



LE CONSEGUENZE COSTITUZIONALI DELLA BREXIT

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Leaving the Union: Constitutionalising  
Secession Rights in the United  
Kingdom

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# Leaving the Union: Constitutionalising Secession Rights in the United Kingdom\*

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**Abstract [En]:** Among the many consequences of Brexit has been increased territorial tension within the United Kingdom (UK). This article assesses whether the four constituent units of the UK have a right to secede. Exploring the legislative treatment of Northern Ireland, both before and after 1998, it argues that there is no general right to secede under the UK constitution. Moreover, it questions whether such a right could ever effectively be recognised within a political constitution.

**Titolo:** Lasciare l'Unione: costituzionalizzare il diritto di secessione nel Regno Unito

**Abstract [It]:** Tra le molte conseguenze della Brexit vi è da segnalare un incremento della tensione territoriale all'interno del Regno Unito. Questo articolo esamina se le quattro unità costitutive del Regno Unito siano titolari di un diritto di secessione. Analizzando il quadro legislativo dell'Irlanda del Nord, sia prima che dopo il 1998, si sosterrà che non esiste un diritto generale alla secessione in base alla Costituzione del Regno Unito. Inoltre, ci si interrogherà se un tale diritto possa essere effettivamente riconosciuto all'interno di una costituzione politica.

**Keywords:** Secession rights; United Kingdom; Northern Ireland; Scotland; political constitution

**Parole chiave:** diritto di secessione; Regno Unito; Irlanda del Nord; Scozia; Costituzione politica

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## 1. Introduction

Among the many consequences of Brexit has been increased territorial tension within the United Kingdom (UK). Irish unification and Scottish independence both appear more plausible prospects than before while support for Welsh independence has significantly increased, albeit from a low base. Do Northern Ireland, Scotland and Wales have a constitutional right to leave the UK? Legally, authority to determine the UK's territory rests with Westminster. But politically, might the constituent sub-units of the UK have a right to leave? In a recent contribution, Ciaran Martin has argued that the UK has – since 1921 – been a Union based on consent.<sup>1</sup> If London were to refuse requests from a majority in the Scottish Parliament for a Scottish Independence referendum, Martin argues, this would transform the Union into

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\* Articolo sottoposto a referaggio. I am grateful to Aileen McHarg both for sharing with me a draft paper that addresses similar issues and for assistance on some points of UK constitutional law.

<sup>1</sup> C. MARTIN, *Resist, Reform, or Re-Run: Short- and Long-Term Reflections on Scotland and Independence Referendums*, Blavatnik School of Government, Oxford, 2021.

one based on law. In supporting his constitutional argument that the Union is based on consent, Martin relies on the legislative treatment of Northern Ireland since 1921. In this article, I both challenge Martin's account of Northern Ireland's legislative status within the Union and suggest that the treatment of Northern Ireland is so rooted in the UK's "Irish question" that it does not evidence a general principle also applicable to Scotland and Wales. More broadly, the article explores the potential and limits of a union based on consent within a constitutional order founded on parliamentary sovereignty.

Section 2 explores how countries with mastertext constitutions address territorial integrity, with a particular focus on rights of secession. This provides a framework to address the legislative treatment of Northern Ireland. Section 3 outlines the way in which Northern Ireland came into existence and the legislative treatment of its territorial status prior to the Belfast / Good Friday Agreement in 1998. Section 4 then explores the provisions of the Northern Ireland Act 1998 that regulate the manner in which Northern Ireland may leave the Union to unify with Ireland. Section 5 reassesses Martin's claims about the Union based on consent in light of that detailed consideration of Northern Ireland. Section 6 questions whether a legal system founded on parliamentary sovereignty can ever depend on the consent of its constituent subunits. Section 7 concludes. Two brief notes on terminology adopted for ease of expression. First, I refer throughout to rights of secession, notwithstanding that Northern Ireland may only leave the UK for the purposes of reunifying with Ireland. Where relevant, I emphasise this particular feature of Northern Ireland's situation. Second, I refer to England, Scotland, Wales and Northern Ireland as either the "constituent sub-units" of the UK or more simply as the "units".

## **2. Approaches to territorial integrity in mastertext constitutions**

A constitution may outright prohibit any alteration of the national territory, either through a statement that the national territory is indivisible or through a statement that the territory is unamendable.<sup>2</sup> Thirty-six percent of national constitutions take these approaches. A constitution may explicitly or implicitly allow for alterations to its territory. Ten percent of national constitutions allow for territory to be amended either by legislation or parliamentary approval of a treaty; 6 percent of national constitutions allow territory to be amended by a supermajority in parliament, while 9 percent allow territory to be amended following a referendum. Constitutional silence on territorial amendment probably implies that alteration is permissible either as a legislative competence or by constitutional amendment. None of these approaches amounts to a right to secede, however, since the power of territorial amendment remains vested with the territory-wide constitutional actors of the existing constitutional order.

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<sup>2</sup> This analysis draws on O. DOYLE, *The Silent Constitution of Territory*, in *The International Journal of Constitutional Law*, vol. 16, n. 3, 2018, pp. 887-903.

A constitution may specifically grant a sub-unit a right to secede. Only four currently extant constitutions grant such a right. Article 4.2 of the Liechtenstein Constitution grants a right to individual communes to secede. Article 39 of the Ethiopian Constitution grants every nation, people, and nationality in Ethiopia a constitutional right to secede. Article 113 of the Constitution of St. Kitts and Nevis allows the legislature of Nevis Island to provide that the island of Nevis should cease to be federated with the island of Saint Christopher and accordingly that the Constitution should no longer have effect in the island of Nevis. Article 74 of the Uzbekistan Constitution grants a right to the Republic of Karakalpakstan to secede based on “a nation-wide referendum held by the people of Karakalpakstan”.

