

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
; 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 reW

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.

second, two neighbouring states in international law

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: **f 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**

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.

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 -
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

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

appreciated in his recent (2019) memoirs, would not necessarily lead to a united Ireland of the people of Ireland, rather than the forced marriage of territorial unity. To this end I propose

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

binding non-

the people in the South democratically expressing their consent to unification.

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:

for the creation or recognition of subordinate legislatures and for the powers and

Think the NI assembly. The 1998 Belfast agreement was recognized in Irish constitutional law through art 29 (international relations):

State may consent to be bound by the British-Irish Agreement done at Belfast on

the 10th

(art 29.7(1)). No reference there to the good Friday

agreement!

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

International Law

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-

26.

Governments to introduce and support in their respective Parliaments legislation to give

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 leaders -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 -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

d 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 3 12 stitution Unit report which