

2014

Self-Determination, Justice, and a "Peace Process": Irish Nationalism, the Contemporary Colonial Experience, and the Good Friday Agreement

Amy Maguire

University of Newcastle Law School, Australia

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Maguire, Amy (2014) "Self-Determination, Justice, and a "Peace Process": Irish Nationalism, the Contemporary Colonial Experience, and the Good Friday Agreement," *Seattle Journal for Social Justice*: Vol. 13 : Iss. 2 , Article 13.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol13/iss2/13>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.

**Self-Determination, Justice, and a
“Peace Process”:
Irish Nationalism, the Contemporary Colonial
Experience, and the Good Friday Agreement**

Amy Maguire*

Abstract

In a sense, the “Irish peace process” is a success story, as it has largely achieved a shift from military/paramilitary violent conflict to political conflict, played out through democratic institutions. However, the perception that a peace has been achieved belies the fact that the meta-conflict remains unresolved. This article engages with the Irish peace process in the context of the collective human right of self-determination. I argue that self-determination retains a mission of liberation in the twenty-first century, particularly in relation to contemporary colonial cases, such as that of Irish nationalists in Northern Ireland. In this context, I explore the Irish peace accord, the Good Friday Agreement (“the Agreement”). While the Agreement has shifted the conflict largely into the realm of political debate, it has been less effective in promoting a peace that is grounded in justice. Indeed, some have recently argued that the people of Northern Ireland must choose between peace and justice. In this article, I question this proposed binary and argue that it is possible and worthwhile to pursue both justice and peace. An effective process of transitional justice for the

* Dr. Amy Maguire is an academic at the University of Newcastle Law School, Australia. Email for correspondence: Amy.Maguire@newcastle.edu.au.

I would like to acknowledge and thank Kerry Brent for her excellent research assistance in the preparation of this article. I also appreciate the extremely helpful feedback provided by colleagues in the writing circle at Newcastle Law School. Any errors remaining are my own.

North of Ireland can acknowledge colonialism as well as its impacts in Ireland, and can promote self-determination. Such a process can provide the foundation for the Good Friday Agreement to be implemented in ways that promote not only an end to violent conflict, but a just and lasting peace.

I. INTRODUCTION

“In places torn by war, there is all too often a choice to be made between justice and peace. We may want both; we may cry out for both. But the bleak truth is, we cannot have both.”

Jonathan Freedland¹

“Peace” has a particular connotation in terms of the conflict between Irish nationalist efforts to achieve Irish unification, and British unionist efforts to maintain Northern Ireland as a province of the United Kingdom.² In a sense, the Irish peace process is a success story, as it has largely achieved a shift from military/paramilitary violent conflict to political conflict, played out through democratic institutions.³ However, the perception that a peace has been achieved belies the fact that the meta-conflict remains unresolved.

¹ Jonathan Freedland, *Whatever Gerry Adams' Past, Peace Takes Precedence over Justice*, THE GUARDIAN, May 3, 2014, <http://www.theguardian.com/commentisfree/2014/may/02/gerry-adams-jean-mcconville-south-africa-painful-compromise>.

² In this article, I use the umbrella term “Irish nationalist” to refer to people and communities who seek the unification of the two Irish jurisdictions; Northern Ireland (currently a unit of the United Kingdom) and the Republic of Ireland (an independent state). I include in the term Irish nationalists those people who would also be identified as “Irish republicans,” a group that has historically been associated with a physical force tradition in Irish politics. I also use the umbrella term “British unionist” to refer to people and communities who seek to maintain the union between Northern Ireland and Great Britain. I include in this term those people who would also be identified as “British loyalists,” a term which has been used to identify more extreme elements in the unionist tradition, including members of the Orange Order and loyalist paramilitary groups.

³ The primary institution is the Northern Ireland Assembly, a consociational parliament, which exercises some powers devolved from the central UK administration at Westminster.

That is, the parties to the conflict "disagree about what caused the conflict."⁴

Further, the peace as it stands in Northern Ireland has not been shaped by the notion of self-determination. Self-determination is a foundation principle in the international human rights framework. It is an emancipatory principle, which acknowledges the right of "peoples" to determine their own destinies in the political, economic, social, and cultural spheres. The exercise of self-determination peaked during the decolonisation⁵ period of the 1960s and 1970s. Some contemporary commentators assert, however, that self-determination has a limited role to play in international affairs in the twenty-first century.⁶ Therefore, despite the central position of self-determination in the international human rights framework, there is a risk that decolonisation will come to be regarded as a historical phenomenon, rather than an ongoing imperative. Some contemporary hard cases in self-determination, notably the case of Irish nationalists in the North of Ireland, have already been unjustifiably marginalised in international legal discourse.

This article engages with matters of peace, law, and violence in the context of international law, particularly the collective human right of self-determination. I argue that self-determination retains a mission of liberation in the twenty-first century, particularly in relation to contemporary colonial cases, such as that of Irish nationalists in Northern Ireland.⁷ The Irish

⁴ Christine Bell, et al., *Justice Discourses in Transition*, 13 SOC. & LEGAL STUD. 305, 316 (2004).

⁵ Throughout this article, I use Australian English spelling rather than US English spelling.

⁶ See, e.g., Hurst Hannum, *Rethinking Self-Determination* 34 VA. J. OF INT'L L. 1, 31 (1993); Noel Pearson, *Uses of Layered Identities*, WEEKEND AUSTRAL., Nov. 18, 2006, at 28.

⁷ "Northern Ireland" is the official term for the northeastern six counties of the island of Ireland, which is administered as a province of the United Kingdom of Great Britain and Northern Ireland. The term "Northern Ireland" is often rejected by Irish nationalists living in that territory, in favour of terms such as "the North of Ireland" or "the Six

nationalist claim to self-determination is acknowledged in the central document of the Irish peace process, the Good Friday Agreement.⁸ Since its adoption in 1998, the Agreement has come to be widely accepted as the legal instrument essential to peaceful political progress in Ireland.

The Agreement has succeeded in shifting the nature of the conflict in Ireland. As a legal institution, the Agreement has promoted peace and discouraged violence, shifting the conflict largely into the realm of political debate. However, the Agreement and its outworkings have been less effective in promoting a peace that is grounded in justice. The pursuit of justice in post-conflict societies is complicated by the need to frame the past and acknowledge the significance of past wrongs in order to achieve future goals.⁹ As noted above, Freedland recently argued that the people of post-conflict societies must choose between peace and justice.¹⁰ In a similar recent comment, Clive Crook argued that Northern Ireland has a long way to go in the pursuit of post-conflict reconciliation, and that its people are obliged to settle for peace and truth without also aspiring to justice.¹¹

Counties.” In this article, I use the terms “Northern Ireland” and “the North of Ireland” interchangeably, in order to acknowledge the competing nationalist identifications of the two main communities: Irish nationalists and British unionists.

⁸ See generally Agreement Reached at Multi-Party Negotiations, Belfast, Apr. 10, 1998, Cm. 3883, available at <https://www.gov.uk/government/publications/the-belfast-agreement> (*hereinafter* Good Friday Agreement). The Good Friday Agreement is also commonly known as the Belfast Agreement. This power sharing accord is typically known to Irish nationalists in the north of Ireland as the “Good Friday Agreement,” as it was signed on Good Friday in 1998. As with the terms “Northern Ireland” and “North of Ireland,” the language surrounding the agreement is contentious, with the ‘Good Friday’ usage suggesting an association with the Catholicism that is the religious context for the Irish nationalist community. In this article, I will generally use the phrase “the Agreement,” which is in common use in Ireland.

⁹ Cillian McGrattan, *Policing Politics: Framing the Past in Post-Conflict Divided Societies*, 21 DEMOCRATIZATION 389, 390 (2014).

¹⁰ Freedland, *supra* note 1.

¹¹ Clive Crook, *Northern Ireland Can't Have Peace and Justice*, BLOOMBERG VIEW May 6, 2014, <http://www.bloombergview.com/articles/2014-05-06/northern-ireland-cant-have-both-peace-and-justice>.

This proposed peace-justice binary presents particular challenges for those who have suffered the most in conflict, namely victims of violence. According to Graham Dawson, contradictions between peace processes and the desire for justice

are especially acute for the victims of violence who, confronted by amnesty and other arrangements designed to draw perpetrators into a negotiated political settlement, may be forced to choose between the pursuit of justice and the securing of a peace settlement or the securing of information about the death of a loved one.¹²

In this article, I question this peace-justice binary, to argue that it is both possible and worthwhile to simultaneously pursue justice and peace. I use the term justice in the context of transitional justice theory, a body of scholarship that focuses on the promotion of justice in post-conflict societies. I argue that analysis of the Irish nationalist claim to self-determination is currently inadequate, and that this is a key limiting factor in the capacity of the Good Friday Agreement and its outworkings to promote both peace and justice. An effective process of transitional justice for the North of Ireland must acknowledge and address the Irish nationalist claim to self-determination and the colonial experience it emerges from. This can provide the foundation for the Agreement to be implemented in ways that promote not only an end to violent conflict, but also a just and lasting peace.

In the remainder of this introduction, I explain the three key concepts in this article, namely (A) the right of self-determination, (B) peace, and (C) transitional justice. I also explain my methodology. In Part II, I argue that

¹² Graham Dawson, *The Desire for Justice, Psychic Reparation and the Politics of Memory in "Post-Conflict" Northern Ireland*, 18 *RETHINKING HIST.: J. OF THEORY & PRAC.* 265, 266 (2014). See also generally MARIE BREEN SMYTH, *TRUTH RECOVERY AND JUSTICE AFTER CONFLICT: MANAGING VIOLENT PASTS* (2007); BRANDON HAMBER, *TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH, RECONCILIATION AND MENTAL HEALTH* (2009).

self-determination retains a mission of liberation for Irish nationalists in Northern Ireland, whose circumstances evidence a contemporary colonial experience. In Part III, I introduce the Good Friday Agreement, and demonstrate that this peace accord acknowledges the legitimacy of the Irish nationalist self-determination claim. In Part IV, I explore how the Agreement has shifted the nature of the political conflict in Ireland, and argue that its capacity to promote a just peace must be continually and critically assessed. That capacity can be enhanced by attending to the requirements of transitional justice.

