Response to the Interim Report of the Working Group on Unification Referendums on the Island of Ireland

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The Interim Report undermines each of the three key principles it lays out in Chapter 1 (paras 1.28-31). It compromises rigorous impartiality by developing processes that may indefinitely delay unification referendums. It delineates configurations that will have the effect of imposing consensual decision-making on the question of sovereignty. And it strays far from the 1998 Agreement's notion that the referendum question would offer a binary choice.

I'll first comment on the legal context of the 1998 Agreement. My interpretation is very different from that of the Interim Report. I'll then relate my view of the legal context to a critique of the referendum configurations. As the Interim Report notes, the design of these configurations stands as "the core issue" of unification referendums (para. 9.1).

Legal Context

I'll make five points about the legal context of unification referendums. Some of this section is based on, and draws from, part one of my "Stealing Irish Unity: The Repertoire of Thieves" (Burke 2020b).

1. The right of self-determination in the 1998 Agreement, which the Interim Report quotes at paragraph 1.9, needs to be highly qualified. It states:

> it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland (Constitutional Issues section, para 1(ii)).

This right cannot be exercised by "the people of the island of Ireland alone … and without external impediment". Other parts of the Agreement and related documents give Britain a triple-lock veto over Irish self-determination. This veto is vested in the Secretary of State, Parliament and government.

The Secretary of State has the power to initiate, or not, the formal process of constitutional change in the north by calling a border poll. Without such a poll being called, the people of Ireland have no domestic route to exercise their right of self-determination. Later on, I explore the far-reaching consequences of the Secretary of State's virtually arbitrary authority over a border poll.

The British Parliament also has a veto, in at least two ways. First, before a border poll can be held, Parliament must approve the Secretary of State's draft order directing the holding of a poll. Second, implementation of a pro-unification outcome must also await the approval of Parliament. The Agreement and related documents place no obligation on Parliament either to give its approval to the Secretary of State's order for a poll or to pass proposals implementing unification. And without Parliamentary approval, any movement towards unification stalls or ends.

The British government has a veto too. The proposals implementing unity must be agreed by the British and Irish governments before they are introduced in their respective parliaments for approval. While the Agreement obligates the British government to lay agreed proposals before Parliament, it does not obligate the government to agree to proposals in the first place. If Britain withholds agreement, unification will not be implemented.

Outside the role of the Secretary of State in the referendum process, the Irish government and Oireachtas have equivalent power to become obstacles to unity.

Justice Humphreys calls attention to the "hypothetical reluctance by the United Kingdom government to facilitate Irish unity—either by refusing to hold a referendum or by holding such a referendum and failing to give effect to its outcome" (Humphreys 2009, xxii). In the end, he thinks it unlikely that London would resile from its commitments, although he examines the inadequacy of judicial remedies should that eventuality occur (Humphreys 2009, 121-22, 159, 164-66 & 204-05). I think Humphreys overstates the reach of British commitments to facilitate unity. As mentioned above, there is much leeway in the Agreement and related documents for Britain to become an obstacle to unification without legally breaching its commitments.

Seamus Mallon, in contrast to Humphreys, directly urges the British and Irish governments to break its commitments, however weak they might be (Mallon 2019, chap. 13). He suggests that neither London nor Dublin should hold a border referendum if the anticipated outcome were a slender majority for unity; nor should they implement the results of a narrowly-won poll. I think there is a real possibility that the British or Irish government would impede unity, especially if there is significant unionist opposition to the referendum process.

In sum, the people of Ireland's right to exercise self-determination alone and without external impediment must be understood in the context of potential but robust British limitations on that right. And it must also be seen against Ireland's ability to block the path to unification.

2. I agree with the Interim Report that the Agreement clearly provides for a binary choice in a unification referendum. But I disagree with the Interim Report's conclusion that the choice offered in a referendum can be about much more than just the sovereignty question. I believe, with those participants who questioned the legitimacy of the Interim Report's approach, "that the Agreement implies a choice about the basic principle of sovereignty, not about detailed designs" (para. 9.29).

