

**UNIFICATION REFERENDUMS:
A RESPONSE**

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16 January 2021

¹ Available https://www.austenmorgan.com/wp-content/uploads/2018/02/Belfast_Agreement.pdf.

Introduction

1. I refer to: working group on unification referendums on the island of Ireland, *Interim Report*, November 2020 (259 pp). I use the abbreviations: WG for working group; and IR for *Interim Report*. Responses have been invited by 18 January 2021, and this is one.
2. Everything about this project at the Constitution Unit is big, even gargantuan: the size of the WG – an unlucky 13, with one missing in action; the length of the IR – 259 pages; the bibliography – 14 pages, with the internet trawled by gophers for ‘Ireland’ and ‘referendum’; the list of figures – eight; and list of tables – twelve; the number of oral consultants – 63 (including two former Irish premiers); though not written submissions – only 24 (including the SDLP and Sinn Féin but no unionist or non-nationalist parties).
3. The intention is to impress, if not intimidate. I remain unimpressed, despite the squirreling that has gone on to show how to run referendums better. I have been persuaded that the 2016 Brexit referendum badly destabilized the Constitution Unit (as part of the metropolitan elite).² Northern Ireland was always going to be an attractive antidote, because of the Irish nationalist belief that a united Ireland was the way back to the EU. One fears the Constitution Unit turning next to Scotland (with its different way back to the EU), and academic hob-nailed boots tramping into another peripheral crisis with naively proffered technical advice on a (legal or illegal?) Scottish referendum. Liberals, including internationalists, generally believe in the territorial

² Independent commission on referendums, *Report*, July 2018.

integrity of states.³ Why is it in post-imperial England, that it is thought to be constitutionally progressive to support the breakup of the United Kingdom state?⁴ The analogy of Canada in the fourth quarter of the twentieth century should be considered, with federalist Ottawa having hopefully seen off Francophone (catholic) separatism in Quebec.⁵

4. I have a walk on part in the IR, as having made one of the 24 written submission.⁶ It was entitled: 'The Law on Irish Unity: an opinion' (12 pp). I indicated that I had authored *The Belfast Agreement: a practical legal analysis* (London 2000), and hyper linked my professional website with access to the 601 pages. The book failed to make it into the expansive bibliography. Absolutely none of my ideas was referenced, even to be rejected. And those ideas are, of course, articulated by others of no mean intellectual stature. As a Constitution Unit groupie of some two decades, I must now accept that I have been cancelled and move on.
5. So why do I bother with this response? The answer is simple: the intellectual irresponsibility of this project, throwing reunification petrol on the Brexit fire in Northern Ireland. Nationalists think a referendum is their new way to a united Ireland (all others having failed disastrously). The Constitution Unit rushed to help. Maybe the significance of 1998 – an alternative perspective and one I press - is the fuller acceptance of the consent principle by nationalists, after three decades of political violence; the referendum idea could be about working Northern Ireland democratically

³ 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.' (1945 UN Charter, art 2(4))

⁴ Dawn Oliver, 'The United Kingdom in Transition: from where to where?', in Mads Andenas & Duncan Fairgrieve, eds., *Tom Bingham and the Transformation of the Law: a liber amicorum*, London 2009, pp 147-62.

⁵ *Reference re Secession of Quebec* [1998] 2 SCR 217.

⁶ P 221.

(as a national minority), given that the Republic of Ireland has clearly abandoned the fourth green field for gliding about Brussels as a minor European state.

6. There is no basis for arguing that a unification referendum in Northern Ireland is inevitable, much less imminent (though that is tried⁷). So why all the technical work? While Northern Ireland voted remain in 2016 (by 56 per cent to 44), the democratic unionist party received its largest vote ever in the 2017 general election (and 10 MPs out of 18). Those two things were connected.

Key Ideas

7. I reference my opinion of 15 August 2020 as background to the discussion here of chapter 4 of the IR, entitled 'Legal Context'. I use the following abbreviations: United Kingdom ('UK'); Northern Ireland ('NI'); Republic of Ireland ('ROI') as opposed to Ireland (and island of Ireland!);⁸ and Belfast agreement as opposed to good Friday agreement⁹. That terminology follows from being a lawyer practising in England and Wales and in Northern Ireland.
8. Among the ideas I discussed last summer were:
 - first, the interrelationship of: a border referendum in UK law, a constitutional referendum in the ROI, and a UK/ROI agreement in international law – three legal events (para 5);

⁷ Para 4.

⁸ Ireland Act 1949 s 1(3).

⁹ Cm 3883 of April 1998; Northern Ireland Act 1998 s 98(1).

- second, two neighbouring states in international law, and the cession of territory (paras 9-11);
- third, the 1998 Belfast agreement, a bilateral treaty with legal and political faces (paras 15-17);
- fourth, the statutory referendum provisions in UK law, formally the Constitution Unit's topic (paras 19-24);
- fifth, the very different constitutional referendums in the ROI (paras 26-27);
- and sixth, the possibility – even likelihood - of inconsistent outcomes (paras 18, 24-25 & 28).