A. The Right of Self-Determination

The right of self-determination is enshrined in common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR): “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹³

Self-determination entails the right of a “people” to choose their own form of political organisation and relationship to other groups.¹⁴ However, self-determination goes beyond this “essence” of political control, to extend “full rights in the cultural, economic and political spheres.”¹⁵ The right represents the means for a people “to preserve its cultural, ethnic, historical, or territorial identity.”¹⁶ Self-determination is a foundation principle in the

¹³ G.A. Res 2200A (XXI), ¶ 1, U.N. Doc. A/2200 (Dec. 16, 1966). The ICCPR and ICESCR are the core treaty sources of contemporary international human rights law. They are distinguished from other treaties by near-universal adoption by members of the international community.

¹⁴ IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553 (6th ed. 2003).

¹⁵ Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT’L & COMP. L. Q. 867, 880 (1989).

¹⁶ Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSN’L L. & CONTEMP. PROB. 1, 4–5 (1993).

body of international human rights law, and the capacity of human beings to realise their individual human rights is closely tied to the degree to which their community exercises self-determination.¹⁷

The right of self-determination has a revolutionary character, both in the sense that its origins may be traced to revolutionary movements, and in its capacity to revolutionise relationships between peoples and states.¹⁸ The principle of self-determination can be traced to the French and US revolutions.¹⁹ However, the principle of self-determination was most prominently engaged during the decolonisation era of the 1960s and 1970s.²⁰ During this era, colonised peoples around the globe seized upon the right of self-determination as a vehicle by which the mission of decolonisation, which Frantz Fanon and others described,²¹ could be achieved.²² In the twenty-first century, some have argued that self-determination's mission of decolonisation is almost or entirely complete.²³ However, some contemporary hard cases in self-determination have been unjustifiably marginalised in international legal discourse. Irish nationalists in Northern Ireland fall into a category of contemporary self-determination claimants who assert a colonial experience, but do not meet the archaic

¹⁷ Héctor Gros Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, ¶ 59, United Nations, E/CN.4/Sub.2/405 (1980); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 77 (1996).

¹⁸ Thornberry, *supra* note 15. Thornberry refers to self-determination as a "concept of liberation."

¹⁹ ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 11 (1995).

²⁰ ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196 (2004).

²¹ FRANTZ FANON, *THE WRETCHED OF THE EARTH* 41 (Constance Farrington trans., 1965).

²² Many of these peoples asserted independent statehood through the trusteeship system of the United Nations. The United Nations records the changes in sovereignty in over 80 former trust and non-self-governing territories. See UNITED NATIONS, *TRUST AND NON-SELF-GOVERNING TERRITORIES, 1945–1999* (1999), available at <http://www.un.org/en/decolonization/nonselgov.shtml>.

²³ See, e.g., Hannum, *supra* note 6, at 31; Pearson, *supra* note 6.

“salt-water” test²⁴ of colonialism. Contemporary legal commentators have recognised that this test, which aimed to impose predictability by ruling out claims from peoples not separated by an ocean from their colonisers, was and remains manifestly unjust.²⁵

B. Peace: Settlement, Resolution, or Reconciliation?

The Irish peace process demonstrates that the meaning of “peace” is contingent and context-dependent. Herbert Kelman identifies three different ways in which violent conflict between identity groups can be brought to an end. The first, conflict settlement, produces agreements (brokered by third parties) that meet the interests of parties “to the extent that their respective power positions enable them to prevail.”²⁶ Public support may be based on a desire for the end of violent conflict but may “not rest in any particular change in public attitudes toward the adversary.”²⁷ The second, conflict resolution, moves beyond settlement to change the relationship between parties, diluting the influence of power or required surveillance in agreement-making, and encouraging the building of trust and new understandings of the other.²⁸ The third and final step beyond conflict resolution, and the “interactive problem-solving framework” resolution can create, is reconciliation. Good agreements can be tested by their capacity to

²⁴ The “salt-water” test of colonialism required a colonial territory and people to be geographically and ethnically distinct from the colonising power.

²⁵ Andrew Hurrell, *International Law and the Making and Unmaking of Boundaries*, in STATES, NATIONS AND BORDERS: THE ETHICS OF MAKING BOUNDARIES 275, 292 (Allen E. Buchanan & Margaret Moore eds., 2003); David Wippman, *Introduction: Ethnic Claims and International Law*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 1, 11 (David Wippman ed., 1998).

²⁶ Herbert C. Kelman, *Conflict Resolution and Reconciliation: A Social-Psychological Perspective on Ending Violent Conflict Between Identity Groups*, 1 LANDSCAPES OF VIOLENCE: AN INTERDISC. J. DEVOTED TO STUDY VIOLENCE, CONFLICT, & TRAUMA 1, 1 (2010).

²⁷ *Id.*

²⁸ *Id.* at 2.

enable reconciliation (as a process that evolves over time).²⁹ Reconciliation is the most challenging form of peace to achieve, as it requires identity change "by removing the negation of the other as a central component of one's own identity."³⁰

The Good Friday Agreement was, at least in part, an outcome of the lengthy campaign of resistance mounted by Irish nationalists against the British state and its administration of Northern Ireland. Indeed, one Sinn Féin Member of Parliament in the Northern Ireland Assembly, Martina Anderson, depicted Irish nationalism as a struggle against colonialism.³¹ The Agreement and its outworkings have achieved a shift from violent and militarised political conflict to (largely) non-violent political conflict. There are few who would argue against the legitimacy of this transition, particularly considering the resounding popular support for the Good Friday Agreement as expressed in referenda in both Irish jurisdictions.³² On July 28, 2005, the Provisional Irish Republican Army (IRA), a key protagonist of the "physical-force" Irish Republican movement, declared an end to its armed campaign.³³ In its statement, the IRA concluded that the objective of Irish unity could and would be advanced by "purely political and democratic programmes" and "exclusively peaceful means," noting the "compelling imperative on all sides to build a just and lasting peace."³⁴ In

²⁹ *Id.* at 3.

³⁰ *Id.* at 4.

³¹ Interview with Martina Anderson, Sinn Féin Director of Unionist Engagement, in Belfast (Mar. 21, 2006). Martina Anderson is an Irish nationalist politician, sitting in the Northern Ireland Assembly for Sinn Féin, and a former Irish Republican Army (IRA) Volunteer and prisoner.

³² Some dissident Irish republican groupings remain active in Ireland and assert the illegitimacy of the Good Friday Agreement and related institutions.

³³ Irish Republican Army, *Statement on the Ending of the Armed Campaign*, CAIN Web Service (Jul. 25, 2005), available at <http://cain.ulst.ac.uk/othelem/organ/ira/ira280705.htm>.

³⁴ *Id.*

this context, *legitimate* resistance ought to now be characterised as non-violent political activity.

However, there is a risk in Ireland that the peace process subsumes the underlying and unresolved political conflict between the competing visions for the territory's future held by Irish nationalists, British unionists, and the two sovereign states of the United Kingdom and the Republic of Ireland. If "peace" marginalizes legitimate resistance to colonialism, then it will not produce justice in the sense of self-determination and, over time, it may trigger a resurgence in violent conflict. In this context, proactive evaluation of the Agreement and what it can deliver serves the interests of justice and self-determination.

C. Transitional Justice

Transitional justice is a set of scholarly enquiries concerned with the emergence of societies from violent conflict.³⁵ According to Christine Bell, Colm Campbell, and Fionnuala Ní Aoláin, "'transitional justice' encompasses the legal, moral and political dilemmas that arise in holding human rights abusers accountable at the end of conflict."³⁶ Studies in transitional justice can provide corrective and redemptive visions for justice after conflict, with their foci on human rights serving to mediate political divides.³⁷ Transitional justice enquiries have frequently reflected on the post-conflict circumstances of Northern Ireland.³⁸ These enquiries can assist in exploring the potential of the Good Friday Agreement, due to their focus on the capacity of law and legal institutions to contribute to social transformations. Indeed, the Agreement contains a number of provisions that could be helpful in developing transitional justice—for example, those

³⁵ Alex Boraine, *Transitional Justice as an Emerging Field*, 5 (Repairing the Past: Reparations and Transitions to Democracy, Conference Paper, Mar. 2004).

³⁶ Bell et al., *supra* note 4, at 305.

³⁷ RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 228 (2000).

³⁸ I will discuss several of these in more detail in Part IV(i) of this article, below.

that require reform of policing, criminal justice, victims' rights, human rights, and the release of paramilitary prisoners.³⁹

As noted above, I advocate for the development of a peace in the North of Ireland that encompasses—rather than marginalises—a concern for justice. This position has been strongly asserted by community-based peace movements in Northern Ireland over many years. For example, former leader of the Northern Ireland Women's Coalition, Monica McWilliams, wrote in 1995 of women's "struggle for peace and justice."⁴⁰ McWilliams cited Oonagh Marron, an organiser of the 1994 Clár na mBan⁴¹ conference under the theme "A Woman's Agenda for Peace": "It is up to us in the women's movement to build an undeniable force, to maintain the pressure that will ensure that when the politicians talk of peace they mean peace with justice."⁴²

This article positions self-determination in relation to both the Irish peace process (particularly through the lens of the Good Friday Agreement) and transitional justice theory. In the North of Ireland, self-determination can serve as the glue that binds the notions of peace and justice, and informs a peace process capable of achieving reconciliation over time, rather than mere settlement of violent conflict.

³⁹ Campbell, et al., *The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland*, 66 MODERN L. REV. 317, 338 (2003).

⁴⁰ Monica McWilliams, *Struggling for Peace and Justice: Reflections on Women's Activism in Northern Ireland*, 6 J. WOMEN'S HIST. 13, 32 (1995).

⁴¹ An Irish phrase meaning "women's agenda."

⁴² Oonagh Marron, *The Cost of Silencing Voices Like Mine*, in UNFINISHED REVOLUTION: ESSAYS ON THE IRISH WOMEN'S MOVEMENT 38–42 (Fran Devaney et al. eds., 1989), quoted in Monica McWilliams, *Struggling for Peace and Justice: Reflections on Women's Activism in Northern Ireland*, 6 J. WOMEN'S HIST. 13, 32 (1995).