There are at least three arguments in support of this position: the language in the Agreement itself, the legal and practical precedent of the 1973 border poll, and the court's interpretation of the Northern Ireland Act 1998. First, the Agreement states that the choice in a border poll is about whether "Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland" (Annex A, para. 1(2)). There is nothing in this clause implying that the border poll is also about the detailed process leading to unification or the complex architecture of a united Ireland. If the poll were about such matters, one would expect to see some pertinent language. Second, the border poll held in March 1973, the north's only experience of such a poll, was on the basic question of sovereignty. The Northern Ireland (Border Poll) Act 1972 provided that the ballot paper would ask voters to choose from the following two options: "Do you want Northern Ireland to remain part of the United Kingdom?" or "Do you want Northern Ireland to be joined with the Republic of Ireland, outside the United Kingdom?" (Schedule). That is, the sole precedent for a border poll in the north says nothing about, and makes no provision for, detailed designs of a united Ireland. Third, the High Court ruling in the McCord case—which directly addresses the border-poll provisions of the Northern Ireland Act 1998—specifies that referendums on the question of unification are held first. It is only after pro-unity votes north and south that the British and Irish governments would need to reach agreement "as to the form of that united Ireland and the way it [sic] which it would be governed and structured." (NIQB 106 2018, para. 5). That is, according to the Court, the principle of unification and the details of a united Ireland are separate questions that are decided sequentially by the different mechanisms of popular referendum and inter-governmental agreement. I say more about this issue in the next section on referendum configurations.

3. The Interim Report is confusing on the question of confederalism as a possible model of a united Ireland. On the one hand, it states: "If voters opt for unification, we interpret the Agreement to mean that there must be a direct transfer of sovereignty from the UK to Ireland" (para. 4.38). This statement seems to rule out the confederal option, as sovereignty would be transferred to a new independent northern state, not to Ireland. In a confederation, sovereignty would continue to reside in the constituent unit of Northern Ireland, regardless of how much authority is uploaded to the overarching confederal institutions.

On the other hand, the Interim Report equivocates on the confederal question: "A *confederal Ireland* … would less clearly meet the prescription of unity laid down in the 1998 Agreement, since it would involve the creation of an independent Northern Ireland state" (para. 7.55). A much stronger statement than this is called for: confederalism does not at all meet the prescription of unity laid down in the Agreement. I'm with Justice Humphreys here, who emphasizes that "independence or any other solutions apart from a United Kingdom or a united Ireland are ruled out by the Agreement" (Humphreys 2018, 237). Surely, if the Agreement meant to alter such a fundamental element of the long-standing conception of constitutional consent, the alteration would have been clearly spelled out in the text. It's not. Arguably, there would have been no Agreement in 1998 if the confederal-independence option were on the table. I cannot imagine nationalist or republican talks participants ever accepting it.

4. I don't understand the Interim Report's discussion in Chapter 8 of the Secretary of State's discretionary power to call a unification referendum. The High Court ruling at paragraph 18 is simply listing *examples* of the reasons for which and the circumstances in which the Secretary of State might exercise the discretionary power. As we know, that power could be used for almost any reason and in almost any circumstance. It seems to me that the examples are not meant to be a comprehensive or a representative or even a summary list of the use of the discretionary power. The Interim Report's separate discussions of the High Court's three examples elevate those examples to a status they don't deserve.

When I first read the High Court judgment, I was struck by the reasons Sir Paul Girvan cited for calling a border poll:

> For example, the Secretary of State could call a poll *in order to give a quietus to the controversial question of a united Ireland for a period of time* if she thinks that a majority would vote in favour of remaining in the United Kingdom. She could direct such a poll if there was a doubt in her mind as to whether a majority was to be found on one side or the other. She could decide to call such a poll *if persuaded by political representatives that it would be desirable* to sound the people out on the issue or *to close the issue for a number of years* (para. 18, my emphasis).

