. The second chamber, the **Senate** is appointed on a regional basis at the nomination of the PM. Senators retire at age 75. Analogous in many of its functions to the House of Lords, it is often accused of being partisan and non-representative. However, it tends to take seriously its role of giving 'sober second thought' to legislation (all parliamentary bills must pass through Senate). It generally suggests amendments to bills rather than vetoing them. It can introduce non-fiscal legislation. Proposals for Senate reform, so far not adopted, include guaranteed seats for women and aboriginal representatives. National security, foreign policy and interprovincial commerce and communication are exclusively in the federal jurisdiction.

Provinces and territories: Canada has 10 provinces each with its own unicameral legislature. There are 2 territories, also with legislatures, although these are run on different principles than the provinces'. They have less autonomy than provinces, but are gaining in terms of self-government. Provincial legislatures are run on the Westminster model. Lieutenant-Governors are analogous to the Governor General.

Provincial Premiers appoint an executive council, varying somewhat according to provincial need. Provinces control their own constitutions, tax revenues and municipal government. Areas of provincial jurisdiction include, among others: education, provincial courts, health and welfare, shops and alcohol. Other areas, including agriculture and immigration, are concurrent federal-provincial affairs. Regular First Ministers' conferences are a central mechanism of executive federalism and the main forum for resolving federal-provincial relationships and disputes.

Tension between the regions is increasing in Canada. Regional economic disparities are offset somewhat by transfer payments, but, given provincial responsibility for social provision, poorer provinces levy higher taxes to make up budget shortfalls.

Vanuatu/New Hebrides:

Condominium: From 1907 to independence in 1980, Vanuatu (a group of some 80 islands about 2200 km north-east of Sydney) was an Anglo-French condominium known as the New Hebrides. This joint administration involved no partition of territory and neither power claimed sovereignty. British laws applied to British nationals, French laws to French nationals. There was a separate legal status for natives, who were exempt from taxation and conscription. Non-French, non-British nationals had to choose French or English jurisdiction (e.g., some Canadians opted for French; others for British). Some public services were provided jointly by the Condominium. Others were provided in duplicate. District Agents were Condominium positions, but French and British governments also appointed French and British DAs. The police was supposed to be a unitary force with French and British divisions, but these divisions operated separately in practice. A Joint Court, designed to resolve land disputes, included a neutral president (initially Spanish), a French Judge, a British Judge and a Public Prosecutor.

Post-independence: Vanuatu (pop approx. 140,200) adopted a Westminster parliamentary system, with many of its general government powers partially devolved to 11 **Regional Councils** and with modifications at the national and regional levels to accommodate the role of tribal chiefs.

General government: a President, with largely ceremonial powers, is elected by an electoral college made up of Parliament and the presidents of the Regional Councils (2/3 majority required on this secret ballot). Legislative power lies with the 46-member, unicameral parliament, which is elected by PR. Executive power lies with a Prime Minister (elected by and from Parliament) and council of ministers (appointed by the PM from Parliament members). A national council of chiefs has authority to discuss matters relating to customs and traditions and to make recommendations to government on these matters.

Regional Councils are elected and include representation of local customary chiefs. Their Presidents are elected by and from Council members. The distribution of powers, responsibilities and functions is a matter for negotiation between individual regional councils and the general government, subject to a 2/3 vote in Parliament.

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