D. Methodology

I have provided a more detailed explanation of my methodology elsewhere.⁴³ This article draws on a combination of doctrinal legal research and qualitative socio-legal research, with particular emphasis on data gathered through in-depth research interviews with 14 participants in Ireland. Analyses of self-determination have typically been highly doctrinal, and have not followed a bottom-up approach to exploring the justifications or claims advanced by individual members of claimant groups. In this article, I privilege the experiences and aspirations of rights claimants to “talk back” to international law. In doing so, I critique the colonial origins and biases of the international legal system.

Research participants in this study were targeted due to their experiences and expertise in self-determination, ensuring that all participants approached the research project from an informed position and delivered “information-rich” data through the interviews.⁴⁴ In the first footnote referring to each participant, I include a brief statement of his or her relevant background and/or professional role in relation to the research. Qualitative research does not seek to make claims of generality,⁴⁵ but rather seeks to show valid and reliable connections between the data and the analysis.⁴⁶ In the research on which this article is based, I grounded my findings in the meanings expressed by interview participants by using the

⁴³ Amy Maguire, *Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law*, 22 GRIFFITH L. REV. 238, 242–46 (2013).

⁴⁴ Jamie Baxter & John Eyles, *Evaluating Qualitative Research in Social Geography: Establishing ‘Rigour’ in Interview Analysis*, 22 TRANSACTIONS OF INST. OF BRIT. GEOGRAPHERS 505, 513 (1997).

⁴⁵ Ann Chih Lin, *Bridging Positivist and Interpretivist Approaches to Qualitative Methods*, 26 POL’Y STUD. J. 162, 163 (1998).

⁴⁶ Baxter & Eyles, *supra* note 44, at 512.

constant comparison method,⁴⁷ coding frequently raised concepts and using direct quotations from transcripts.

In this article, I focus on the theme that emerged from data analysis as the core variable, namely, the contemporary colonial experience of Irish nationalists in Northern Ireland and the influence of that experience on their self-determination claims. This core variable recurs frequently throughout the data, links various data, becomes more detailed through constant comparison, and has significance in theory generation.⁴⁸ The core variable of colonialism, as discussed by interview participants, drew together the other themes raised in interviews "to form an explanatory whole."⁴⁹ The perspectives of these interviewees on colonialism and the contemporary Irish nationalist claim to self-determination echo Malcolm X's assertion: "You can't separate peace from freedom, because no one can be at peace unless he has his freedom."⁵⁰ In contemporary, multi-cultural Ireland, however, the parallel imperative is to ensure that the pursuit of freedom does not threaten the peace that has been painstakingly negotiated. Throughout this article, I ask whether the Good Friday Agreement can promote both peace and justice through self-determination.

⁴⁷ The process of constant comparison involves constantly comparing data and emerging analysis to generate a theory. See BARNEY GLASER & ANSELM STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 104 (1967).

⁴⁸ Michelle Byrne, *Grounded Theory as a Qualitative Research Methodology*, 73 *ASS'N OF OPERATING ROOM NURSES J.* 1155, 1155 (2001). "Theory generation" refers to the use of constant comparison and the deep analysis of data to lift data beyond its basic meanings and to develop abstract theoretical conclusions. See Roy Suddaby, *From the Editors: What Grounded Theory Is Not*, 49 *ACAD. OF MGMT J.* 633, 636 (2006).

⁴⁹ ANSELM STRAUSS & JULIET CORBIN, *BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY* 146 (1998).

⁵⁰ Malcolm X, Speech in New York City, "Prospects for Freedom in 1965" (Jan. 7, 1965), in *MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS* 147 (1965).

II. SELF-DETERMINATION AND THE MISSION OF LIBERATION IN IRELAND

A. The Meaning of Self-determination from Irish Nationalist Perspectives

In this section, I briefly consider some of the Irish interviewees' perspectives on the meaning of the right of self-determination. This provides context for the subsequent exploration of the contemporary colonial experience of Irish nationalists in the North of Ireland. All 14 participants accepted the international legal definition of the right as a starting point, and each then went on to apply the definition in practical terms. For example, Bríd Rodgers acknowledged the independence aspect of self-determination, but went on to note that this aspect of the right is complicated in the Irish context:

The issue [in Ireland] is that there are two sets of people on the island who see self-determination differently. The only way to solve that is to get to a context where you accept the legitimacy of both, but you provide a context where they can work together, and eventually heal, and move on to self-determination.⁵¹

Paul O'Connor agreed that all of the people of the island of Ireland are entitled to decide their destiny together.⁵²

To Eoin Ó Broin, self-determination operates on three levels: the nation, the community, and the individual. Along with balancing these three "sites" of self-determination, he argued that the right must also be balanced with

⁵¹ Interview with Bríd Rodgers, Social Democratic and Labour Party (*hereinafter* SDLP), Lurgan, Ireland (Mar. 9, 2006). Bríd Rodgers was one of the first Ministers in the devolved Northern Ireland Executive, elected for the Social Democratic and Labour Party (SDLP), a centrist Irish nationalist party, and a founding activist in the civil rights movement.

⁵² Interview with Paul O'Connor, Pat Finucane Centre, Derry, Ireland (Mar. 2, 2006). Paul O'Connor is an Irish nationalist human rights activist, based at the Pat Finucane Centre in Derry, which represents the families of victims of conflict in their efforts to gain justice and truth.

social, economic, political, and cultural rights.⁵³ Both O’Connor and Terry Enright emphasised the importance of social and cultural freedom as aspects of self-determination.⁵⁴ Essential to this multi-faceted conception of self-determination is the notion of inclusion in governance. Anthony Coughlan acknowledged that self-determination has been traditionally understood to refer to independent statehood, but explained that “it also refers to the state you’re in, and whether it respects your culture and language, and right to a . . . standard of living, access to jobs, freedom from discrimination.”⁵⁵

Another common theme among participants was that self-determination has to be interpreted on a community level if it is to mean anything to claimants. According to Margaret Ward,

I think it has to start with people’s lived reality—what difference will it make to their lives? If they can’t be convinced on that then that kind of high-level objective wouldn’t move them.⁵⁶

Ó Broin also emphasised the community aspect of self-determination, arguing that the right must be primarily concerned with community-based activism, empowerment, and engagement on issues affecting people in their everyday lives.⁵⁷ Niall Murphy provided an example of community

⁵³ Interview with Eoin Ó Broin, Sinn Féin, Belfast, Ireland (Jan. 24, 2006). Eoin Ó Broin is an Irish nationalist political activist and writer.

⁵⁴ Interview with Paul O’Connor, *supra* note 52; Interview with Terry Enright, Human Rights Consortium, Belfast, Ireland (Feb. 2, 2006). The late Terry Enright was a member of the Irish nationalist community in Belfast, and a long-time community worker and human rights activist.

⁵⁵ Interview with Anthony Coughlan, Trinity College, Dublin, Ireland (Mar. 3, 2006). Anthony Coughlan is an Irish former academic, and a commentator on Irish engagement with Europe.

⁵⁶ Interview with Margaret Ward, Women’s Res. & Dev. Agency, Belfast, Ireland (Jan. 29, 2006). Margaret Ward is an Irish historian and human rights activist, and Director of the Women’s Research and Development Agency, an organisation situated in Belfast and dedicated to the promotion of women’s equality and rights.

⁵⁷ Interview with Eoin Ó Broin, *supra* note 53.

engagement with self-determination through the Gaelic Athletic Association, which he described as a custodian of Irish cultural pursuits.⁵⁸

However, several respondents concluded that Irish self-determination has failed to gain traction as an international legal issue. The right faces two major obstacles in this context: first, Britain's international status and its capacity to shape the "Irish question" as a domestic political problem,⁵⁹ and second, the lack of international advocacy on the part of the Irish state.⁶⁰ Consequently, academic and political commentary has failed to adequately acknowledge the effects of colonialism on Irish nationalists.⁶¹ Those who have attempted to expose the colonial legacy of British imperialism in Ireland have been left "without a paradigm to explain inequality, injustice and repression within the North of Ireland."⁶²

⁵⁸ Interview with Niall Murphy, Kevin R. Winters & Co. Solicitors, Belfast, Northern Ireland (Mar. 15, 2006). Niall Murphy is a member of the Irish nationalist community, and a legal practitioner in Belfast, specialising in human rights.

⁵⁹ Interview with Professor Christine Bell, Transitional Justice Institute, University of Ulster, Derry, Northern Ireland (Oct. 27, 2005). Christine Bell is a legal academic specialising in the study of transitional justice, with origins in the British unionist community in Northern Ireland. Interview with Anthony Coughlan, *supra* note 55. Interview with Terry Enright, *supra* note 54. Interview with Eoin Ó Broin, *supra* note 53. Interview with Mike Ritchie, Coiste na n-Irchimí, Belfast, Ireland (Dec. 7, 2005). Mike Ritchie is a community worker, who represents former Irish republican political prisoners.

⁶⁰ Interview with Professor Kieran McEvoy, Queens University Belfast, Belfast, Ireland (Jun. 22, 2006). McEvoy is a legal academic and criminologist, with particular expertise in relation to political imprisonment. McEvoy is also a long-time committee member of the Committee for the Administration of Justice, a prominent human rights NGO in Belfast.

⁶¹ Pamela Clayton, *Religion, Ethnicity and Colonialism as Explanations of the Northern Ireland Conflict*, in *RETHINKING NORTHERN IRELAND* 40, 48 (David Miller ed. 1998).

⁶² Robbie McVeigh, *The British/Irish "Peace Process" and the Colonial Legacy*, in *DIS/AGREEING IRELAND: CONTEXTS, OBSTACLES, HOPES* 27, 28 (James Anderson & James Goodman eds., 1998).

B. Aspects of the Historical and Contemporary Irish Nationalist Experience of Colonialism

In this section, I briefly explore some aspects of the historical and contemporary Irish nationalist experience of colonialism through the lens of three themes that emerged from my qualitative research—namely, the nature of British administration in Northern Ireland, social imperialism and the colonial mindset, and the suppression of Irish culture. The data from which these themes emerged support the conclusion that self-determination retains a contemporary mission of decolonisation, and that self-determination for Irish nationalists in Northern Ireland requires renewed critical evaluation. This section also provides context for Section IV of this article. In that section, I argue that, in order to ensure the capacity of the Agreement to promote a just peace, it is essential to acknowledge contextual matters of colonialism and self-determination.