Two of the four reasons, highlighted in italics above, concern the use of a unification referendum in order to discourage for a time the public's consideration of the issue of a united Ireland. The Interim Report does not comment on the reasons. I think they warrant some discussion, even as we remember that the High Court sees the reasons only as examples of the Secretary of State's exercise of her discretionary power.

The Interim Report's seeming unconcern for reasons becomes evident in its odd examination of the third example mentioned in the High Court ruling (paras 8.26-29). Sir Paul Girvan describes a circumstance in which the Secretary of State is persuaded by political representatives to call a border poll for the purpose of shutting down the issue of unification for a period of time. But the Interim Report sees in Girvan a circumstance in which the Secretary of State might be persuaded by political representatives to call a poll for the purpose of settling the issue in favour of unification. These two circumstances are different to the extent that they emerge for different reasons. They are at cross-purposes: one to stop consideration of the issue, the other to resolve it in a particular direction. I'm not sure how the Interim Report mistook one for the other.

Reasons also become relevant in examining the apparent tension between the High Court and Appeal Court rulings on the question of using a border poll to delay unification. To reiterate, the High Court makes clear that it is acceptable for the Secretary of State to call a referendum for the purpose of giving a quietus to, or closing down, the controversy over a united Ireland. The Court of Appeal appears to say something different. The Secretary of State:

> would not be acting with rigorous impartially if in the face of diminishing support for Northern Ireland remaining in the United Kingdom he directed the holding of a border poll with the sole purpose of achieving a majority to remain and thereby to delay a united Ireland for a period of 7 years (NICA 23 2020, para. 66).

Regrettably, the Court of Appeal does not directly address the seeming inconsistency with the High Court ruling. One way of resolving the tension, though, is to consider that the Secretary of State ordering a border poll for the reason of postponing unification for seven years is perfectly legitimate, provided that it's not the sole reason for doing so. The two court rulings may not be as inconsistent as they first seem. Taken together, they leave ample leeway for the Secretary of State to use a poll for delaying Irish unity. In short, I disagree with the Interim Report's assertion that "[c]alling a referendum in the expectation of defeating the unification proposal would … be problematic" (para. 8.113).

5. I also have concerns about the Interim Report's analysis of the Secretary of State's mandatory duty to call a referendum, especially in regard to the evidence that there is a likely majority for unification. The two court rulings in the McCord case and the NIO affidavit submitted to the High Court suggest that the Secretary of State has undefined, unfettered and virtually unaccountable authority in the exercise of her mandatory duty. In the end, it's completely up to the Secretary of State to determine what constitutes evidence of likely majority support for a united Ireland and how to weigh that evidence. The Court of Appeal emphasizes the Secretary of State's open-ended authority by making repeated references to it: the law "does not specify any matter which should be taken into account or any matter which should be left out of account"; it is "silent as to the sources of information which the respondent might rely upon"; and it leaves the Secretary of State "to decide what is, or is not relevant to the decision-making process depending on the prevailing circumstances" (paras 78, 79 & 98).

Both court rulings studiously avoid saying that evidence from opinion polls and election results must be taken into account in the Secretary of State's assessment that a majority for unification is likely. The strongest statement on such evidence appears in the NIO affidavit:

> In relation to making an assessment about the likely outcome of a border poll, the Secretary of State may decide to take account of opinion poll evidence or may even decide to commission such evidence. … The Secretary of state is also likely to be informed by the results of any elections and opinion evidence, where available and reliable" (Sloan 2018, para. 14).

However likely the Secretary of State is to consider such evidence, she may in the end decide not to take it into account.

The Secretary of State's unspecified and expansive authority over the determination of evidence is especially relevant to the Interim Report's discussion of the "six primary sources of evidence that might be taken into account" (para. 8.46). The Working Group's examination of evidence is informative and sensible. I agree with much of it. But it may be moot. As the Interim Report notes:

> We have examined six possible types of evidence that the Secretary of State might take into account in assessing the likelihood that a majority would vote in favour of unification. From a legal point of view, it would not be proper for the Secretary of State to close their mind to any particular source of evidence: all evidence must be fairly considered (para.8.90).