Noteworthy in the first three cases is the care taken within the mastertext constitution to operationalise the right of secession. In the case of Liechtenstein, the secession procedure may be initiated by a majority of the citizens residing there who are entitled to vote. The secession must be regulated by a law or treaty; in the latter case, a second ballot is required in the commune. In the case of Ethiopia, a two-thirds majority in the relevant Legislative Council must vote to secede; the federal government then organizes a referendum in the relevant area after a three-year cooling-off period.<sup>3</sup> After a majority vote in the referendum, the national legislature transfers its powers to the Council of the seceding entity and effects a division of assets. In the case of Saint Kitts and Nevis, the secession must be approved by a two thirds majority in the legislature of Nevis, followed by a two thirds majority at referendum. Among many requirements aimed to foster deliberation, a full and detailed proposal for a new constitution for the island of Nevis must be laid before the legislature for at least six months before the referendum. If the President of the legislature certifies that all the procedural requirements have been satisfied, the Governor General must sign the law giving effect to secession. In the case of Uzbekistan, the right to secede features in a chapter of the Uzbekistan Constitution that – on its face – concedes a wide autonomy to the Republic of Karakalpakstan, but there is no indication of how the right to secede can be exercised, neither how it is initiated nor how any decision to secede would be implemented.

This examination illustrates that effective constitutionalisation of a right to secede requires more than simply stating the right to secede. If the constitutions of Ethiopia, Liechtenstein and Saint Kitts and Nevis did not contain those additional provisions, the central government would both control the circumstances in which the constituent sub-units could choose to secede and have considerable discretion whether to respect such a vote, effectively depriving the units of any constitutional entitlement to secede. The core mechanism of secession must be preceded by a procedure for initiating the secession mechanism and succeeded by a procedure for giving effect to any secession decision.<sup>4</sup> This provides a

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<sup>3</sup> I am grateful to Assefa Fiseha for assisting with an understanding of the Ethiopian procedure.

<sup>4</sup> This should render us doubtful about whether the right to secede within Uzbekistan could effectively be exercised.

helpful framework for analysing the case of Northern Ireland post-1998. To assess the claim that the UK has been a Union based on consent, however, we must first explore the pre-1998 position.

### 3. (Northern) Ireland in the United Kingdom – pre-1998

The *Acts of Union 1800*, passed by the Irish Parliament in Dublin and the Westminster Parliament in London, created the United Kingdom of Great Britain and Ireland. While we must be cautious in projecting contemporary democratic standards onto past political decisions, the Irish *Act of Union* cannot be seen as any form of consent to the Union by the people of Ireland.<sup>5</sup> Roman Catholics – a large majority in the country – had only had the franchise restored in 1793 and remained excluded from membership in the Parliament. Over half of the favourable votes for the second Union Bill – the first had failed – came from boroughs with an electorate of fewer than 20 men. Peerages, sweeteners, illegal bribes, office placements and annuities were provided to secure support for the Union. In 1801, Ireland's population was over one quarter of the entire UK but was accorded only 15 percent of representation at the House of Commons in Westminster. After the Union, Ireland remained a separate, restive part of the UK. A nationalist movement emerged, dedicated to the repeal of the Union.<sup>6</sup> In the latter half of the nineteenth century, the Irish MPs at Westminster used their voting power to advance the cause of limited self-government for Ireland, known as “home rule”. However, support for home rule varied considerably over the island of Ireland. The province of Ulster, particularly its eastern portion, saw intense opposition, due to a markedly different religious-demographic make-up. This reflected the success of plantations of British Protestants some 250 years previously.<sup>7</sup> Ulster consisted of nine counties, four with a Protestant majority, two with a narrow Catholic majority and three with a large Catholic majority.

Following the Easter Rising of 1916, Irish nationalists came to favour independence over home rule. At the Westminster general election of 1918, Sinn Féin won 73 of the 105 Irish seats. These MPs, however, refused to take their seats at Westminster and instead established a new Irish parliament in Dublin in January 1919. Between 1919 and 1921, the Irish Republican Army fought a war of independence against Britain. The Westminster Parliament passed the *Government of Ireland Act 1920*, establishing separate parliaments for “Northern Ireland” and “Southern Ireland”, for the first time introducing a formal, political partition of the island. The jurisdiction of the Parliament for Northern Ireland extended to the four counties of Ulster with a Protestant majority and the two counties with a narrow Catholic majority. The Anglo-Irish Treaty of 1921, agreed between representatives of the British Crown and representatives

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<sup>5</sup> See B. O'LEARY, *A Treatise on Northern Ireland Volume 1: Colonialism*, Oxford University Press, Oxford, 2019, pp. 218-219.

<sup>6</sup> R. FOSTER, *Modern Ireland: 1600-1972*, Penguin, London, 1998, p. 544.

<sup>7</sup> J. BARDON, *A History of Ulster*, The Blackstaff Press, Belfast, 2001, ch.5.

of the provisional Irish government in Dublin, transformed this intra-state partition into an embryonic international border. The precise partition chosen and the manner in which it was implemented are important to an understanding of subsequent UK legislative treatment of Northern Ireland. The exclusion of three counties of Ulster – Donegal, Monaghan and Cavan – increased the Protestant majority in Northern Ireland from 56:44 to 65.5:34.5.<sup>8</sup> This protected the Protestant majority against relatively greater growth in the Catholic population. In the assessment of J.J. Lee, the purpose of the border was to provide unionists with as much territory as they could safely control. It was not an attempt to separate unionists and nationalists but instead to ensure Protestant supremacy over Catholics even in predominantly Catholic areas. While unionists had a tenable claim to the exclusion of some areas from home rule, they had no “no claim at all on some of the areas they eventually annexed”.<sup>9</sup> O’Leary highlights how, although Ireland had joined the Union as a unit, the *1920 Act* offered limited self-government to two units “without an overall act of national consent, and despite being expressly opposed by the party that had won a majority of seats and a majority mandate across the island”.