Advocates for Irish self-determination have typically avoided the international legal forum as a site for advancing self-determination claims.⁶³ This is noteworthy because international recognition can significantly assist claimants in asserting and exercising their right to self-determination. It can, for instance, enable claimants to bolster their claims by referring to comparable situations in their advocacy.⁶⁴ It can also develop a broader support base and provide a much wider range of fora for advancing a self-

⁶³ Interview with Eoin Ó Broin, *supra* note 53.

⁶⁴ Interview with Professor Robert McCorquodale, University of Nottingham, Nottingham, UK (Mar. 27, 2006). Robert McCorquodale participated in this research during the process of interviews relating to the self-determination claims of Irish nationalists in Northern Ireland. His academic writings are also cited extensively in this article. McCorquodale is not a member of either major community in Ireland, nor is he engaged in a self-determination claim there. He was interviewed on the basis of his expertise in self-determination as a professor of international law, with particular focus on Britain’s engagement with the right. In this sense, McCorquodale’s participation in this research is similar to that of Professor Christine Bell, another non-claimant interviewee, whose expertise has been considered through both her comments in our interview and her written work.

determination claim. Had Ireland been recognised more widely as a site of colonialism, advocates may have been able to build on what Adrian Guelke recognised as the lack of international legitimacy of Northern Ireland as a political entity.⁶⁵ Instead, the continued colonial experience of Irish nationalists in the North of Ireland, and their right to self-determination, has been under-explored and under-theorised in legal discourse.

In arguing that colonialism relates not to distance, as in the salt-water archetype of colonialism, but rather to the form of administration, Robert McCorquodale asked, “Is the type of administration a foreign administration over those who are different and who don’t share the same approach?”⁶⁶ The use of the term “foreign” is complicated in the Northern Irish context, because over half of the constituents of that jurisdiction identify themselves as British, “Northern Irish,” or “Ulstermen,” and remain accepting of British governance. For Irish nationalists and interviewees in this research, however, British rule is both a foreign and different approach from how they imagine governance if Ireland were unified.

Like McCorquodale, Bernadette McAliskey rejected the salt-water approach to colonial categorisation, finding that the British presence in Ireland has never been appropriately named as colonial, due to the erroneous perception that colonies must be distant from the imperial power.⁶⁷ Further, several participants in this study identified the unaccountability of the British ruling class as a key signifier of continued colonialism. Coughlan stated, “the classic characterisation of colonialism was a subordinate people who had their laws made by others . . . and Britain

⁶⁵ Adrian Guelke, *International Legitimacy, Self-Determination and Northern Ireland*, 11 REV. OF INT’L STUD. 37, 38 (1985).

⁶⁶ Interview with Professor Robert McCorquodale, *supra* note 64.

⁶⁷ Interview with Bernadette McAliskey, South Tyrone Empowerment Program, Dungannon, Northern Ireland (Jun. 7, 2006). Bernadette McAliskey is an Irish republican and socialist activist and former politician, who continues to contribute to public debate on the Irish national question and directs the South Tyrone Empowerment Program, supporting migrant workers.

does still do that in Northern Ireland.”⁶⁸ Enright was more explicit in his condemnation of the unaccountable and distant ruling class of British politicians and bureaucrats primarily responsible for the governance of Northern Ireland: “[T]hose people are like a secret society, behind closed doors, who still think of us as the natives and still think that the natives have to be told how to live and what to do.”⁶⁹ For Irish nationalists, self-determination would require governance that is accountable and representative, rather than continued dominance by history’s greatest imperial power.

Notwithstanding the recent devolution of some powers to a power-sharing government in Belfast,⁷⁰ some participants in this study identified continued social imperialism as another vestige of colonialism. Northern Ireland as a quasi-state was constructed for the benefit of its British unionist population, who for most of its history, have dominated in a broad range of social fields.⁷¹ Ó Broin argued that the legacy of unionist dominance in the North of Ireland has been the creation of a class of people who “benefited from the dividends of imperialism,” such as powerful politicians, professionals, and workers who were able to gain reliable employment in the shipyards and factories.⁷² Meanwhile, Irish nationalists in the North

⁶⁸ Interview with Anthony Coughlan, *supra* note 55. I note that this assessment remains accurate, even though some law-making capacity has been devolved to the Northern Ireland Assembly.

⁶⁹ Interview with Terry Enright, *supra* note 54.

⁷⁰ The Northern Ireland Assembly exercises devolved powers in the areas of agriculture, culture, education, employment, trade, environment, finance, health, social services and, since 2010, has power over policing and justice. *Devolution Settlement: Northern Ireland*, GOV.UK (Feb. 20, 2013), <https://www.gov.uk/devolution-settlement-northern-ireland>.

⁷¹ Christine Bell & Kathleen Cavanaugh, “Constructive Ambiguity” or Internal Self-Determination? *Self-Determination, Group Accommodation, and the Belfast Agreement*, 22 *FORDHAM INT’L L.J.* 1345, 1351 (1998).

⁷² Interview with Eoin Ó Broin, *supra* note 53.

have suffered marginalisation and discrimination in all aspects of social life.⁷³

O'Connor developed this argument further, finding that anti-Catholic sentiment and sectarian conflict has been used to justify British imperialism in Ireland. O'Connor perceived a legacy of the superiority of one group over another as a continuing symptom of colonialism:

You cannot take people out of their homes, kill them, starve them, treat them like shit, for centuries, unless you had something in your head which told you that they were somehow less than you. You used religion to do it here, and you use race elsewhere.⁷⁴

It is clear from such perspectives of the colonised that, whatever future political settlements might be made, self-determination in Ireland must be asserted on the basis that all the people of the island have equal entitlement to rights and recognition.

A further aspect of continued colonial influence identified by Irish participants in this study was the dominance of British culture over Irish culture within many areas of social life. O'Connor gave the example of the use of British points of reference, such as Big Ben, in the textbooks used by children in schools. For O'Connor's children, famous sites in London have no cultural relevance,⁷⁵ and they would be better served by education that reflects their Irish identities. As was recognised by Murphy, some of the key areas in which Irish people assert self-determination lie within the cultural sphere. In promoting the use of the Irish language, and supporting Gaelic sports, people claim their cultural identity.⁷⁶ Often, though, the British and devolved Northern Irish administrations either fail to support or

⁷³ TIM PAT COOGAN, *IRELAND IN THE TWENTIETH CENTURY* 125 (2003); MICHAEL FARRELL, *NORTHERN IRELAND: THE ORANGE STATE* 326 (2nd ed. 1976).

⁷⁴ Interview with Paul O'Connor, *supra* note 52.

⁷⁵ *Id.*

⁷⁶ Interview with Niall Murphy, *supra* note 58.

actively discourage the practice of Irish culture.⁷⁷ The suppression of Irish culture reflects and reinforces the continued influence of colonialism, particularly the notion of the superiority of the colonial culture over the culture of the colonised. More broadly, testimonies from Irish research participants in relation to self-determination demonstrate the need to critically evaluate the Irish peace accord, the Good Friday Agreement, in the context of the contemporary colonial experience.

III. THE GOOD FRIDAY AGREEMENT AND SELF-DETERMINATION IN IRELAND

As noted above, the self-determination claim of Irish nationalists in the North of Ireland has not gained traction as an international legal issue, in part because of the United Kingdom's capacity to depict the matter as a domestic political and inter-communal problem. I have argued that it is essential to expose the contemporary colonial experience of nationalists in the North of Ireland in order to examine Irish self-determination with an honest acknowledgment of context. The other essential contextual factor in relation to contemporary self-determination in Ireland is the Good Friday Agreement. In this section, I explore the significance of the Agreement in relation to self-determination, with emphasis on the key provisions of the

⁷⁷ This is especially apparent currently in relation to the legal protection of the rights of Irish speakers in Northern Ireland. The British Government committed to the passage of an Irish Language Act in the St. Andrews Agreement (an Agreement clarifying aspects of the peace process and devolved government), but has not met this commitment. Agreement at St Andrews, Ir.-Gr. Brit., Annex B, Oct. 19, 2006, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136651/st_andrews_agreement-2.pdf. The British unionist parties in the Northern Ireland Assembly have prevented the passage of an Irish Language Act through that parliament, with George Robinson of the Democratic Unionist Party describing the Irish language as "closely identified with IRA terrorism," and Ulster Unionist David Kennedy arguing that the nationalist party Sinn Féin use the Irish language "as a kind of warped ideological jihad." N. IR. ASSEMBLY OFF. REP. (Oct. 9, 2007)(statements of Mr. G. Robinson and Mr. Kennedy), *available at* <http://archive.niassembly.gov.uk/record/reports2007/071009.htm>.

Agreement and its status as a transitional instrument. In the years ahead, the Agreement must be continually analysed in terms of its capacity to promote self-determination.

A. The Value of the Good Friday Agreement in Building Self-Determination

During the recent conflict in the North of Ireland, several attempts at securing lasting peace were thwarted or abandoned. The Good Friday Agreement received mass public support throughout Ireland when it was made.⁷⁸ In the challenging years since its acceptance at referenda, the Agreement has not been abandoned by any of the mainstream political parties. In fact, the Democratic Unionist Party, which rejected the Agreement at the time of negotiations, is now the largest party in the consociational⁷⁹ parliament established under the Agreement. The Agreement is generally accepted as the foundation of political progress in Northern Ireland, and between the Irish jurisdictions and the Irish and British states. I argue that the Agreement can also facilitate transitional justice in Ireland by taking into account the demands of the right to self-determination.

General consensus on the importance of the Agreement among political leaders was demonstrated in March 2009, when dissident Irish republicans⁸⁰

⁷⁸ In Northern Ireland, 71.1 percent of voters answered “yes” to the referendum question: “Do you support the Agreement reached at the multi-party talks on Northern Ireland and set out in command paper 3833?” In the Republic of Ireland, 94.4 percent of voters agreed to a change to the Irish Constitution, to enable the operation of the Agreement. Nicholas Whyte, *Northern Ireland Elections: The 1998 Referendums*, ARK (Feb. 17, 2002), <http://www.ark.ac.uk/elections/fref98.htm>.

⁷⁹ Consociational government is a model that guarantees group representation in political institutions and seeks to avoid majority dominance. It was adopted in Northern Ireland as a suitable model for enabling political transition following inter-communal conflict.