Regardless of propriety, the Secretary of State *might not* take into account some, perhaps most, of the six sources of evidence examined in the report. It's for the Secretary of State to decide. The import of the statement that "all evidence must be fairly considered" is tempered by the realization that the Secretary of State unilaterally determines what counts as evidence and what does not. This is the major reason why the court rulings and the NIO affidavit would not commit to the necessity of considering any particular type of evidence.

In addition to the multiple sources of evidence, there is the matter of what weights the Secretary of State should attach to the evidence. While the Interim Report does not specify abstract or numerical weights for each source of evidence, it verbally suggests that some kinds of evidence are weightier than others. The summary statement says:

> High-quality survey and polling work could offer the most robust evidence as to current attitudes on the unification question. Voting in elections, a vote in the Assembly, and qualitative sources such as deliberative fora could all provide additional insights into the state of people's attitudes and how those attitudes might change over time. We would urge caution solely in respect of demographic data, which, alone, can offer only weak and contextual information (para. 8.90).

The Interim Report also issues some caveats in relation to the use of qualitative evidence:

> Yet it must be asked how much weight a Secretary of State could place on such [qualitative] evidence in judging the likely overall balance of public opinion. If election and survey results consistently showed majorities for parties supporting early unification and for unification itself, or if the Assembly expressed the view that a majority would vote for unification, it would be difficult for the Secretary of State to justify not calling a referendum on the basis of qualitative evidence alone. As we noted above, high-quality survey work could also dig into public opinion in some detail. While qualitative evidence could be valuable, therefore, it could only reasonably be used to supplement other, more quantitative sources (para. 8.89).

This view of the relative worth of qualitative and quantitative evidence is an accurate assessment of how evidence should be used for the statutory requirement of assessing the likelihood of a majority for unification. The problem is that the NIO and the Court of Appeal have set (non-numerical) weights that directly contradict those suggested by the Interim Report.

The NIO affidavit places as much or more emphasis on qualitative evidence as it does on quantitative evidence from opinion surveys and election results. It tends to highlight the importance of qualitative information that the Secretary of State receives in her capacity as head of the NIO: the resources at her disposal to monitor various aspects of life in the north, her close and regular contact with representatives from all political parties, and her constant engagement with different sectors of civil society (paras 13 & 14).

At the same time, it tends to underline the limits of empirical evidence. Public opinion on Brexit and changing demographic trends are not directly related to "the likely outcome of a border poll in favour of a united Ireland" (para. 31). A single election result is not sufficient to trigger the ordering of a poll under the mandatory duty (paras 24 & 25). If the Secretary of

State considers public opinion surveys, they must be reliable indicators of voting intent (paras 12 & 14).

This approach to empirical evidence is, of course, sensible. The problem is that the affidavit admits of no similar or equivalent limits on the robustness of qualitative evidence. It seems unconcerned with the representativeness and reliability of the information the Secretary of State garners in her many interactions with politicians and civil society activists. Nor does it seem troubled by exactly how such information relates to the performance of her statutory requirement to assess public opinion on a likely majority for unification.

The Court of Appeal's approach to the consideration of evidence compounds the NIO's apparent privileging of qualitative sources. The Court notes that the Secretary of State's assessment of public opinion in the exercise of her mandatory duty "is not a simple empirical judgment driven solely by opinion poll evidence." Rather, it is "an evaluative judgment as to a likely outcome … essentially a political judgment." The Court is assured that the Secretary of State will responsibly apply this judgment in view of "differing and unpredictable events" and "changes in the prevailing circumstances." Some of the unpredictable and changing factors that the Secretary of State may need to take into account include the relative economic performance of the north and south, the variable tax structures across the two jurisdictions and how the trading relationship between the UK and EU works out (paras. 50, 57 & 80).