The Treaty accorded to Ireland the same constitutional status within the British Empire as Canada, Australia, New Zealand and South Africa, providing that it should be styled and known as “the Irish Free State”. Article 11 provided that until one month after Westminster passed an Act to ratify the Treaty, the powers of the Irish Free State would not be exercisable in respect of Northern Ireland. Moreover, no elections to the Parliament of the Irish Free State would take place within that month. Article 12 provided that if both Houses of the Parliament of Northern Ireland, within one month of the Westminster Act, addressed His Majesty to the effect that the powers of the Irish Free State institutions should not apply to Northern Ireland, then the Government of Ireland Act 1920 would continue to apply in respect of Northern Ireland. Given the partition imposed by the UK government in 1920, this was all a foregone conclusion and the border between Northern Ireland and the rest of the island became the border between the UK and the Irish Free State. This rather elaborate provision and process allows for two constructions. On the one hand, given that the Irish Free State formally included the whole island of Ireland, the whole island seceded from the UK and then, following a partition, Northern Ireland seceded from the Irish Free State to join the UK.<sup>10</sup> On the other hand, given that the powers of the Irish Free

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<sup>8</sup> B. O’LEARY, *A Treatise on Northern Ireland Volume 1*, cit., p. 339.

<sup>9</sup> J.J. LEE, *Ireland 1912-1985: Politics and Society*, Cambridge University Press, Cambridge, 1989, pp. 45-46, quoted in B. O’LEARY, *A Treatise on Northern Ireland Volume 1*, cit., p. 340.

<sup>10</sup> For this interpretation, see A. RENWICK et al, *Final Report of the Working Group on Unification Referendums on the Island of Ireland*, University College London, London, 2021, p. 15.

State institutions never applied to Northern Ireland, it was “Southern Ireland” that seceded from the UK, becoming the “Irish Free State” as it did so, while Northern Ireland never left.<sup>11</sup>

One final point to note. Article 12 also provided for the establishment of a Boundary Commission to “determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland”. The Irish side anticipated – perhaps naïvely, perhaps due to misrepresentation on the part of Prime Minister Lloyd George, perhaps both – that the Commission would recommend significant changes to the boundaries of Northern Ireland, such as moving the two counties with Catholic majorities into the Irish Free State and rendering the remnant an unviable statelet. Ultimately, the Boundary Commission recommended very minimal changes and, in the context of a financial settlement between the Irish Free State and the UK, no changes to the border were made.

In 1937, a new Constitution was adopted in the Irish Free State that marked a definitive legal rupture with the UK and named the state as “Éire” or, in the English language, “Ireland”. Article 2 of this Constitution defined the national territory of Ireland to consist of the whole island of Ireland, while Article 3 provided that “pending the re-integration of the national territory” the laws enacted by the Irish Parliament would only have the same territorial extent as the laws of the Irish Free State Parliament, i.e. the 26 counties of what the British had called “Southern Ireland”. In 1949, Ireland declared itself a Republic and thereby left what had by then become the British Commonwealth of Nations. Responding to this, the Westminster Parliament passed the *Ireland Act 1949*, section 1(2) of which provided that neither Northern Ireland nor any part thereof would cease to be part of the UK without the consent of the Northern Ireland Parliament. Importantly, this statute did not give the Northern Ireland Parliament permission to withdraw from the United Kingdom, but rather – subject to the caveat that no Parliament can bind its successor – guaranteed that Northern Ireland could not be ejected from the UK without the consent of its Parliament.<sup>12</sup> This was not a wholly hypothetical concern. In 1940, the British Government had offered Irish Prime Minister de Valera Irish unification in return for Ireland ending its policy of neutrality in World War II.<sup>13</sup> Colin Murray identifies “deep-seated concerns that the UK and Irish governments might negotiate about the status of Northern Ireland over the head of [the Northern Ireland

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<sup>11</sup> For this interpretation, see D. TORRANCE, *Library Briefing Paper: Parliament and Northern Ireland 1921-2021*, House of Commons Library, London, 2021, p. 29.

<sup>12</sup> O’Leary notes that while the democratic will of the Northern Ireland public were presented to the Westminster Parliament as deciding the matter, the cabinet had been briefed with a paper that suggested it was unlikely that Great Britain would ever agree to Irish unification even if the people of Northern Ireland desired it. B. O’LEARY, *A Treatise on Northern Ireland. Volume 2: Control*, Oxford University Press, Oxford, 2019, p. 142.

<sup>13</sup> R. DONNELLY, *Britain offered unity if Ireland entered the war*, in *The Irish Times*, 15 February 2001.



Parliament]”.<sup>14</sup> He further notes that granting the veto to the Northern Ireland Parliament – rather than to a plebiscite – was significant given how gerrymandering had marginalised nationalism within the Parliament.<sup>15</sup>

In 1972, the Westminster Parliament abolished the Northern Ireland Parliament, instituting a system of “direct rule” from London. The *Northern Ireland (Border Poll) Act 1972* directed a poll “with respect to the border” to be held in Northern Ireland “[w]ith a view to enabling the people of Northern Ireland as a whole to make known their wishes”. At the second reading of the Bill, the Secretary of State explained its rationale as being to take the question of the border out of the day-to-day political scene and to reassure the people of Northern Ireland that its position in the UK could not be changed without the consent of a majority of its inhabitants.<sup>16</sup> He also indicated that if a majority of the people of Northern Ireland were to opt for a united Ireland, no British Government would stand in their way.<sup>17</sup> This poll was held in 1973, but was boycotted by the nationalist community. 57.5 percent of the eligible electorate voted; 98.9 percent of those who voted supported Northern Ireland remaining in the United Kingdom.<sup>18</sup>

The *Northern Ireland Constitution Act 1973* was then enacted, section 1 of which provided:

It is hereby declared that Northern Ireland remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1 to this Act.