⁸⁰ “Dissident” is a commonly used phrase to describe Irish republican militants and political activists who dissent from the recent shift in Irish republicanism towards purely political activism, and its associated compromises.

claimed responsibility for the shooting deaths of two British soldiers in Antrim and a policeman in Craigavon, two towns outside Belfast.⁸¹ These events raised fears of a severe threat to the peace process. Unionist and nationalist political leaders united in their condemnation of the threat. Then British Secretary of State for Northern Ireland, Shaun Woodward, called the peace process "unstoppable."⁸² Deputy Chief Minister of the Northern Ireland Assembly, Martin McGuinness of Sinn Féin, made a particularly strong statement. McGuinness was previously an IRA commander and supporter of the political war against the British occupation of the North of Ireland. However, he said: "[T]hese people [the gunmen] are traitors to the island of Ireland; they have betrayed the political desires, hopes and aspirations of all of the people who live on this island. They don't deserve to be supported by anyone."⁸³

The political leaders' desperation to preserve the peace at this time proves their belief that the Agreement is an instrument that is too essential to peaceful progress to be abandoned. Indeed, according to journalist John Ware, the fact that British unionist politicians declined an opportunity to use the killings for political mileage against their nationalist opponents "suggests the peace process is going from strength to strength."⁸⁴

In May 2014, this conclusion was tested by the four-day arrest and detainment of Sinn Féin President Gerry Adams by the Police Service of Northern Ireland for questioning in relation to the 1972 abduction and murder of Belfast mother Jean McConville. His arrest raised concerns

⁸¹ Henry McDonald, "Real IRA Claims' Murder of Soldiers in Northern Ireland, THE GUARDIAN, Mar. 9, 2009, <http://www.theguardian.com/uk/2009/mar/08/northern-ireland-soldiers-killed-antrim>.

⁸² *Arrests Over NI Policeman Murder*, BBC NEWS (Mar. 10 2009, 3:11 PM), http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7935394.stm.

⁸³ *Id.*

⁸⁴ John Ware, *Real IRA Hits Back at the Heretics*, SYDNEY MORNING HERALD, Mar. 12, 2009, <http://www.smh.com.au/opinion/real-ira-hits-back-at-the-heretics-20090311-8v53.html?skin=text-only>.

regarding the stability of the peace process, particularly in light of comments from other Sinn Féin members that the timing of the arrest was politically motivated, with European parliament and local government elections approaching. Martin McGuinness was quoted as saying that “dark forces” opposed to the peace process continued to operate within the Police Service of Northern Ireland, and that Sinn Féin would have to review its support for the police if Adams was charged.⁸⁵ The arrest of Adams was controversial, particularly because it highlighted two issues that continue to divide public opinion: “the pardoning of militants, and the confidence of all sides in the neutrality of the police.”⁸⁶ Adams himself, following his release, maintained his innocence, stated his continued support for “civic, accountable, public service policing”⁸⁷ and his resolve to continue to “build the peace.”⁸⁸ He said that “there can be no going back—peace needs to be built with a consistent and determined focus.”⁸⁹ Such responses to recent major threats to peace in the North of Ireland demonstrate the centrality of the Good Friday Agreement—and its machinery of peace—in the political outlook of representatives from both Irish nationalist and British unionist perspectives.

⁸⁵ *Gerry Adams Arrested: PSNI to Ask for More Time to Quiz Sinn Féin Leader over Jean McConville’s Murder*, BELFAST TELEGRAPH, May 2, 2014, <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/gerry-adams-arrested-psni-to-ask-for-more-time-to-quiz-sinn-fein-leader-over-jean-mcconvilles-murder-30239136.html>.

⁸⁶ Padraic Halpin, *Gerry Adams Walks Free Following McConville Murder Probe*, REUTERS ONLINE, (May 4, 2014, 7:41 PM), <http://www.reuters.com/article/2014/05/04/us-northernireland-adams-idUSBREA4302H20140504>.

⁸⁷ Gerry Adams, *The Jean McConville Killing: I’m Completely Innocent. But What Were My Accusers’ Motives?*, THE GUARDIAN, May 8, 2014, <http://www.theguardian.com/commentisfree/2014/may/07/jean-mcconville-killing-gerry-adams-innocent-accusers>.

⁸⁸ *Gerry Adams Walks Free Following McConville Murder Probe*, REUTERS, (May 4, 2014), <http://www.reuters.com/video/2014/05/04/gerry-adams-walks-free-following-mcconvi?videoId=312826364>.

⁸⁹ *Gerry Adams Press Conference*, BBC NI (May 4, 2014), available at <https://www.youtube.com/watch?v=qxcgDT8A4IQ>.

Commentators from a wide range of perspectives have repeatedly described the Good Friday Agreement as immensely significant. According to Colin Harvey, the Agreement is "constitutive" and must underpin all future constitutional developments in Northern Ireland.⁹⁰ Former Taoiseach (Irish Prime Minister) Bertie Ahern regarded the Agreement as "truly historic" because it was the first time since 1918 that "the people of Ireland voted on the same day to determine the future of the entire island."⁹¹ Bell and Cavanaugh assert that, while the Agreement is filled with "constructive ambiguities" designed to facilitate the settlement, the vote of the people of the island in favour of it could be argued to be an exercise in self-determination, in that the people expressed their desire for the Agreement to form the foundation for devolved government and political progress.⁹² Rodgers finds that the Agreement "is self-determination," because of its wide public acceptance—as demonstrated through referenda.⁹³

The involvement of all the people of Ireland signaled that the future of self-determination is necessarily an ongoing question, to be jointly addressed by the people of both jurisdictions. Indeed, "the Agreement's institutions are being created by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland."⁹⁴ Mike Ritchie expressed a nationalist perspective on this aspect of the Agreement: "[A] reading of the Good Friday Agreement shows that the unit of self-determination is quite clearly the Irish people."⁹⁵ Ritchie's perspective

⁹⁰ Colin J. Harvey, *The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland*, in HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND 9, 36 (Colin J Harvey ed., 2001).

⁹¹ Bertie Ahern, *In Search of Peace: The Fate and Legacy of the Good Friday Agreement*, 25 HARV. INT'L REV. 26, 27 (2003).

⁹² Bell & Cavanaugh, *supra* note 71, at 1357.

⁹³ Interview with Brid Rodgers, *supra* note 51.

⁹⁴ Brendan O'Leary, *The Nature of the Agreement*, 22 FORDHAM INT'L L.J. 1628, 1647 (1998).

⁹⁵ Interview with Mike Ritchie, *supra* note 59.

demonstrates the ongoing aspirational value of the Agreement; it is not only a means of establishing and institutionalising the peace process, but also sets a foundation for broader social change, including the realisation of self-determination.

B. Key Provisions of the Good Friday Agreement and “Constructive Ambiguity”

The Good Friday Agreement begins with a declaration by all the negotiating parties of their support for the negotiated provisions—as a basis on which to build reconciliation and a new, shared future.⁹⁶ The negotiating parties then endorse the decision of the British and Irish governments to:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.⁹⁷

The effect of these provisions is that the two governments withdraw their stake in the future constitutional status of Northern Ireland, and agree that any change is entirely subject to the will of the people. In this sense, the Agreement represents a modern, democratic approach to sovereignty.⁹⁸ This

⁹⁶ Good Friday Agreement, *supra* note 8, at 1, Declaration of Support.

⁹⁷ *Id.* at 2. Constitutional Issues [1].

⁹⁸ The Agreement effectively nullifies the effect of the *uti possidetis juris* principle, enabling a change in political borders on the basis of popular agreement. The principle of *uti possidetis juris* has operated to require formerly colonial territories to maintain their

shift can put issues of self-determination truly within the hands of the people of the North of Ireland.

The Agreement provides for constitutional change by requiring the British Secretary of State for Northern Ireland to trigger a poll “if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.”⁹⁹

Should a poll be held and fail, at least seven years must pass before another poll could be held.¹⁰⁰ As yet, no poll has been held and there has been no demand made for such a poll because Irish nationalists (and voters in favour of the unification of the Irish jurisdictions) remain in the minority of voters in the North of Ireland.¹⁰¹ Therefore this element of the Agreement remains a largely unexplored—but very important—provision with regards to self-determination.

The Agreement also acknowledges the right of the people of the North of Ireland to identify and be recognised as British or Irish or both, regardless of any potential future change in the territory’s constitutional status.¹⁰² This provision is important for Irish nationalists now, considering their experience of systemic discrimination on the basis of their communal identity. It may be of great significance to British unionists in a potential future united Ireland. In that case, the protection for self-identification set out in the Agreement would require sensitive and creative methods of state-

colonial borders upon the achievement of independent statehood. *Frontier Dispute Case (Burkina Faso v. Republic of Mali)* 1986 I.C.J. 554 (Dec. 22).

⁹⁹ Good Friday Agreement, *supra* note 8, at 2. Constitutional Issues, Schedule 1 [2].

¹⁰⁰ *Id.* at 2. Constitutional Issues, Schedule 1 [3].

¹⁰¹ According to the 2012 Northern Ireland Life and Times Survey, 22 percent of people over the age of 18 describe themselves as nationalist. This is compared to 28 percent who describe themselves as unionist, and 47 percent who do not describe themselves as either unionist or nationalist. See *Community Relations: Identity, Northern Ireland Life and Times Survey*, ACCESS RESEARCH KNOWLEDGE, http://www.ark.ac.uk/sol/surveys/community_relations/time_series/CRencyidentity.htm (last updated Jun. 5, 2013).

¹⁰² Good Friday Agreement, *supra* note 8, at 2. Constitutional Issues [1] (vi).

building and governance to ensure that a British minority in Ireland would not suffer systemic discrimination.

Strand One of the Agreement provides for the establishment of a consociational Northern Ireland Assembly.¹⁰³ The Assembly exercises devolved powers in the areas of agriculture, culture, education, employment, trade, environment, finance, health, social services, and—since 2010—policing and justice.¹⁰⁴ Powers in other areas are reserved by the British government in Westminster. The rules of the Assembly are designed to ensure cross-community participation and support for legislation and executive decisions. Certain key decisions may only be taken with either a majority of all members voting, including a majority of members of both unionist and nationalist designation, or a 60 percent majority of all members voting, including at least 40 percent of members from both unionist and nationalist designations.¹⁰⁵ A First Minister and Deputy First Minister, elected from the two largest parties in the Assembly, are jointly responsible for overseeing the exercise of executive powers by Ministers, who are in turn elected by proportional representation.¹⁰⁶

Strand Two of the Agreement aims to strengthen cooperation between the northern and southern Irish jurisdictions through a North-South Ministerial Council. This Council comprises members of the executive governments of Northern Ireland and the Republic of Ireland, who meet together regularly to cooperate on matters of mutual concern and cross-border issues.¹⁰⁷ The six areas of cooperation currently include agriculture, education, environment, health, tourism, and transport.¹⁰⁸ There have been several

¹⁰³ *Id.* at 3. Strand One.