I think the Court of Appeal is mistaken. It will prove difficult for the Secretary of State to discern, with any degree of confidence, how these highly complex and changeable factors will specifically affect voting in a border poll. This evidential problem is magnified by the Appeal Court's suggestion that these factors might somehow alter the border-poll voting patterns that are otherwise indicated by empirical evidence from public opinion surveys or election results. The Secretary of State cannot, contrary to the opinion of the Appeal Court, draw any meaningful inference or make any informed judgment from a purely speculative or qualitative consideration of the hypothetical effects of unstable factors.

In effect, the Court attaches greater weight to qualitative than to quantitative evidence. This approach is the opposite of that indicated in the Interim Report. Rather than using qualitative information solely as a supplement to quantitative evidence, as the Working Group says, the Court of Appeal suggests using it to supplant such evidence.

My final comment regarding the mandatory duty to order a unification referendum is about honesty and rigorous impartiality as constraints on the Secretary of State's use of evidence. I disagree with the position of the Interim Report. I have much less faith than does the Working Group that honesty and rigorous impartiality will act as effective restrictions on the Secretary of State's authority over calling a border poll.

The High Court ruling stressed the importance of honesty in the exercise of the mandatory duty:

> the Secretary of State must honestly reflect on the evidence available to her to see whether it leads her to the conclusion that the majority would be likely to vote in favour of a united Ireland. (NIQB 106 2018, para. 20).

To this, the ruling of the Appeal Court added the requirement of rigorous impartiality:

> We agree that the respondent must act honestly. We would add that he must also act with rigorous impartiality in the context that it is for the people of the island of Ireland alone to exercise their right of self-determination (NICA 23 2020, para. 82).

It's ironic that the very court judgments stressing the constraining effects of honesty and rigorous impartiality should interpret the Secretary of State's authority as so infinitely pliable as to render those "constraints" worthless.

Regarding the High Court's concern, what does "honestly reflect on the evidence available" really mean if the Secretary of State alone decides what the evidence is and how to consider it or reconsider it in light of prevailing circumstances? What does that phrase actually mean if the Secretary of State need not take into account the best evidence available from opinion polls or election results? It doesn't mean very much.

Honest reflection also becomes problematic in the Appeal Court's ruling. In its differential weighting of qualitative and quantitative evidence, the Court allows private or privileged information that the Secretary of State gathers in her institutional capacity as head of the NIO to override open and public information that opinion surveys and elections results provide.

Similar problems emerge when considering rigorous impartiality as a curb on the Secretary of State's power over a unification referendum. The Court of Appeal views rigorous impartiality in the context of the unfettered right of the people of the island of Ireland to exercise self-determination. But that right is fettered: the Secretary of State can easily be an impediment to self-determination. The Interim Report notes that "there might be a lasting period when the evidence [of a likely majority for unification] was not clear either way, causing phase 1 to continue indefinitely" (para. 10.12). Clarity of evidence is entirely within the realm of the Secretary of State, as only she can know the "the overall evidential context" relevant to calling a poll (NIQB 106 2018, para. 20). Given the Secretary of State's undiluted power to define and attach weights to evidence, there is a real possibility that that the process will get bogged down by the lack of a decision over ordering a unification poll.

As the Court of Appeal suggests, the Secretary of State can always cite her qualitative evaluation of the impact of "unpredictable events" and "prevailing circumstances" on border-poll voting intentions as a rationale for ignoring or overriding empirical evidence of a likely majority. Continually to delay a poll in the face of such evidence is to work against unification, which is a partial act, not a rigorously impartial one.

I'm not sure I agree with the Working Group's conclusion that "*not* holding a referendum in a situation where it appeared likely that a majority would vote for unification … would violate the 1998 Agreement" (para. 9.63). The courts' interpretation of the Agreement seems to allow for

that possibility. The real problem is that the court has materially altered what I believe is the fair-minded and proper reading of "mandatory duty" in the Agreement and related legislation. In effect, the courts are saying that there is nothing, outside the exercise of the duty itself, that can signify the duty has become mandatory. That is, the Secretary of State's very act of ordering a border poll is the only way we can know that the trigger condition of "likely majority" has been met. The courts' interpretation thus fuses the condition for triggering a poll with the act of ordering a poll. This view loses the Agreement's notion of "likely majority" as a separate, independent and antecedent condition compelling the Secretary of State to act by calling a poll.