Schedule 1 allowed the Secretary of State to direct the holding of a poll, but such a poll could not take place more frequently than once every 10 years. No poll was ever held after that held under the *1972 Act*. The *1973 Act* essentially transferred the veto on Northern Ireland's ejection from the Union from the now defunct Parliament to the “people of Northern Ireland”. Whatever about the political position of the UK Government, there continued to be no legislative recognition of any right on the part of the people of Northern Ireland to leave the Union and unify with Ireland. In Article 5 of the Sunningdale Agreement 1973, however, the UK government declared that if in the future the majority of the people of Northern Ireland should indicate a wish to become part of a united Ireland, the British Government would support that wish.

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<sup>14</sup> C.R.G. MURRAY, *The People of Northern Ireland*, in O. DOYLE, A. MCHARG and J.E.K. MURKENS (eds.), *The Brexit Challenge for Ireland and the United Kingdom: Constitutions under Pressure*, Cambridge University Press, Cambridge, 2021, p.110.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Hansard*, 21 November 1972, col. 1089.

<sup>17</sup> *Ibid.*, 1091.

<sup>18</sup> See A. RENWICK et al, *Final Report*, cit., pp. 16-17.



## 4. Northern Ireland in the United Kingdom – the 1998 settlement

### 4.1. Overview

The Belfast / Good Friday Agreement 1998 introduced a new set of relationships within Northern Ireland, between Northern Ireland and Ireland, and between Ireland and the UK. Political power-sharing within Northern Ireland was founded on a compromise about the future constitutional status of Northern Ireland. Under the Agreement's core unification principle, Northern Ireland remains part of the United Kingdom so long as a majority of its people so wish, but must become part of a united Ireland if a majority of people voting in a referendum favour that outcome, *provided* that there is a concurrent, democratic expression of consent in Ireland.<sup>19</sup> These provisions were endorsed by the political parties in Northern Ireland, whether in 1998 or subsequently, by the people of Northern Ireland and Ireland voting in simultaneous referendums in 1998, and by an international agreement between the UK and Ireland, binding in international law. Ireland compromised on its territorial claim to Northern Ireland, replacing Articles 2 and 3 of the 1937 Constitution with provisions that accepted the legitimacy of Northern Ireland while expressing an aspiration to national unification; the UK compromised on the right to control its own borders.

The genius of the Belfast / Good Friday Agreement was to reconcile nationalist views of Irish self-determination with unionist views about the basis for Northern Ireland's status within the Union. Article 1(ii) recognises that it is for “the people of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right to self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland”. The “people of Ireland” were vested with the right to self-determination, but its exercise required agreement between the two parts. The Article refers five times to “the people of Northern Ireland”, an ontological entity that had never been formally conceded by Ireland prior to 1998.<sup>20</sup>

The Agreement required amendments to both UK and Irish law to give effect to these compromises. My focus here is on how the *Northern Ireland Act 1998* operationalises the right of the people of Northern Ireland to participate in any self-determination decision made by the people of Ireland. There are three principal differences between the border poll provisions in the *1973 Act* and the *1998 Act*. Together, these concede a political agency to the people of Northern Ireland but do not amount to a legal right of secession. First, under the *1973 Act*, the holding of a border poll was a discretionary matter for the Secretary of State for Northern Ireland. Under the *1998 Act*, that discretion continues. However,

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<sup>19</sup> For analysis, see *Ibid.*, ch.4; C. HARVEY, *Popular Sovereignty, Irish Reunification and Change on the Island of Ireland*, in M. CAHILL et al (eds.), *Constitutional Change and Popular Sovereignty: Populism, Politics and the Law in Ireland*, Routledge, London, 2021, pp. 267-284.

<sup>20</sup> For an account of Irish nationalism's evolving recognition of “the People of Northern Ireland”, see C.R.G. MURRAY, *The People*, cit., pp. 109-115.

Schedule 1 of the *1998 Act* imposes an obligation on the Secretary of State to order 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”. I shall return to the interpretation of this phrase further below. Second, the minimum length of time between two polls is reduced to seven years. Third, whereas the *1973 Act* did not specify any legal consequences of the vote, section 1(2) of the *1998 Act* specifies that if a majority in the border poll favours unification, the Secretary of State must “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 *1998 Act* therefore not only provides a locus of authority for secession – as is the case in Uzbekistan – but is similar to Ethiopia, Liechtenstein and Saint Kitts and Nevis in both reducing the power of central government to determine when a secession decision may be made, and imposing obligations on central government after the decision has been made. But each of these elements must now be explored in more detail.

#### 4.2. Triggering the border poll

Whereas Ethiopia, Liechtenstein and Saint Kitts and Nevis all confer on the legislative assembly of the constituent sub-unit the right to initiate the secession process, the *Northern Ireland Act 1998* does not confer that power on the Northern Ireland Assembly. Such an approach would be problematic, given that the Assembly was not designed to operate on a majoritarian basis. Under its consociational voting rules, each community could veto any proposal to hold a border poll. Vesting the Assembly with the power to initiate a border poll would therefore significantly undercut those provisions of the Agreement that vested the self-determination right in a majority of the people of Northern Ireland; it would allow a minority ensure that the majority's view could never be ascertained. Yet, there would be no secession right for Northern Ireland if the Secretary of State simply retained a discretion whether to call a border poll. The *1998 Act* attempts to square this circle by imposing a legal obligation on the Secretary of State. The Secretary of State is required to call a border poll “where 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”. This standard leaves the Secretary of State a wide latitude. There is scope for considerable disagreement when assessing how people might vote in the future, particularly when we do not precisely who would be entitled to vote,<sup>21</sup> when they would be asked to vote, and the precise content of the proposal on which they would be asked to vote. Given all these variables, it is significant that the test is not simply whether it appears likely that a majority would vote in favour but

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<sup>21</sup> On the franchise, see C. MCCRUDDEN, O. DOYLE, and D. KENNY, *The Franchise in Irish Unification Referendums*, in *Irish Studies in International Affairs*, vol. 32, n. 2, 2021, pp. 183-213.

rather whether that appears likely *to the Secretary of State*. It is contestable how to weigh these factors and some factors may pull in opposite directions. A court would be slow to second-guess any decision of the Secretary of State not to call a referendum, at least where there was evidence of good faith engagement with all relevant material.