¹⁰⁴ *Devolution Settlement: Northern Ireland*, *supra* note 70.

¹⁰⁵ Good Friday Agreement, *supra* note 8, at 3. Strand One [5] (d) (i), (ii).

¹⁰⁶ *Id.* at 3. Strand One [14]–[25].

¹⁰⁷ *Id.* at 4. Strand Two.

¹⁰⁸ See Areas of Cooperation, NORTH SOUTH MINISTERIAL COUNCIL, <http://www.northsouthministerialcouncil.org/index/areas-of-co-operation.htm> (last visited Feb. 2, 2009).

periods since the Assembly's establishment when it has been suspended, due to disagreements between parties, and during these periods the Ministerial Council has not functioned according to its remit.

Strand Three of the Agreement establishes a British-Irish Council, which aims to further relationships and cooperation between the British and Irish governments, as well as with the devolved governments in Northern Ireland, Scotland, and Wales.¹⁰⁹ Strand Three also establishes a British-Irish Intergovernmental Conference, which brings together Ministers of each government. Meetings are sometimes convened to enable the Irish government to put forward views and proposals on matters that are not devolved to the Northern Ireland Assembly, but are of special interest to the Irish state.¹¹⁰ These measures have been recognised as distinctive and significant in relation to self-determination under international law. According to Geoff Gilbert, Colin Warbrick, and Dominic McGoldrick, "the level of participation for the minority group and especially the kin-State is more than is required by any international instrument."¹¹¹ Again, this demonstrates the capacity of the Agreement to put issues of self-determination into the hands of the peoples involved.

Essential to the Good Friday Agreement are the provisions concerning protection of human rights. These provisions particularly emphasise values of equality, non-sectarianism, freedom of religious and political expression, and non-discrimination.¹¹² The British government pledged to incorporate into Northern Ireland law the European Convention on Human Rights, and to establish the Northern Ireland Human Rights Commission and an

¹⁰⁹ Good Friday Agreement, *supra* note 8, at 5. Strand Three.

¹¹⁰ *Id.* at 5. Strand Three, British-Irish Intergovernmental Conference [5].

¹¹¹ Geoff Gilbert, et al., *The Northern Ireland Peace Agreement, Minority Rights and Self-Determination*, 47 INT'L & COMP. L. Q. 943, 949 (1998).

¹¹² Good Friday Agreement, *supra* note 8, at 6. Rights, Safeguards and Equality of Opportunity [1].

Equality Commission.¹¹³ The Irish government committed to establishing an equivalent Human Rights Commission.¹¹⁴ The Agreement emphasises the importance of reconciliation and of acknowledging the experiences of victims of conflict.¹¹⁵ According to Sinn Féin President Gerry Adams, the Agreement provides a “peaceful and democratic” way to achieve a “citizen-centred, rights-based society.”¹¹⁶ The Agreement’s provisions on human rights should be read in the context of its recognition of the right to self-determination,¹¹⁷ which is more broadly recognised as the foundation principle for the contemporary human rights framework under international law.¹¹⁸

The Agreement has been described by Bell and Cavanaugh as an exercise in “constructive ambiguity.”¹¹⁹ This is a political device used to gain agreement on a disputed text. While in this case the constructive ambiguity of the Agreement produced positive results in terms of the peace process, it also created some uncertainty in relation to key terms.¹²⁰ The central ambiguity in the Good Friday Agreement relates to the “unit” of self-determination that it is said to create. The Agreement first vests a decision on future constitutional change in “the majority of the people of Northern Ireland.”¹²¹ However, in the next paragraph, the Agreement identifies self-determination as a right to be exercised by “the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment.”¹²²

¹¹³ *Id.* at 6. Rights, Safeguards and Equality of Opportunity [2], [5], [6].

¹¹⁴ *Id.* at 6. Rights, Safeguards and Equality of Opportunity [9].

¹¹⁵ *Id.* at 6. Rights, Safeguards and Equality of Opportunity [11]–[13].

¹¹⁶ Adams, *supra* note 87.

¹¹⁷ Good Friday Agreement, *supra* note 8, at article 1 (ii).

¹¹⁸ Espiell, *supra* note 17; ANAYA, *supra* note 17.

¹¹⁹ See generally Bell & Cavanaugh, *supra* note 71.

¹²⁰ *Id.* at 1356.

¹²¹ Good Friday Agreement, *supra* note 8, at 2. Constitutional Issues [2] (i).

¹²² *Id.* at 2. Constitutional Issues [2] (ii).

While these provisions appear to conflict, the use of these two different categories need not be interpreted as a source of confusion. Bell and Cavanaugh argue that reference to the two competing groups boosts the legitimacy of the Agreement, and confirms the right of all the people of the island to involvement in future self-determination solutions.¹²³ In giving both the people of the North of Ireland and the people of the island of Ireland a place within this central provision, the Agreement acknowledges that each jurisdiction has unique features, and that the two must collaborate if constitutional change is to occur. The constructive ambiguity of these essential provisions also enables either of the two potential future outcomes—continued union with Britain or the creation of a united Ireland—to be achieved in the context of the legal protections offered by the Agreement.

IV. ASSESSING THE CAPACITY OF THE AGREEMENT TO PROMOTE A JUST PEACE

The Good Friday Agreement makes no assumptions about future constitutional settlements, but instead offers either the continuation of the union with Britain or the establishment of a united Ireland as alternative future outcomes. This flexibility is bolstered by the commitments made by the two governments that they have no vested interest in either outcome, and that they are bound to facilitate whichever outcome expresses the will of the majority of the people.¹²⁴ Therefore, the Agreement is a transitional rather than a final settlement. It was intended to bring an end to violent political conflict while enabling the different communities to continue to debate their future status through democratic means.¹²⁵ As discussed below, the Agreement does not set out a comprehensive framework for conflict

¹²³ Bell & Cavanaugh, *supra* note 71, at 1360–61.

¹²⁴ Good Friday Agreement, *supra* note 8, at 2. Constitutional Issues [1].

¹²⁵ Harvey, *supra* note 90, at 34.

resolution or reconciliation, thus demonstrating that a dialogue on establishing a just peace must be maintained.

The openness of the Agreement necessitates an ongoing conversation regarding the constitutional arrangements on the island of Ireland, and how potential change might affect its people. Discussion regarding whether and how change might occur in Ireland is essential to avoid extending the suffering imposed on Irish nationalists through partition and colonial domination to future generations. This proposed conversation requires contributions influenced by international legal considerations—particularly the right of self-determination. Indeed, it has been argued that international law explains the Good Friday Agreement more effectively than other legal approaches.¹²⁶ In the following sections, I note several matters of priority in relation to the development of a just peace in Northern Ireland: the need to acknowledge colonialism and provide for transitional justice, the full significance of the consent principle in the Agreement, and the potential for an inclusive self-determination solution in Ireland.

A. The Need to Acknowledge Colonialism and Provide for Transitional Justice

In Section II of this article, I argued that the colonial experience of Irish nationalists must be acknowledged in order to move forward with a truthful awareness of their historical context, and to progress the essential debate on Ireland's constitutional future. While the Good Friday Agreement appears to respect the legitimacy of two competing political aspirations—British unionism and Irish nationalism—it does not name colonialism as a fundamental contextual experience for the territory or its peoples. This is a troubling gap in the Agreement, as is the absence of acknowledgment that the British state had an active role in the conflict in Ireland.

¹²⁶ Campbell et al., *supra* note 39, at 326.

However, considering that the primary goal at the time of negotiations was to facilitate the end to violent conflict, it is unsurprising that the Agreement is flawed in these ways. In McAliskey's conception, the negotiations leading to the Agreement were concerned with how the conflict "could be managed out of existence," rather than with conflict resolution.¹²⁷ This assertion is supported by the findings of Campbell, Ní Aoláin, and Harvey that the Agreement deals little with the past and the legacies of the conflict,¹²⁸ but rather aims to transform a violent conflict into a political conflict.¹²⁹ Cillian McGrattan concurs, finding that historic wrongs, victims, reconciliation, and truth-telling have been largely marginalised in the Agreement and its operation post-1998.¹³⁰ In the future, effective transitional justice processes will be required in order to adequately acknowledge matters of colonialism and self-determination, and to facilitate the establishment of a just peace in the North of Ireland.

As discussed in the introduction of this article, transitional justice is a set of scholarly inquiries concerned with societies in post-conflict transition.¹³¹ Transitional justice inquiries focus on human rights and seek redemptive visions for justice after conflict.¹³² Justice is conceived of as a conditional, rather than an absolute quality; that is to say, what a society deems just during post-conflict transition will depend on the nature of the injustices perpetrated during the conflict.¹³³ In this context, truth-telling and dealing with the past become central concerns for transitional justice enquiries.¹³⁴

¹²⁷ Interview with Bernadette McAliskey, *supra* note 67.

¹²⁸ Campbell et al., *supra* note 39, at 339.

¹²⁹ Harvey, *supra* note 90, at 34.

¹³⁰ McGrattan, *supra* note 9, at 400.

¹³¹ Boraine, *supra* note 35.

¹³² TEITEL, *supra* note 37, at 228.

¹³³ *Id.* at 6.

¹³⁴ Christine Bell, *Dealing with the Past in Northern Ireland*, 26 *FORDHAM INT'L L.J.* 1095, 1097 (2002).