If not calling a border poll can violate rigorous impartiality, so can calling a poll. The two court rulings suggest that the Secretary of State has the discretion to call a border poll with the intent, though not the sole intent, of frustrating movement towards Irish unity. These judgments sanction an exceedingly weak conception of rigorous impartiality on the increasingly salient question of unification.

As a final word on rigorous impartiality, let's turn to the 1998 Agreement. Its invocation of rigorous impartiality has had little if any impact on politics in the north. It's difficult to imagine how rigorous impartiality will suddenly become meaningful during the process of unification referendums.

Generally, the Interim Report spends a lot of time examining evidence that the Secretary of State may not use, discussing non-numerical weights that the Secretary of State and court seem to reject, and delimiting constraints that are easily evaded.

The Referendum Configurations

In this section, I elaborate on my comments about binary choice and the 1998 Agreement.

The Working Group says that the 1998 Agreement frames its work on unification referendums:

> we have presumed throughout our work that the 1998 Agreement determines the basis on which Irish unification could occur. That Agreement was reached only through painstaking negotiations, and each of its elements was essential to its success. Seeking to alter any one part could destabilise the whole, and it is not our role to suggest that this should be done. Thus, we assume that the referendum question would be one that, at least at the decisive point, offered a binary choice: Northern Ireland would remain part of the United Kingdom or become part of a sovereign united Ireland (para. 1.31).

My argument is that the three referendum configurations the Interim Report deems worthy of further consideration alter the Agreement in potentially destabilizing ways. As I said in the first section, the Agreement intends for the border poll to be a binary choice on the principle of unification. The three configurations depart from this intention.

It might be useful to distinguish between simple and compound binary choice. Simple binary choice offers two simple (single-barreled) options to voters, as in the 1973 border poll: Union or Unity. In the language of the Interim Report, the choice in 1973 was between the constitutional status quo and unification. The vote was about just the question of sovereignty, just the principle of unification. Configuration 1 in the Interim Report offers the same kind of vote. Both the 1973 border poll and configuration 1 are consistent with the simple binary choice described in the Agreement. Configurations 2, 4 and 5 offer a different kind of choice, what I call compound binary choice, and they are not in accord with the Agreement. Figure 1 shows these kinds of choice in schematic form.

Figure 1: Models of Simple and Compound Binary Choice

Simple Binary Choice			
Border poll:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification** (Simple/single-barreled option)
Agreement:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification** (Simple/single-barreled option)
Config 1:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification** (Simple/single-barreled option)
Compound Binary Choice			
Config. 2:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification + UI model** (Compound/double-barreled option)
Config. 4:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification + UI process + default** (Compound/triple-barreled option)
Config. 5:	**Constitutional status quo** (Simple/single-barreled option)	**vs.**	**Unification + UI process + interim/default** (Compound/triple- or quadruple-barreled option)

Configurations 2, 4 and 5 move away from a straightforward choice between the two simple options of the constitutional status quo and unification. They offer the status quo as one option. This option is a simple or single-barreled option. But they also offer a second option that is not simple but compound, not single-barreled but multiple-barreled. In configuration 2, for instance, voters choose between the constitutional status quo on one side and unification *plus* the model for a united Ireland on the other. This kind of choice is also asymmetric, with a simple option confronting a compound one. Configurations 4 and 5 offer a similar asymmetric choice, with the second options becoming increasingly complex.

The purpose of this classification is to facilitate an understanding of the effects of configurations 2, 4 and 5. Those configurations have some significant ramifications that the Interim Report does not examine sufficiently or at all. I'll look at three of them.

1. The first and most obvious effect is that the configurations change the meaning or substance of the referendums. A referendum solely about the principle of unification is different from a referendum about both the principle and detailed designs. Again, I think the former kind of referendum is consistent with the 1998 Agreement but the latter kind is not.