Chapter 4: Legal Context

9. I decided to draft this response when I glanced at the executive summary¹⁰, and read the following (which could have made headlines in the Irish press): **'If the Oireachtas legislated for unification while Westminster did not, Northern Ireland would become disputed territory: under Irish law, it would become part of Ireland; in British [*erratum* United Kingdom] law, it would remain part of the United Kingdom. It would be highly desirable to avoid this eventuality.'** (para 15)

10. It is clear beyond peradventure that the WG has failed to understand the tripartite context (which I had laid out in August 2020) of: UK law; Irish law; and international

¹⁰ Pp vi-xvi.

law. And all this with reference to the sacred Belfast/Good Friday Agreement (para 3), which the Irish government never stops mentioned is registered at the United Nations!¹¹

United Kingdom Law

11. The relevant law is section 1 of the Northern Ireland Act 1998 (status of Northern Ireland), plus schedule 1 (polls for the purposes of section 1). Section 1 is quoted inadequately in para 4.21 of the IR, and schedule 1 is treated similarly in para 4.22.

12. Section 2(2) is not even referred to: **‘But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be a part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.’** The WG does not even know there is to be a UK/ROI agreement. Does there have to be an agreement, construing this statutory provision? If the answer is no, then it is impossible to see how a united Ireland could be achieved. If the answer is yes, then the agreement could provide for alternatives (including transitions), and it would be up to Westminster (and to the Oireachtas?) as to whether it further legislated after the two governments made an agreement.

13. I will let the WG find its own way to schedule 1 of the Northern Ireland Act 1998, where its referendum is provided for.

¹¹ UNTS, vol 2114, pp 487-559, 11 July 2000 (in English and French).

14. One only has to think about the UK's exit from the EU, from 23 June 2016 to 31 December 2020, and the torrent of international agreements and primary and secondary domestic legislation, to get an idea of how an even more divided NI would be absorbed into the ROI, and that without civil war and maybe a first war between the UK, a member of NATO, and the ROI, an EU state.
15. A number of legal points needs making about UK law. First, the question of consent has been inscribed on the constitution of NI from the first (in 1921), though it shifted from the parliament to the people, and from consenting to remain in the UK to alternatively consenting to leave and join a united Ireland.
16. Second, a secretary of state refusal to hold a poll is unlikely to be successfully judicially reviewable. After all, a court would not be making the decision. The question would be whether the secretary of state was acting within a range of reasonable responses. A secretary of state could rely upon a wide range of materials to justify not holding a poll: it is a practical not ideological question. Arguably, a decision to hold a poll might be successfully judicially reviewable, if it could be shown that the secretary of state was responding to political pressure and not properly exercising his/her discretion. A Sinn Féin majority in the NI assembly, would not necessarily mean that a majority of the people of NI was now prepared to go into a united Ireland, in advance of an agreement between the two governments and on conditions which were not clear. A UK secretary of state would not be rushing to hold a referendum.
17. Third, while para (iv) of article 1 of the British-Irish agreement – part of the Belfast agreement - related two 'yes' votes to two governments attempting to legislate for a united Ireland, UK law makes clear that there has to be a prior agreement of two governments.

18. And fourth, inconsistency has to be factored in. If NI voted ‘no’ (as is most likely), nothing happens. But, if NI votes ‘yes’, that is not the end of the matter. If the ROI votes ‘no’, again nothing happens. But, if the ROI votes ‘yes’ as well, the issue goes off to the two governments. Either or both could decline to put related legislation before their legislatures. And the UK government cannot compel its parliament, just as the Irish government has to work with its legislature.
19. Such referendums, like the legal cession of territory between states, are far from stable legal processes. Two ‘yes’ votes in Ireland, as the late Seamus Mallon clearly appreciated in his recent (2019) memoirs, would not necessarily lead to a united Ireland – more likely the opposite: ‘...we can work...towards the unification of the people of Ireland, rather than the forced marriage of territorial unity. To this end I propose replacing the “sword of Damocles” of a 50 per cent plus one Border Poll vote with the doubly protective “shield” of Parallel Consent.’¹² That was Irish *Realpolitik*. Unfortunately, the WG has got nowhere near that.