It is not possible to adequately address the range of transitional justice enquiries relating to Northern Ireland in this article. However, it is important to explore truth-telling and reconciliation. Efforts to develop such mechanisms have arguably been hampered by the lack of acknowledgment of the colonial experience or the self-determination claim of Irish nationalist people in the North of Ireland. The peace process in Ireland has not led the British state to address its active involvement in the conflict. As efforts to develop transitional justice processes have advanced since 1998, “the United Kingdom has sought to contain the implications of the Northern Ireland transitional process to the geographical location of the conflict.”¹³⁵ In 2007, legislation was passed at Westminster that limits the Commission’s investigative powers. The legislation prevents the Commission from investigating any intelligence services or their members, or from inquiring into whether intelligence services have violated the human rights of individuals in the community.¹³⁶ This parliamentary limitation is characteristic of the British state’s long-standing position that it serves as the neutral arbiter between two “warring tribes,” or what is known as the “community relations” analysis of the conflict in Ireland.¹³⁷ Britain’s projection of itself as an arbiter and promoter of equality¹³⁸ significantly hampers its capacity to transform the social institutions of Northern Ireland¹³⁹ through which colonialism has been perpetuated, and thus hampers its capacity to help facilitate the establishment of a just peace.

¹³⁵ Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS Q. 127, 204 (2005).

¹³⁶ Justice and Security (Northern Ireland) Act 2007 (UK) (UK ed. 2007) s69B.

¹³⁷ Bill Rolston, *Assembling the Jigsaw: Truth, Justice and Transition in the North of Ireland*, 44 RACE & CLASS 87, 88–89 (2002).

¹³⁸ Mike Tomlinson, *Walking Backwards into the Sunset: British Policy and the Insecurity of Northern Ireland*, in RETHINKING NORTHERN IRELAND 94, 95 (David Miller ed. 1998).

¹³⁹ Ní Aoláin & Campbell, *supra* note 135, at 203–04.

A mechanism for truth-telling and addressing the past would significantly bolster the capacity of the Agreement to promote true peace and reconciliation. Indeed, former British cabinet minister and Secretary of State for Northern Ireland, Shaun Woodward, wrote in 2014 that the peace process can always unravel, “[s]o long as Northern Ireland avoids settling on a mechanism to deal justly and fairly with its past.”¹⁴⁰ Kelman argues that the process of identity change, which is essential to conflict resolution, requires, among other things, “a common moral basis for peace . . . consistent with the principles of fairness and attainable justice” and “admitting the other’s truth into one’s own narrative.”¹⁴¹ Woodward recommended that the British government fund a review of potential mechanisms, and commit (in advance of the review) to putting its recommendations to a referendum.¹⁴² In 2007, the British and Northern Irish governments established a Consultative Group on the Past, chaired by the former Primate of the Church of Ireland¹⁴³ and a former Catholic priest. The Group delivered its report in 2009,¹⁴⁴ and recommended a raft of measures that could together have established “an overall mechanism for dealing with the past.”¹⁴⁵ Instead, the report was met with summary rejection from the British and Northern Irish governments and its recommendations have not been adopted.¹⁴⁶

¹⁴⁰ Shaun Woodward, *Gerry Adam’s Arrest Shows It’s Time to Deal with Northern Ireland’s Past*, THE GUARDIAN May 6, 2014, 4:00 PM, <http://www.theguardian.com/commentisfree/2014/may/05/gerry-adams-arrest-northern-ireland-good-friday>.

¹⁴¹ Kelman, *supra* note 26, at 6.

¹⁴² *Id.*

¹⁴³ A large Protestant denomination in Ireland, particularly in the North.

¹⁴⁴ REPORT OF THE CONSULTATIVE GROUP ON THE PAST (Jan. 23, 2009), *available at* http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf.

¹⁴⁵ Bill Rolston, *Dealing with the Past in Northern Ireland: The Current State of Play*, 8 ESTUDIOS IRLANDESES, 143, 147–49 (2013).

¹⁴⁶ *Id.* at 147–48.

Should the peace process develop to a point of supporting a truth and reconciliation process, international oversight would be essential,¹⁴⁷ as became clear in the aftermath of the release of the report of the Consultative Group on the Past in 2009. Public and political reactions to this report have been volatile. Former British unionist leader David Trimble found offensive the notion that the families of all those killed during the conflict should receive a compensation payment, as this proposal equated the experiences of victims' families regardless of whether the victims were civilians, police, soldiers, or paramilitaries.¹⁴⁸ The Consultative Group rebutted this view in its report, which concluded that any hierarchy of victims of the conflict is sectarian,¹⁴⁹ and ought to be rejected to prevent the politicisation of victimhood.¹⁵⁰ However, some nationalist politicians also argued that the Group's proposals were inherently flawed because the Group's members were appointed by the British government, its report failed to implicate the British state as a participant in the conflict, and it appeared to rule out the possibility of independent internationally convened inquiries into controversial incidents.¹⁵¹

The need for a holistic approach to the peace process in Ireland—that is, one that accounts for rights issues and reconciliation issues—was supported by recent qualitative research conducted in Northern Ireland with rights and

¹⁴⁷ See, e.g., UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Office of the High Commissions for Human Rights, <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx> (last visited Sep. 26, 2014).

¹⁴⁸ See, e.g., *Trimble Rejects "Offensive" Troubles Payment Plan*, THE IRISH TIMES, Jan. 27, 2009, <http://www.irishtimes.com/newspaper/breaking/2009/0124/breaking14.htm>.

¹⁴⁹ REPORT OF THE CONSULTATIVE GROUP ON THE PAST, *supra* note 144, at 66.

¹⁵⁰ *Id.* at 68.

¹⁵¹ See *Adams Rejects Legacy Report*, IRISH REPUBLICAN NEWS, Mar. 27, 2009, <http://republican-news.org>; Press Release, Sinn Féin General Election, Ó Caoláin and Doherty Set Out Sinn Féin's Concerns with Report from Consultative Group on the Past (Mar. 5, 2009), available at <http://www.sinnfeingeneralelection.com/en/press-centre/entry/1349>.

reconciliation advocates. In this study, Maggie Beirne and Colin Knox note that the rights and reconciliation approaches are each limited in terms of their capacities to produce true resolution of the conflict in Northern Ireland.¹⁵² They note that advocates for human rights-focused approaches to peace-building can appear too focused on international legal standards to “successfully affect local realities and divisions.”¹⁵³ Further, Beirne and Knox find that advocates who privilege reconciliation over rights may focus on the bottom-up generation of new relationships, yet fail to adequately address the “power differentials between those being reconciled” or “the role of the state in creating and maintaining divisions.”¹⁵⁴ Beirne and Knox argue for a collaborative approach to peace building between rights and reconciliation advocates and movements in Northern Ireland in a way that mirrors my argument that the peace process must be pursued in the context of the fundamental issues of colonialism, self-determination, and transitional justice.

B. Recognising the Full Significance of the Consent Principle

The “consent principle,” essential to the Good Friday Agreement, means that the constitutional status of Northern Ireland is no longer—at least in legal terms—subject to the will of the British state. Instead, it is said to depend on the will of a majority of its people, and requires Britain to give effect to any future change it may wish to make.¹⁵⁵ Campbell, Ní Aoláin, and Harvey argue that this principle demonstrates that the Agreement makes a creative contribution to the development of the international law on the transfer of sovereignty: “No longer is territorial cession about the transfer of sovereignty by means of an agreement between ceding and

¹⁵² Maggie Beirne & Colin Knox, *Reconciliation and Human Rights in Northern Ireland: A False Dichotomy?*, 6 J. OF HUM. RTS. PRAC. 26, 33 (2014).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Campbell et al., *supra* note 39, at 320.

acquiring state, but rather the ceding of the decisive power to citizenry itself, with the prior consent of the implicated states.”¹⁵⁶

The British state’s acceptance of this shift, enabling the citizenry to exercise control of constitutional and territorial status through elections, “is a radical reconfiguration of both the theory and practice of state formation.”¹⁵⁷ It is an official acknowledgment that Northern Ireland has a right to secede and join a union with the Republic of Ireland, if that is the wish of the people.¹⁵⁸ It is important that the consent principle be understood in this sense, rather than confined by an interpretation that emphasises the protection that the consent principle offers to the preferences of the British unionist majority.

It is certainly true that the consent principle operates to ensure that unionists cannot be forced into a united Ireland while they remain a majority in Northern Ireland. Some Irish nationalists would regard the consent principle as the equivalent of the unionist “veto,”¹⁵⁹ which militant nationalism always resisted during the political conflict. Prior to the development of consociational mechanisms through the Good Friday Agreement, unionists were seen to be exercising a veto over claims for Irish unification, and were supported in this through the force of the British state.¹⁶⁰ Indeed, some Irish nationalists opposed to the Agreement continue to argue that their former comrades, many now Sinn Féin politicians and

¹⁵⁶ *Id.* at 329–30.

¹⁵⁷ *Id.* at 330.

¹⁵⁸ O’Leary, *supra* note 94, at 1647.

¹⁵⁹ Although, as Tim Pat Coogan recognises, the Agreement effectively gives both sides of the divide a veto through the “parallel consent” requirement. COOGAN, *supra* note 73, at 683.

¹⁶⁰ Gary K. Peatling, *Unionist Identity, External Perceptions of Northern Ireland, and the Problem of Unionist Legitimacy*, 39 ÉIRE-IRELAND 215, 220 (2004).

members of the Northern Ireland Assembly, have accepted a unionist veto despite claiming they would never do so during the conflict.¹⁶¹

However, the consent principle may be interpreted in a more positive light from the Irish nationalist perspective. For example, Rodgers believes the significance of the Good Friday Agreement is that it recognises the legitimacy of both nationalist and unionist perspectives.¹⁶² She adds that by incorporating the consent principle, the Agreement enables both nationalists and unionists to advocate peacefully for their desired ends.¹⁶³ The consent principle undoubtedly represents a compromise on the part of nationalists, some of whom previously did not accept the need to secure majority support for constitutional change, instead arguing that British rule in the North of Ireland is inherently wrong and ought to be immediately ended.¹⁶⁴ However, alongside the consent principle's majority protection offered to the British unionist community, the principle's complementary and novel protection is now offered to Irish nationalists in the Agreement through Britain's hugely significant commitment to respect whatever choice the people make. This commitment is yet to be tested, but Britain has committed itself in formal legal terms. This represents a massive shift in the British position, considering both its historical reluctance to accept the weakening of its empire and its vehement and long-term opposition to militant Irish republicanism.

Importantly, the notion that future constitutional change will only come through political rather than violent means was a key factor in securing

¹⁶¹ See, e.g., *McGuinness at Centre of Storm*, IRISH REPUBLICAN NEWS, Mar. 13, 2009, <http://republican-news.org> (quoting President of Republican Sinn Féin, Ruairi O'Bradaigh).