In *In re McCord*, the Northern Ireland Court of Appeal rejected attempts to compel the Secretary of State to state in advance how they would assess whether it appeared likely that a majority would vote in favour.<sup>22</sup> Stephens L.J., with whom the other members of the Court of Appeal agreed, emphasised the value of flexibility over the value of consistency. The context recommends “a flexible response to differing and unpredictable events in a way which the strict application of rules would prevent”.<sup>23</sup> The Court emphasised that the duty to call a border poll turned on an assessment as to the likely majority of those voting and would arise even if it was not in the public interest to direct the holding of a border poll. It required “an evaluative judgment as to a likely outcome” and was “essentially a political judgment” assigned to a politician. The Working Group on Unification Referendums on the Island of Ireland suggested that the Secretary of State should have regard to a wide range of evidence, including opinion polls, voting patterns, the views of elected representatives in Northern Ireland, and demographics.<sup>24</sup>

The force of the *legal* obligation on the Secretary of State to call a border poll if certain conditions are met is attenuated by the highly *political* assessment that is required to ascertain whether those conditions pertain. This weakens any conclusion that Northern Ireland has a right to secede. Further relevant in this regard is the legal form through which the Secretary of State must call a border poll. The terminology in schedule 1 of the *1998 Act* is that the Secretary of State “by order” directs the holding of a poll. The order specifies the persons entitled to vote and the question or questions to be asked, and may include any other provision about the poll which the Secretary of State thinks expedient. Importantly, section 96(2) of the Act provides that an order under schedule 1 shall be made by statutory instrument and “shall not be made unless a draft has been laid before and approved by resolution of each House of Parliament”. The Court of Appeal in *McCord* considered that this emphasised “the essentially political and democratic” decision to be made.<sup>25</sup> It was a political decision because it must be made by a politician and positively endorsed by other politicians; it was democratic because the process of laying the draft before both Houses of Parliament ensured that the order was overseen by political representatives. Unlike the Secretary of State, the Houses of Parliament are under no obligation to approve an order where it appears likely to them that a majority would vote in favour of unification. Even if they were legally under

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<sup>22</sup> [2020] NICA 23.

<sup>23</sup> *Ibid.*, para 57.

<sup>24</sup> A. RENWICK et al, *Final Report*, cit., ch. 8.

<sup>25</sup> *Ibid.*, para 63.

such an obligation, their failure to approve such an order could not be subject to judicial review given that Article 9 of the Bill of Rights of 1688 provides that proceedings in Parliament cannot be impeached or questioned in any court.<sup>26</sup> The effect of this provision is to give each House of Parliament a veto on the holding of a border poll, significantly undermining the operationalisation of Northern Ireland's right to depart from the Union. It is likely that the Secretary of State is, where it appears likely to him that a majority would vote in favour of unification, under a judicially reviewable legal obligation to place a draft order before each House of Parliament. But the Houses are under no obligation to approve it and their failure to do so is not amenable to judicial review.

The provisions of section 96(2) do have a basis in the Belfast / Good Friday Agreement. The Agreement specified clauses to be included in UK legislation that are now transposed as section 1 and schedule 1 of the *Northern Ireland Act 1998*. After specifying the first three paragraphs of the Schedule, the Agreement provides: “4. (Remaining paragraphs along the lines of paragraphs 2 and 3 of existing Schedule to 1973 Act.)” Section 96(2) is substantively the same in this respect as paragraph 3 of the Schedule to the 1973 Act. The Court of Appeal in *McCord* expressed the view that section 96(2) was “in effect a word-perfect reproduction of the draft legislation” in the Agreement.<sup>27</sup> Nevertheless, it is questionable whether section 96(2) is compatible with the Agreement. The Agreement does not require that paragraphs 2 and 3 of the existing schedule be reproduced, but rather that the new legislation contain provisions *along those lines*. The verbatim reproduction of paragraphs from the 1973 Act transformed what appeared to be a *legal duty* on central government to hold a border poll in some circumstances into a *political discretion*. In my view, the express text on the mandatory duty and the clear relationship of that duty to the right of self-determination of the Irish people should have outweighed the far looser and less specific language of “remaining paragraphs along the lines of ...”. A faithful implementation of the Agreement into UK law required something other than verbatim transcription of those paragraphs of the *1973 Act*. Nevertheless, this is an argument of international law that does not affect the position in UK law. Notwithstanding the other significant changes from the *1973 Act*, the *1998 Act* does not grant Northern Ireland a legal right of secession since institutions of central government – in this case the Houses of Parliament – have a legally untrammelled veto on the holding of a border poll.

### 4.3. Implementing the people's decision

As noted above, section 1(2) of the *1998 Act* requires that if a majority in the border poll favours Irish unification, the Secretary of State “shall lay before Parliament such proposals to give effect to that wish”

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<sup>26</sup> See discussion in *R (Miller) v The Prime Minister* [2019] UKSC 41, par. 63-68.