The three configurations complicate individual voter choice and blur the interpretation of the referendum outcomes. The Interim Report assumes, quite rightly, that the different elements of the compound option—unification, the model of a united Ireland, the process for designing a united Ireland, and the default/interim arrangements of a united Ireland—are analytically separate from one another. Voters in the referendums may well consider these elements as separate issues and distinct determinants of their vote on referendum day. In configuration 4 referendums, for instance, one group of voters might support the principle of unification, be indifferent about the design process, but intensely dislike the proposed default arrangements and therefore vote against unity. Another group might not favour the principle of unification, be indifferent about the design process, but like the proposed default arrangements of a united Ireland they see as inevitable and therefore vote for unity. Other combinations of voter preferences would lead to similar or different voting choices.

The point is that these individual choices aggregate to a referendum outcome, and we can't know what a referendum in favour of unification really means any more than we can know how to interpret a vote against unification. Unity may win in the north or south not because voters endorse the principle of unification but for other reasons. Unity may lose not because voters reject the principle of unification but for other reasons. I'm not sure how useful would be a referendum with such an indeterminate mandate. The outcomes of referendums based on simple binary choice lend themselves to more straightforward interpretations and confer a more direct mandate.

That is not to say that voters should vote in an information vacuum. They should be presented with detailed models and designs, as is already starting to happen in some quarters. But these details should not be seen as necessarily definitive, as in configuration 2; or as possibly definitive, as in configurations 4 and 5. And they should not be on the referendum ballot, as configuration 1 correctly specifies.

2. The Interim Report gives an inappropriate veto to the north. The 1998 Agreement confirms, in the notion of consent, a northern veto over the principle of unification. The Interim Report contravenes the Agreement by inserting—into the unification referendums of configurations 2, 4 and 5—an additional and simultaneous northern veto over governance structures in a 32-county Ireland. If unity wins in the south but loses in the north, the north will have vetoed the principle of unification, as is mandated by the Agreement, but it will also have vetoed—at the same time—the governance arrangements of a united Ireland, which is not supported by the Agreement. In all three configurations, the unity option may lose in the north not because voters reject the principle of unification but because they do not approve of the proposed form of a united Ireland. This outcome is inconsistent with both the consent provisions in the Agreement and the conception of consent that existed prior to 1998.

I recognize that the Interim Report discusses a northern veto at various points: possibly incorporating it as a change to the constitutional amending procedure in a united Ireland, or as a requirement for passage of the second set of referendums in configurations 4 and 5 (paras 7.67, 9.44, 9.56, 10.40 & 10.45). Neither of these forms of a northern veto contravenes the Agreement. I nevertheless oppose them because they risk alienating significant segments of the nationalist and republican electorate in what may be a futile attempt to appease northern unionists. The additional and coincident northern veto that the three configurations entrench in the unification referendums is even more disagreeable. I strongly oppose it because it both violates the Agreement and risks increasing nationalist and republican alienation.

3. A related effect of the referendum configurations concerns decision rules. As the Interim Report points out, the decision-rule model of the 1998 Agreement provides for two separate questions to be decided by two separate processes. The question of unification is decided by a simple majority vote of 50% + 1 in a referendum. The question of internal governance structures is decided by reaching consensus in a talks or deliberative process.

In its three referendum configurations, the Interim Report develops a decision-rule model that differs significantly from that of the Agreement. These configurations merge the two separate questions into one. That is, they develop what I called above a compound question about both unification *and* the design of governance structures. By combining the two questions, the Interim Report also mixes the two decision rules. The Working Group envisages the following general sequence: first, there is an attempt to reach consensus on governance structures, then there are popular referendums on the principle of unification and the proposed structures. In configuration 2, the governance structures are final; in configurations 4 and 5, they are default or interim arrangements, pending the outcome of a second round of consensually-based (and perhaps more fully-inclusive) deliberations and a second set of referendums on the form of a united Ireland.