¹⁶² Interview with Bríd Rodgers, *supra* note 51.

¹⁶³ *Id.*

¹⁶⁴ In light of renewed violent political actions since 2009, it appears that some nationalists continue to subscribe to this view.

majority support for the popular referenda that confirmed the Agreement.¹⁶⁵ It was this shift that enabled veteran Irish nationalist leader Gerry Adams to conclude: “The Good Friday Agreement is the people’s agreement. It does not belong to the elites. It must be defended, implemented and promoted.”¹⁶⁶ Furthermore, it is this type of interpretation of the Agreement and its potential that can absorb an acknowledgment of the colonial experience of Irish nationalists and their legitimate claim to self-determination, while simultaneously promoting the achievement of a just peace in Ireland.

C. The Potential for an Inclusive, All-Island Self-determination Solution

The Good Friday Agreement provides legal and political confirmation that Irish unification is a potential future outcome. According to Bertie Ahern, the Agreement makes the people truly sovereign for the first time, and establishes a mechanism of consent through which the people of the island may choose to exercise the right of self-determination and unite as one sovereign Irish state.¹⁶⁷ Therefore, the Agreement has the capacity to enable an eventual all-island self-determination settlement in three senses. First, any future change will be required to consider the interests of all communities on the island. Second, and crucially for Irish nationalists, the unification of the two jurisdictions is now accepted as a legitimate political goal. Third, the Agreement confirms that nationalists are equally entitled to advance their political aspirations through peaceful means.¹⁶⁸

¹⁶⁵ The notion that future constitutional change will only come through political rather than violent means was demonstrated by the high levels of support in the dual referenda, which implicitly asked if voters preferred a power-sharing deal agreed by numerous political parties and the sponsoring governments of Britain and Ireland.

¹⁶⁶ Adams, *supra* note 87.

¹⁶⁷ Bertie Ahern, *The Good Friday Agreement: An Overview*, 22 *FORDHAM INT’L L.J.* 1196, 1196 (1998).

¹⁶⁸ Good Friday Agreement, *supra* note 8, at 1. Declaration of Support [5].

The island status of Ireland is significant in terms of international opinion regarding the success of the settlement contained in the Good Friday Agreement. Guelke's argument that the current borders and status of Northern Ireland lack international legitimacy¹⁶⁹ has often been cited.¹⁷⁰ He notes that the all-Ireland dimensions of the Agreement—for example, the North-South Ministerial Council and cross-border implementation bodies—were accepted internationally as guarantees that the Agreement was not partitionist and would not stand as an obstacle to “the eventual outcome of a united Ireland.”¹⁷¹ Guelke's view demonstrates why the cross-border dimensions of the Agreement, which confirm that the Agreement is concerned with the self-determination of all the people of the island, were so fundamental to securing Irish nationalist agreement. In responding to the 1995 Forum for Peace and Reconciliation, an important consultation process conducted three years before the Agreement was reached, Sinn Féin stated: “What is required is a new and imaginative approach which tilts the balance away from the prohibitive and negative power of veto towards the positive power of consent, of considering consent, of negotiating consent.”¹⁷² As discussed above, the Agreement now provides for such a positive conception of the role of consent in future constitutional debates.

The mass support for the peaceful political process set out in the Good Friday Agreement demonstrates popular acceptance of the importance of inclusivity in relation to self-determination in contemporary Ireland. An

¹⁶⁹ Guelke, *supra* note 65, at 37.

¹⁷⁰ See, e.g., Bell & Cavanaugh, *supra* note 71, at 1360–61; Clayton, *supra* note 61, at 51; Peatling, *supra* note 160, at 233.

¹⁷¹ Adrian Guelke, *Northern Ireland and Island Status*, in *NORTHERN IRELAND AND THE DIVIDED WORLD: POST-AGREEMENT NORTHERN IRELAND IN COMPARATIVE PERSPECTIVE* 228, 250 (John McGarry ed. 2001). “Partition,” in the Irish context, refers to the creation of the Northern Ireland statelet in 1920, where the whole island of Ireland had previously been regarded as a single entity. “Partitionist” refers to actions and institutions that entrench the partition of Ireland.

¹⁷² *Paths to a Political Settlement in Northern Ireland: Policy Papers Submitted to the Forum for Peace and Reconciliation* 40 (1995).

inclusive approach does not require a particular community to abandon its own history or aspirations, as I have argued in this article in relation to Irish nationalists. However, as O'Connor explains, inclusiveness does require a more plural conception of self-determination:

[Y]ou put everything that's important to you in your life into bags, and that's your history and you shouldn't leave that behind. We need to come at it as who we are [as Irish nationalists] and recognise that it's important who we are, but also make space. So someone will suggest that in a new structure [for example, a united Ireland] unionists can maintain a British passport—sure, why not? That doesn't take away my right. I almost find self-determination a more useful phrase in describing what I want than a united Ireland—a united Ireland seems to be saying “I want a unit, that we control,” which could seem exclusive. Self-determination means that Protestants, Catholics, working class, middle class . . . self-determine their lives.¹⁷³

This approach would necessitate the preservation of the minority rights protections incorporated in the Agreement in any new constitutional arrangement. The aim would be to ensure that Irish self-determination means the highest possible level of self-determination and rights protections for everyone on the island, including those who do not express an Irish national identity.

Following the Good Friday Agreement, and as a demonstration of its willingness to respect the choice of a majority in Northern Ireland, the UK Parliament repealed the Government of Ireland Act of 1920 (UK).¹⁷⁴ This statute had enabled the partition of Ireland. In turn, the electorate of the Republic of Ireland agreed through referendum to change Articles 2 and 3 of the Irish Constitution, as a condition of the voters' acceptance of the

¹⁷³ Interview with Paul O'Connor, *supra* note 52.

¹⁷⁴ The 1920 Act was repealed under the provisions of the Northern Ireland Act 1998 (UK).

Agreement.¹⁷⁵ Article 2 of the Constitution had previously asserted a territorial claim over the whole of the island of Ireland.¹⁷⁶ Following the post-Agreement amendment, Article 2 now affirms “the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation.”¹⁷⁷ The earlier form of Article 3 anticipated “the re-integration of the national territory” and affirmed “the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory.”¹⁷⁸ Article 3 no longer claims the right of the Irish Parliament to govern the whole island. Instead it recognises

the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.¹⁷⁹

Arguably, these changes were essential to facilitate an inclusive future self-determination solution for Ireland. According to Kieran McEvoy, the changes encouraged nationalists to “think more deeply about accommodating unionist tradition within the island of Ireland” and to recognise “that self-determination is not simply about the expression of one’s own rights, but is about the accommodation of the rights of the other.”¹⁸⁰ Coughlan agrees that the Agreement and consequent amendments to the Irish Constitution ensure the extension of minority rights to British

¹⁷⁵ These changes were made through the Statute Law Revision Act 2007 (Ireland).

¹⁷⁶ IRISH CONSTITUTION (BUNREACT NA HEREANN) (1937), article 2, prior to nineteenth amendment (1998).

¹⁷⁷ *Id.* at Article 2.

¹⁷⁸ *Id.* at Article 3, prior to nineteenth amendment (1998).

¹⁷⁹ *Id.* at Article 3.

¹⁸⁰ Interview with Professor Kieran McEvoy, *supra* note 60.

unionist people, should the Irish jurisdictions be united.¹⁸¹ These developments might, for example, enable unionists “to retain British citizenship as a complex of legal rights” within an Irish state.¹⁸²

In Part IV of this article, I have argued that the twin goals of justice and peace may be pursued through three parallel endeavours: (1) acknowledging colonialism and its impacts in Ireland, and providing for transitional justice in that context; (2) exploring the full significance of the consent principle in the Good Friday Agreement; and (3) considering the possibility of an inclusive self-determination resolution in Ireland. Foundation transitional justice theorist Ruti Teitel has demonstrated that post conflict transitions “imply paradigm shifts in the conception of justice.”¹⁸³ The processes I have advocated for in this article have the potential to encourage such paradigm shifts and encourage the development of a peace process that looks to the past and its injustices, while also aiming for a new dispensation for peace in the future.

V. CONCLUSION

In his seminal book *States of Denial*, Stanley Cohen asked: “what do we do with our knowledge about the suffering of others, and what does this knowledge do to us?”¹⁸⁴ This article has attended to Cohen’s concern in relation to the Irish peace process by positioning the contemporary colonial experience of Irish nationalists in the North of Ireland as an essential starting point in an honest evaluation of self-determination in Ireland. The colonial experience of Irish nationalists has inflicted injustice and poses an obstacle to the achievement of a just peace. The fact that neither the colonial experience of Irish nationalists nor the role of the British state in the conflict

¹⁸¹ Interview with Anthony Coughlan, *supra* note 55.

¹⁸² *Id.*

¹⁸³ TEITEL, *supra* note 37, at 6.

¹⁸⁴ STANLEY COHEN, *STATES OF DENIAL* x (2001).

has yet been adequately acknowledged demonstrates that the Irish peace process has not achieved conflict resolution or reconciliation.¹⁸⁵

However, the Good Friday Agreement is a living document, capable of facilitating flexible solutions to a potential constitutional change in Ireland. It has encouraged sections of the Irish nationalist community to shift from political violence towards negotiation as a means of furthering their self-determination claims. Representatives of the Irish and British communities now sit at the same table, a circumstance that would have been unthinkable 20 years ago. The Agreement can be implemented in the future to develop conflict resolution and reconciliation opportunities, including a truth-telling mechanism, which in turn can generate transitional justice. As demonstrated in the final two sections of this article, confronting the experience of colonialism need not stand in the way of developing an inclusive self-determination solution in Ireland, and ought not stand in the way of establishing a just peace.

I opened this article with a reference to Freedland's recent argument that the people of Northern Ireland face a choice between justice or peace: "We may want both; we may cry out for both. But the bleak truth is we cannot have both."¹⁸⁶ My argument is that this type of peace-justice binary is defeatist and unproductive. Of course, the peace and the justice that can be achieved in the North of Ireland may prove imperfect. However, just as relative peace is preferable to widespread conflict, so is an honest effort at delivering transitional justice preferable to marginalising truth and ignoring injustice in the hope that wounds will miraculously heal themselves.

¹⁸⁵ See Kelman, *supra* note 26.

¹⁸⁶ Freedland, *supra* note 1.