Irish Law

20. The law in the ROI is in the 1937 Bunreacht na hÉireann, which translates as constitution of Ireland (but does not have an English title). There is no relevant statute law, and none is likely to be necessary – contrary to the speculation in the IR about an Irish unification referendum: ‘Article 3 allows the Oireachtas to legislate for a legally binding non-constitutional referendum that would, if passed, amount to a majority of

¹² Seamus Mallon with Andy Pollak, *A Shared Home Place*, Dublin 2019, chapter 14.

the people in the South democratically expressing their consent to unification.’ (para 4.24)

21. Referendums in the ROI are about changing the constitution, or not – and nothing else: arts 46 & 47. The 1937 constitution originally envisaged a transition to a united Ireland. This flowed from the original articles 2 and 3, which the Irish supreme court later held contained a constitutional imperative: *McGimpsey v Ireland* [1988] IR 567; [1990] IR 110. But art 15.2 was also prefigurative: **‘Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of those legislatures.’** Think the NI assembly. The 1998 Belfast agreement was recognized in Irish constitutional law through art 29 (international relations): **‘The State may consent to be bound by the British-Irish Agreement done at Belfast on the 10th day of April 1998...’** (art 29.7(1)). No reference there to the good Friday agreement! And what did Bertie Ahern’s signature on 10 April 1998 mean? Article 29 was also the mechanism for the replacement of arts 2 and 3 in Bunreacht na hÉireann, by a subsequent constitutional referendum. The people of the ROI did not vote on the Belfast agreement. Perhaps the weakest part of the discussion of Irish law in the IR, is the misconstruing of the amended articles as if they were the original articles: ‘unification as a national aim’ (para 4.23).
22. But none of that produces a united Ireland, on paper. That could only be done by a UK prime minister handing territory contractually (in international law), to his Irish opposite number. The peoples of NI and the ROI are most likely to have spoken well in advance, and almost certainly discordantly.

23. I have left international law to the end, contrary to the votaries of the good Friday agreement who start with the text.
24. The Belfast agreement comprises: a British-Irish agreement ('BIA') of four articles; and a much longer multi-party agreement ('MPA'), which is annex 1 to the BIA. They have different parties. The relationship between the two is explained in article 2 of the BIA: 'The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement.' The three words 'where appropriate implement' mean that, while the obligations of the two states are binding in international law, some things in the Belfast agreement are political or aspirational. That applies to aspects of the MPA, the language requiring construing in international law. It does, after all, call itself a 'comprehensive political agreement'.¹³ But query article 1 of the BIA? It is more than a recital. But para (vi), for example, required a separate annex 2 to limit legal meaning.
25. I see the Belfast agreement as being legal, in international law, and as having been given effect in UK and Irish law, but also as being diluted, or dissolved, in parts by politics. The IR, in contrast, sees it as legal – like Moses' tablets of stone – with the commandments embossed to become fundamental values, namely dogma: 'The Agreement, of course, is more than a legal document. It articulates core political values that guide the ways in which people on these islands can collaborate with one another. We approach its interpretation in that spirit.' (para 4.2)

¹³ Constitutional Issues, para 2.

26. Para (iv) of article 1 of the BIA does include: ‘it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish [construed with reference to paras (i) and (ii)]’. But the condition precedent is two ‘yes’ votes. It does not apply to two ‘no’ votes, the most realistic outcomes. But what if NI voted ‘yes’ and the ROI ‘no’? Or NI voted ‘no’ and the ROI ‘yes’? What happens in those two different scenarios? And finally, what about UK and Irish domestic law?

Conclusion

27. After 259 pages, I can only repeat the conclusion to my original legal opinion. Nothing in the legal reasoning leads me to moderate a word.
28. The Constitution Unit has come to a sorry pass in its history with its working group on unification referendums on the island of Ireland.
29. One may conclude distressingly that, having failed to advise technically on the 2016 Brexit referendum in the UK (which might have produced a different result), its newish leadership has been prevailed upon to compensate by doing that technical work on a putative NI referendum.
30. In shifting out of UK constitutional law, and into international law and two states, the Constitution Unit has lost its sure-footedness. Whether it will be able to recover from the strangulating embrace it is about to experience – with its online survey results no doubt promoting Irish unity – remains to be seen.

31. The Constitution Unit would be advised to study the history and politics of the Irish question as quickly as possible, and to learn from international law and diplomacy, that the two referendums provisions (plus an inter-governmental agreement) was arguably more about maintaining, and not undermining, the partition of Ireland.
32. When Garret FitzGerald hitched that ride with Henry and Nancy Kissinger, in Washington on 8 January 1975, to a memorial service, the bluff of Irish political leadership was called: ‘I said that I knew of his non-interventionist stance so far as Irish affairs were concerned and was not seeking any action by the United States at that time; but in the event – unlikely, I hoped – of a shift in British policy towards withdrawal from Northern Ireland in advance of an agreed political solution we would then seek US assistance in persuading Britain not to embark on a course of action that could be so fraught with dangers not just to Northern Ireland but to the whole of Ireland, and conceivably even – given the involvement of Libya, for example, with the IRA, and Cuba’s long-distance role in Angola – to the wider peace of north-western Europe. He agreed that he would be open to an approach from us in the event of such a grave development.’¹⁴
33. Those 118 words deserve to be inscribed on a monument of Irish statesmanship, and quoted in the Constitution Unit report which will be reported by the BBC, and Irish media, as adding substance to a proposal most certainly not supported by the new Irish government led by Micheál Martin.

¹⁴ Garret FitzGerald, *All in a Life*, Dublin 1991, p 259.