<sup>27</sup> [2020] NICA 23.

as may be agreed between the UK and Irish governments. The terms of this provision were required by the Belfast / Good Friday Agreement, but it is curious that section 1(2) appears to require the Secretary of State to lay proposals to give effect to the wish of the majority in Northern Ireland to unify, irrespective of whether the South has consented. However, in such circumstances, the Irish Government would not be in a position to agree any proposals to give effect to unification, so there would be no such proposals to put before the Westminster Parliament. Of greater practical relevance is the divergence, mandated by the Agreement itself, between the *1998 Act* and other provisions of the Agreement.<sup>28</sup> Article 1(iv) of the 1998 Agreement imposes an obligation on both Governments to introduce *and support* in their respective parliaments legislation to give effect to a choice, on both parts of the island, in favour of unification. The obligation on the UK under UK law is therefore less onerous than the obligation stated in international law. We can go further than this, however, and say that the UK would be in breach of the Agreement if the Westminster Parliament failed to give effect to votes in favour of unification. The whole purpose of the Agreement – stated and restated throughout Article 1 – is to make the status of Northern Ireland depend on a decision of its people. This would be set at naught if the Westminster Parliament (or indeed the Oireachtas) could ignore the results of unification referendums.

Nevertheless, the position in UK law remains that there is no obligation on either the UK Government or the UK Parliament to give effect to a decision on the part of the people of Northern Ireland to unify with Ireland. The divergence between the Agreement and the *1998 Act* in this respect is probably attributable to concerns over parliamentary sovereignty. No Parliament can bind its successor and therefore should not even attempt to stipulate in advance the response that a subsequent Parliament must give to a referendum. While this is understandable in the context of UK constitutional theory, it does illustrate the difficulty of operationalising any legal secession right in such a system – a point to which I shall return in section 6.

#### 4.4. Recapitulation

The *Northern Ireland Act 1998* moved a significant distance towards conferring a legal secession right on Northern Ireland. The Act replaced the pre-existing veto on a united Ireland with a power either to remain or leave in the Union. It operationalised this right of departure by (a) imposing some legal constraints on the discretion of the central government whether to hold a border poll and (b) imposing

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<sup>28</sup> Both Ireland and the UK are dualist states. The Agreement binds each of them in international law, but has no effect in their domestic legal systems. However, some of the provisions in the Agreement require each state to enact specified text into their domestic law. The point here is that the obligations contained in the text that the UK is obliged to enact into domestic law are sometimes less onerous than the obligations that apply to the UK under other provisions of the Agreement. As a result, the UK's obligations under international law extend further than the explicit obligations on internal UK organs of government.

some procedural obligations on the UK Government to negotiate with the Irish Government and place agreed proposals for unification before parliament. However, when contrasted with our comparator countries of Ethiopia, Liechtenstein and Saint Kitts and Nevis, we can see this is an incomplete legalisation of secession. The obligation on the Secretary of State to direct a border poll depends on a highly contestable and political criterion, suggesting that the courts would be slow to order the Secretary of State to direct such a poll. Moreover, each House of Parliament can veto – on purely political and unreviewable grounds – any proposal from the Secretary of State to direct such a poll. At the other end of the process, while the UK Government must negotiate with the Irish Government, there is no obligation on the UK Government to support the proposals, still less on the Westminster Parliament to give effect to them.

Such is the position in UK law. The Agreement goes further. There is a stronger legal imperative for a border poll, since (a) the Agreement does not explicitly contemplate a veto for the Houses of Parliament and (b) such a veto fatally compromises the Agreement’s core provisions that mandate respect for Irish self-determination exercised by agreement between North and South. At the other end of the process, the Agreement requires the UK Government actively to support at Westminster legislation that gives effect to unification. More significantly still, the Agreement implicitly requires that if the North and South concurrently consent to unification, then the UK (as well as Ireland) is under an obligation in international law to give effect to that.<sup>29</sup> Accordingly, the UK would find itself in breach of international law if either House of Parliament vetoed a border poll in circumstances in which it appeared to the Secretary of State that a majority was likely to support unification; and if Westminster refused to legislate for unification after consent to unification was given both North and South. Put more positively, if the central organs of the UK state act in a way that ensures compliance with the UK’s international law obligations, Northern Ireland would have an effective secession right. But such effectiveness depends on political decisions by central UK organs of government, so there is no legal secession right. Moreover, we cannot assume that those organs of government will act in a way that allows the UK to comply with international law. The official position of the current UK Government is that it is permitted to breach its international law obligations, at least in very specific and limited ways.<sup>30</sup>

The Final Report of the Working Group on Unification Referendums on the Island of Ireland reasoned that, if Westminster failed to legislate for unification after a concurrent and democratic expression of

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<sup>29</sup> For analysis in support of this point, see A. RENWICK et al, *Final Report*, cit., para 4.24-4.25.

<sup>30</sup> In response to a parliamentary question questioning the UK’s commitments to its legal obligations under the Ireland / Northern Ireland Protocol to the UK-EU Withdrawal Agreement, the Secretary of State for Northern Ireland indicated that the UK government’s proposed approach did “break international law in a very specific and limited way”. *Hansard*, 9 September 2020, col. 509. The UK government later adopted a different approach on the specific issue, but the decision in principle that the UK may breach international law presumably still holds.



consent North and South, this would result in Northern Ireland having a disputed constitutional status. The UK's breach of international law would not render Northern Ireland part of Ireland, but the UK could expect to experience significant pressure from the US and the EU, among other international actors.<sup>31</sup> If the UK Government wished to stymie Irish unification, therefore, the more effective breach of international law would be to prevent the holding of a border poll at all. This could most safely be done by the Secretary of State proposing an order to direct a poll, and then leaving that order to languish at Westminster, unapproved by either House of Parliament. This would be an unimpeachable course of action under UK law. While it would breach international law, it would be far less striking than a decision to ignore or supersede two referendum votes on the island of Ireland. It would therefore be less likely to generate international opprobrium and domestic political pressure.

