

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

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## **Introduction**



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

badly structured process could become chaotic, the results might not be accepted as

Helping Sinn Féin I submit - in its

democratic state (with a succession of names<sup>6</sup>) which was created legally out of UK law in 1922; it went on to acquire statehood subsequently through international recognition<sup>7</sup>.

10. \_\_\_\_\_, 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.<sup>8</sup> He refers to the annual life and times survey in NI, which shows regularly 22 per cent support for a united

Graham Gudgi

nationalist; and on to Sinn Féin:

an Irish passport. The

Northern Ireland Life and Times Survey showed that in 2017-18, the proportion of

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.<sup>9</sup> 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 agreement<sup>10</sup>, and this settled in the

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<sup>9</sup> Garret FitzGerald, Dublin 1991, pp 258-9; Ronan Fanning, 'How Dublin prepared for the threat of NI Doomsday', 1 January 2006; Garret FitzGerald, 'The 1974-5 Threat of a British Withdrawal from Northern Ireland', vol 17 (2006), pp 141-



18.

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

outcomes. But wh

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 agreement<sup>16</sup>



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 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,

that is not the end of the matter. If the ROI

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. As Seamus Mallon clearly appreciated in his recent (2019) memoirs, would not necessarily lead to a united Ireland more likely the opposite. Ireland, rather than the forced marriage of territorial unity. To this end I propose

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## **Irish Law**

26. The people of the ROI did not vote in 1998 on the same question as those in NI<sup>18</sup>. In the ROI, referendums have been used to change the constitution.<sup>19</sup> 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) may consent to be bound by the British-Irish Agreement done at Belfast on the 10<sup>th</sup> day. 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.

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<sup>17</sup> Seamus Mallon with Andy Pollak,



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 -