

**THE LAW ON IRISH UNITY:
AN OPINION**

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

Introduction

1. I have been a follower for many years of the Constitution Unit at University College, London, and respect its dispassionate, scholarly and highly empirical work. Sadly, the moment of Brexit (2016-19) saw it slip into thinly disguised partisanship.² It tried to fix the 2016 referendum after the result, as it were, showing allegiance to the metropolitan liberal elite. Now, on the question of Ireland, it has gone whole hog for Sinn Féin (on a different, hypothetical, referendum), but this time against the rest of Irish nationalism, Ulster unionism and those (like me) who retain an intellectual interest in preserving the integrity of the United Kingdom³.
2. The Constitution Unit will deny this, most likely. However, it has announced: a working group on unification referendums on the island of Ireland⁴ (with a consultation running until 2 September 2020). That is the title.
3. The Constitution Unit goes on (drawing on its 2018 independent commission on referendums) to refer to: ‘a project examining how any future referendum on the constitutional status of Northern Ireland would be best designed and conducted.’ That is one referendum. But it then refers to partner institutions in Belfast and Dublin, and to conducting an online survey (in both parts of Ireland?). Reassuringly, the Constitution Unit states: ‘the project is not looking at, and will not take a view on, whether such a vote would be desirable or what the outcome should be.’ But it then claims (without evidence): ‘recent developments [Brexit again?] have increased the

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

³ On analogy with Ottawa’s maintaining the Canadian federation against Quebec separatism: *Reference re Secession of Quebec* [1998] 2 SCR 217.

⁴ Working group is ambiguous. Unification is not. And island of Ireland is straight out of Bunreacht na hÉireann, art 2.

chances that this condition [of a mandatory Northern Ireland border poll] could be met in the coming years.’ Not necessarily so: while Northern Ireland did not follow the UK trend in 2016; in the 2017 general election, the democratic unionist party received its largest ever vote there.

4. The project is all rather muddled. And one fears academic capture of the Constitution Unit by glib, non-English ideologues. Some of those involved care more for a united Ireland than the Constitution Unit’s likely recommendations about voters, questions etc.
5. A Northern Ireland referendum is only free-standing in UK law. In politics, and in other law, it is integrally related to a constitutional referendum in the Republic of Ireland. That is a second referendum. And both those referendums are related to one state ceding territory in international law to another, a trade which rarely happens and it invariably dangerous. A United Kingdom/Irish agreement is integral to the scenario, though it sounds in United Kingdom, but not in Irish, law. There are therefore three related legal events.

This Opinion

6. This opinion contains a legal analysis covering: first, two neighbouring states in public international law; second, the 1998 Belfast agreement (it is not legally called the good Friday agreement), a bilateral treaty with legal and political faces; third, the statutory referendum provision in United Kingdom statutory law, which concerns the Constitution Unit; fourth, the very different constitutional referendum provision in Irish law; and fifth, the possibility of two different inconsistent outcomes – which might well

lead, in the atmospheres engendered by political warriors (for leave – now good - and remain – now bad), to major instability and perhaps even a return to the troubles of the 1960s to 1990s.

7. The Constitution Unit naively assumes it can avert with characteristic technical advice precisely that against which it warns: ‘fundamental problems may therefore arise: a badly structured process could become chaotic, the results might not be accepted as legitimate, and there could be civil unrest.’ Helping Sinn Féin – I submit - in its campaigning might be undermining of the very statecraft provided for in the Belfast agreement. The referendum provision, arguably, was related to the concept of consent. The Belfast agreement was about weaning nationalists off ethnic fundamentalism as much as it was about encouraging unionists to share power. The possibility of a Northern Ireland referendum does not mean a probability, much less the desirability of escalating the sectarian conflict in Northern Ireland on to the plane of two states in international law.
8. The Belfast agreement never promised a united Ireland, however much the votaries of the good Friday agreement saw and heard what they wanted to see and hear.

Two States

9. We start with the United Kingdom of Great Britain and Northern Ireland (‘UK’), a liberal-democratic state where England (and then Great Britain) made unions in 1706 and 1800. We then proceed to the Republic of Ireland⁵ (‘ROI’), another liberal-

⁵ Ireland Act 1949 s 1(3).

democratic state (with a succession of names⁶) which was created legally out of UK law in 1922; it went on to acquire statehood subsequently through international recognition⁷.

10. Northern Ireland ('NI') has been integrally a part of the UK since 1801, was not a colony, and that is where it remains. It has never been recognized as a part of the ROI, despite the Irish constitutional claim of 1937 ... which breached the 1925 trilateral (Belfast, Dublin, London) agreement accepting the Irish border.
11. The UK and the ROI are both dualist states, meaning that international law sits out there while they each have their own domestic law. The relationship between the two differs, because the UK uses the common law while the ROI has a written constitution.

Touches of Reality

12. In NI, nationalists – referring to catholics – are very ready to claim growing support for a united Ireland. Graham Gudgin has recently criticized this.⁸ He refers to the annual life and times survey in NI, which shows regularly 22 per cent support for a united Ireland (and 7 per cent for immediate union). 'If Brexit has done less for unification than nationalists hoped, Covid has similarly disappointed.' Graham Gudgin makes two further points. First, the higher catholic birth rate is now closer to the protestant rate: 'If this falling trend continues, there will never be a Catholic majority.' Second, catholics now include Poles, Lithuanians, Portuguese and Filipinos, and they are not historically Irish nationalists. One cannot infer (and could never): from catholic; to

⁶ Irish Free State; Éire; Republic of Ireland; and even Ireland.