### **5. A Union based on consent?**

The claim that the Union is based on consent means that the central government – whatever the legal position – is politically and constitutionally committed to allowing units secede, if they wish to do so. Such a claim can be based both on official practice – especially if reflected in legislation – and on statements by constitutionally significant actors that help us to understand that practice. In this vein, Martin maintains that “since the resolution of the Irish question in 1921 ... the British Union has been based on an assumption of the separate and collective consent of four constituent parts, each of which is free to withdraw its consent if it wishes.”<sup>32</sup> Martin concedes that this principle of consent emerged slowly; it was “enshrined for Northern Ireland in the 1949 Ireland Act” and has been implicitly accepted “since Scottish nationalism became a visible if erratic force”.<sup>33</sup> Insofar as Martin's claim is based on the official and legislative treatment of Northern Ireland – and that is not its only basis – the analysis of the previous two sections shows how it is mistaken. Northern Ireland's entitlement to leave the Union did not gain any formal recognition until 1998, and the evolving position of Northern Ireland is better seen as working out the implications of the Union in 1800 and the departure of the Irish Free State in 1921 rather than any more general normative principle about the requisite consent of the units of the UK. Ireland's entry into the Union in 1800 – like Wales but not like Scotland – could not be described as consensual in any meaningful sense. The departure of the 26 counties of “Southern Ireland” in 1921 was not based on any recognition that they had an entitlement to depart but was part of a compromise designed to end a war. One can quibble over whether Northern Ireland never left the UK or rather seceded with the rest of the Irish Free State and then re-joined the UK. But the more salient point is that

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<sup>31</sup> *Ibid.*, par. 4.64.

<sup>32</sup> C. MARTIN, *Resist*, cit., p. 7.

<sup>33</sup> *Ibid.*



Westminster had deliberately constructed the borders of Northern Ireland in order to carve as large a territory as possible out of the island of Ireland that would have a stable majority for remaining in the Union. Insofar as 1921 established any principle for secession from the UK, it was that departure would be forcibly resisted and, if ultimately conceded, the departing unit would likely be partitioned in order to preserve as much territory within the Union as possible while securing a long-term majority in favour of the Union for that territory. The *Ireland Act 1949* did not establish any entitlement on the part of Northern Ireland to secede but rather reassured the Unionist majority that Northern Ireland would not be removed from the Union without its consent. While official rhetoric was shifting by the early 1970s, neither the *Northern Ireland (Border Poll) Act 1972* nor the *Northern Ireland (Constitution) Act 1973* conceded any entitlement on the part of Northern Ireland to secede. The purpose of the *1972 Act*, as with the *1949 Act*, was to reassure the Unionist majority in Northern Ireland and legitimise the territorial status of Northern Ireland by securing a democratic authorisation for the *status quo*.

The *Northern Ireland Act 1998* goes much further towards recognising a right on the part of Northern Ireland to secede. But our comparison with Ethiopia, Liechtenstein and Saint Kitts and Nevis illustrates how the ancillary provisions necessary to operationalise a secession right are lacking. The discretion of the central executive on whether to call a border poll is subject to a legal constraint, but one that is to be exercised in a political way, while each House of Parliament retains a political veto on the holding of a border poll. At the other end of the process, there is no substantive obligation on the Government or on Westminster to support or give effect to unification. This situation, of course, looks very different when viewed through the lens of the Belfast / Good Friday Agreement. A UK Government committed to the UK's compliance with international law would (a) ensure that a border poll is called if it appears likely that a majority would vote in favour of unification, (b) ensure through party discipline that each House of Parliament approves the draft order for holding a border poll, (c) negotiate in good faith with the Irish Government on the terms of unification if both North and South democratically express their concurrent consent, and (d) ensure again through party discipline that legislation giving effect to unification is passed at Westminster. It is an open question whether a UK Government would act in a way consistent with the UK's international law obligations, but for present purposes the more important point is how this distinguishes the situation of Northern Ireland from that of the other units of the UK. Most tellingly of all, of course, Northern Ireland does not have a right to secede simpliciter. It can only leave for the purposes of unification with the South, reversing the decisions of 1921 and 1800. No equivalent pathway is open to Scotland or Wales. Nor is there another sovereign state that could enter into a legally enforceable agreement with the UK – even if only in international law – that could provide Scotland or Wales with a secession right similar to that of Northern Ireland.

I have given this account to suggest (a) that the Union – even since 1921 – has not been as consensual as Martin suggests and (b) that to the extent Northern Ireland has a right to secede, this may be an idiosyncratic product of Northern Ireland’s distinctive constitutional history rather than of general application to the rest of the UK. But I must now add several qualifications to this account. First, while it is appropriate to identify the lack of consent around the creation of Northern Ireland and its constitutional status pre-1998, there is a risk that such an account reads like a list of nationalist talking points. That is not the intention. Whatever political decisions were made in 1921, there would have been a substantial geographically concentrated minority on the island of Ireland that had a constitutional preference at odds with that of the majority of the island as a whole. Moreover, even illegitimate delineations of territory can become legitimate over time. This is because the political authority of governing arrangements depends on how well they serve the interests of those who are subject to them, not whether they can be traced to a legitimate foundation. Any stable geographic boundaries can provide a framework for politics that pursues the common good, irrespective of how those geographic boundaries were first established.<sup>34</sup> The 1998 Agreement is Ireland’s acceptance of this principle.

Second, my focus on the legislative treatment of Northern Ireland should not obscure the importance of official attitudes. By the 1970s, UK government attitudes had evolved significantly since 1921. Northern Ireland was no longer just a geographic construct designed to provide Irish unionists with as large but constitutionally secure a territory as possible within the Union. Instead, it had become a discrete constituent sub-unit that might be allowed to secede even if this was opposed by a geographically concentrated minority of unionists. Moreover, the UK government was more open to the possibility of Irish unification than it had been in 1919 to Irish independence.

Third, the salience of practices is not limited to their historical rationale. The UK’s treatment of Ireland and Northern Ireland in the first half of the 20th century may have been motivated by a resistance to dissolution of the Union and politico-ethnic identification with Irish, then Ulster, unionists. But this treatment can be reconstructed as consistent with a more normatively attractive principle of popular consent to territorial boundaries, democratically expressed. Furthermore, the normative pull of consistency is strong: the continuing constitutional consent of other units of the UK to the Union should be no less relevant than the consent of Northern Ireland. At its extreme, it could be argued that the principles reflected in the *Northern Ireland Act 1998* should also underpin London’s relationships with Scotland and Wales. But there are limits to how far the normative preference for coherence can overcome differences between two situations. Northern Ireland – at the highest – has no domestic right to secede

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<sup>34</sup> For an argument to this effect, see O. DOYLE, *Populist Constitutionalism and Constituent Power*, in *German Law Journal*, 2019, vol. 20, n. 2, pp. 161-180.

but rather a right – under international law – to reunify with another sovereign state. It remains challenging to infer from this right a general right of secession on the part of the other units of the UK.<sup>35</sup>

## 6. Entitlement to secede within a political constitution

The previous analysis has demonstrated that not even Northern Ireland has a legal right, within the UK constitutional order, to leave the UK. But there is a sense here of comparing apples with oranges; or more specifically, a legal constitution with a political constitution. Perhaps the analysis merely reveals the obvious point that a political constitution cannot guarantee legal rights. Nevertheless, even under its political constitution, the UK government could have gone significantly further in operationalising Northern Ireland's right to secede. Westminster could have legislated for a much clearer legal constraint on the Secretary of State in deciding whether to direct a border poll without any veto for the Houses of Parliament on the holding of a poll. Westminster could also have imposed an obligation on the Government to support the implementation of any unification votes. The failure to institutionalise a legal right to secede to the maximal extent somewhat undercuts the claim that Northern Ireland has a political right to secede. If there were a political commitment, why not make it as legally effective as possible?

While greater legalisation of Northern Ireland's right to secede was possible, what could not have been achieved was a legal guarantee that the outcome of unification votes in Ireland, North and South, would be respected. Even with Brexit, where the consequences of the referendum could be anticipated to unfold shortly after the statute authorising the referendum was passed, it was not possible to stipulate the legal consequences of the referendum in advance. This was because the UK could depart from the EU in many different ways and the precise form would depend on post-referendum negotiations between the UK and the EU. The same applies to Scottish independence and *a fortiori* for Irish unification where the terms of unification would only be negotiated – if at all – many decades after the statute establishing the referendum.

The UK's political constitution has a subtractive and an additive dimension. On the one hand (the subtractive dimension), any legally granted right or constraint on government can be removed by a subsequent parliament. On the other hand (the additive dimension), constitutional conventions might complement or supplement the legal position such that rights and constraints are meaningfully respected notwithstanding their lack of legal protection. Could that additive dimension effectively guarantee a constitutional right to secede? We have some reasons to be doubtful. First, secessions are rare so it would be difficult to establish a pattern of behaviour sufficient to allow us infer the existence of a constitutional

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<sup>35</sup> This conclusion does not affect other arguments in favour of a right of secession. Nor does it bear on the distinct question of whether the central government of the UK ought to permit a constituent unit to secede.

convention. Granted, some theorists maintain that one precedent can be sufficient to ground a convention,<sup>36</sup> but such a convention would necessarily be more contestable than one grounded in repeated observance. Second, the legitimacy of secession is actively contested and touches on core aspects of national identity, with many favouring the maintenance of territorial integrity. Another commonly cited condition for a convention to arise is that there is a good reason for the rule.<sup>37</sup> Given the contested legitimacy of secession, there may not be agreement that there is a good reason to allow secession. This is particularly the case given that any secession is likely to leave a significant minority of loyal compatriots who do not wish to leave, as was the case in the northeast of Ireland. There would thus be an obvious human face to the normative objective of preserving territorial integrity. Third, to be effective, the secession right must also encompass procedures for triggering the secession vote and giving effect to it. In the latter context, this requires negotiating the terms of secession without the benefit of any legally prescribed backstop or time limit for that process, such as applied under Article 50 of the Treaty on European Union.

Any political secession right would therefore have to be grounded on a small number of precedents, in a context of deeply contested normative standards touching on core issues of national identity, and successfully operate in highly complex negotiations where it would be difficult to ascertain and identify responsibility for any failure to give effect to a secession decision. In all of these circumstances, it is difficult to imagine a political-constitutional secession right successfully trumping the politics of territorial integrity. To be clear, it is quite possible that the central government might choose to allow a constituent sub-unit withdraw its consent and depart from a Union with a political constitution. But it is far less clear – and in my view doubtful – whether a central government ideologically opposed to secession would respect a political-constitutional secession right. It is therefore difficult to see how a state governed by a political constitution can reassure its constituent units that any withdrawal of consent to the union would be respected.

## 7. Conclusion

Under-appreciated before the Brexit vote, the UK's membership of the EU underpinned increasing territorial differentiation within the UK. The UK's departure from the EU has in turn exacerbated territorial tensions that the UK's constitution may be ill-equipped to handle. When faced with internal threats to their territorial integrity, many countries have utilised their constitutions to prohibit secession. A smaller number have conceded constitutional rights to secession, hoping that the possibility of future

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<sup>36</sup> W.I. JENNINGS, *The Law and the Constitution*, London University Press, London, 1959, p. 136.

<sup>37</sup> *Ibid.*



departure may persuade constituent units to be happy with remaining for the time-being. There has been some suggestion – largely based on legislative treatment of Northern Ireland and official statements about Scotland – that the UK’s political constitution has evolved to the extent that all its constituent sub-units hold a right of secession. A detailed consideration of Northern Ireland’s legislative treatment, however, reveals a far less consensual position prior to 1998, and even post-1998 a marked reluctance to institutionalise secession rights to the maximal extent possible. This analysis undercuts claims that the United Kingdom depends on the consent of its constituent units, thereby undermining any political strategy that relies on a guaranteed right of future departure as an argument against secessionist sentiment in the immediate term.