⁷ There is no case in public international law which says when.

⁸ 'Irish unity is not inevitable', *Spiked*, 5 August 2020.

nationalist; and on to Sinn Féin: ‘The 2011 Census ... showed that only half of Northern Ireland’s Catholics identify as “Irish” and under half had an Irish passport. The Northern Ireland Life and Times Survey showed that in 2017-18, the proportion of Catholics who support eventual Irish unity is 41 per cent.’

13. As for the ROI, nothing can be inferred from the 1998 constitutional referendum figure of: 94.4 per cent for to 5.6 per cent against; on a 56.3 per cent turnout. The Belfast agreement, after all, reinforced partition. The people were not voting for a united Ireland, or even for the right to agree it. They were voting for a NI settlement, with the UK and Irish governments involved.
14. Historically, throughout the troubles, most people in the ROI were uninterested in NI and opposed to uniting with it. On 8 January 1975, Garret FitzGerald, the Irish foreign minister, misconstruing utterances of Harold Wilson, the UK prime minister, urged Henry Kissinger, in Washington, to consider stopping a precipitate British withdrawal.⁹ Since the Belfast agreement, the people of the ROI have shown no real interest in Irish unity, certainly not in paying for it and making the major adjustments which would be necessary. The rise of Sinn Féin in the ROI, as reflected in the 2020 general election, is related to, not NI, but domestic Irish issues on which it has majored opportunistically.

The Belfast Agreement

15. Arguably, the Irish breach of 1937 was cured with the Belfast agreement of 10 April 1998. The *Irish Times* christened it the good Friday agreement¹⁰, and this settled in the

⁹ Garret FitzGerald, *All in a Life*, Dublin 1991, pp 258-9; Ronan Fanning, ‘How Dublin prepared for the threat of NI Doomsday’, *Sunday Independent*, 1 January 2006; Garret FitzGerald, ‘The 1974-5 Threat of a British Withdrawal from Northern Ireland’, *Irish Studies in International Affairs*, vol 17 (2006), pp 141-50.

¹⁰ 11 April 1998, courtesy of Frank Millar.

catholic consciousness of Irish republicanism that Easter (and Mo Mowlam). The people of NI voted for the Belfast agreement.¹¹ The UK parliament defined the multi-party agreement as the Belfast agreement.¹² And the separate UK-Irish agreement would normally be described as the Belfast agreement¹³ (it was signed in Castle Buildings at Stormont on the outskirts of the city¹⁴).

16. The authoritative UK version of the Belfast agreement is Cm 4705 of May 2000. And the registered version is: UNTS, vol 2114, pp 487-559, 11 July 2000 (in English and French).
17. 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'.¹⁵ 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.

¹¹ Cm 3883 of April 1998.

¹² Northern Ireland Act 1998 s 98(1).

¹³ Confer the 1990 Dublin convention: which is now regulation (EU) no 604/2013 of the European parliament and of the council (Dublin III).

¹⁴ And some unionists called it the Stormont agreement.

¹⁵ Constitutional Issues, para 2.

18. 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?

United Kingdom Law

19. Section 1 of the Northern Ireland Act 1998 (status of Northern Ireland) – anticipated in the Belfast agreement¹⁶ – reads: ‘(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1. (2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be 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.’
20. Schedule 1 is polls for the purposes of section 1. It has four paras. Para 1 empowers the secretary of state (‘SoS’) to hold a poll. Para 2 contains the test: ‘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 ...’. Para 3 imposes a mandatory

¹⁶ Constitutional issues, annex A.

seven-year interval on a second poll. And para 4 makes further provision, which the Constitution Unit may seek to specify.

21. A number of legal points needs making. First, the question of consent has been inscribed on the constitution of NI from the first, 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.
22. Second, a SoS 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 SoS was acting within a range of reasonable responses. A SoS 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 SoS 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.
23. Third, while para (iv) of article 1 of the BIA 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 (and that is, or was, a condition precedent to the Belfast agreement entering into force under article 4(1)(a)).
24. 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.

25. 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.’¹⁷

Irish Law

26. The people of the ROI did not vote in 1998 on the same question as those in NI¹⁸. In the ROI, referendums have been used to change the constitution.¹⁹ In 1998, the people of the ROI voted to remove the territorial claim to NI in articles 2 and 3. This was all done through article 29: international relations. Article 29.7(1) was to read: ‘The State may consent to be bound by the British-Irish Agreement done at Belfast on the 10th day of April 1998...’. So, the Irish government did not agree the Belfast agreement at Castle Buildings, because it chose to consult the people first! This was signature followed by ratification. That was not required by Bunreacht na hÉireann. The Irish constitution is focussed on international agreements being approved by Dáil Éireann.

¹⁷ Seamus Mallon with Andy Pollak, *A Shared Home Place*, Dublin 2019, chapter 14.

¹⁸ ‘Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in Command Paper 3883?’

¹⁹ Bunreacht na hÉireann, arts 46 & 47.

27. There is nothing in the Belfast agreement, and there was nothing in subsequent Irish legislation, to say how the ROI would deal with a united Ireland. Most likely, the people would have to amend the constitution to remove the new articles 2 and 3 inserted after the Belfast agreement. Article 15.2 might be preserved, in order to maintain the Stormont assembly: 'Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.'
28. 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.

Conclusion

29. The Constitution Unit has come to a sorry pass in its history with its working group on unification referendums on the island of Ireland.
30. 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.
31. 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.

32. 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.

33. 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.’²⁰ 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.

²⁰ Garret FitzGerald, *All in a Life*, Dublin 1991, p 259.