A major problem with the Interim Report is this: its referendum configurations may culminate in a consensual model of decision-making being imposed on the question of unification, which is an outcome the Working Group wanted specifically to avoid as it violates the 1998 Agreement. As the Interim Report notes: “While every effort should be made to protect the consensual principle, it cannot ultimately override the simple majority principle on the question of sovereignty” (para. 1.30).

My argument here is based on the Secretary of State’s sweeping power over a referendum and the problematic nature of consensual decision-making.

In the referendum process outlined in the Interim Report’s three configurations, the Secretary of State puts the calling of a referendum under detailed review when it appears that a majority for unification might be likely. I think something markedly different will happen. I doubt that the Secretary of State will put the calling of a referendum under detailed review. In the McCord case, the NIO aggressively defended the Secretary of State’s undefined and unfettered power

to exercise her mandatory duty of ordering a poll in the event of a likely majority for unity. The courts upheld, even expanded, the Secretary of State's authority. Just last week, the NIO reiterated the Secretary of State's determination to wield unconstrained authority over the calling of a unification referendum (McGreevy 2021). The whole point of the Secretary of State not specifying the criteria for ordering a poll is to allow her maximum flexibility for *not* ordering a poll. I can see no reason why the Secretary of State would diminish her authority by initiating a review, which may well lead to public pressure on her to call a unification referendum.

The Interim Report's configurations also have the consensual discussion of detailed designs ending just before the holding of a unification referendum; this ending may be only temporary in configurations 4 and 5, where a second round of discussions may occur. I see a different sequence. I think the Secretary of State will likely wait for consensus to emerge before calling a unification referendum in the north. In other words, rather than unification referendums ending the consensual discussions, as the Interim Report suggests, I think the referendum in the north will not be called until the until the attempt to build consensus succeeds.

The Secretary of State is already under considerable pressure not to call a unification referendum until there is a broad consensus for Irish unity in the form of parallel consent or some kind of super-majority. This pressure will intensify with mounting opinion poll or electoral evidence of pro-unity sentiment. The Interim Report encourages the Secretary of State to wait for consensus because it includes the question of governance structures—properly decided by consensus—in the referendum on unification. This encouragement is a direct result of the Working Group abandoning simple binary choice for compound binary choice and thus confounding the consensual and majority principles of decision-making.

I doubt that a consensus will be built, so we are left waiting, perhaps indefinitely, for the holding of the referendum initiating the process of constitutional change in the north. In effect, the lack of consensus decides the question of sovereignty.

Consensus is an unstable decision rule, highly dependent on context. It can be efficient and effective in situations in which the decision-makers are like-minded people who are predisposed to agree in any case. But where there is a marked polarization of views, as there surely is on the constitution, the consensual model easily breaks down (Burke 2020a). It may well prove to be a formula for continuous crisis, constant impasse, and inordinate delay.

In the consensual model, it's not clear how or when to make a decision short of the appearance of consensus. How or when do you "call the question" if it becomes clear that reaching consensus is not possible? The Interim Report addresses this problem in two ways. It gives the Irish government the lead role in formulating governance proposals following inclusive political and social consultation aiming at consensus.[1] And it uses the unification referendums as a kind of deadline by which consensual deliberation ends and a decision is finalized. But, as I argued above regarding the north, it's less likely that a unification referendum will signal the end of consensual discussion than it is that the consolidation of consensus will initiate the calling of a unification referendum. It's not that the termination of consensual deliberations

awaits the referendum but that the referendum awaits the termination of consensual deliberations.

The Secretary of State can comfortably wait, however long, for a consensus to form before calling a referendum. She need not worry about violating the Agreement's provision for ordering a referendum when it appears likely that there is a majority for unification. As I've explained, the NIO and the courts have stripped this provision of any substance. In a sense, "consensus" or "parallel consent" or a "super-majority" may become the Secretary of State's new threshold for calling a border poll, displacing the Agreement's threshold of "likely majority." It's improbable that this new, much higher threshold will ever be met. Once again, the lack of consensus is tantamount to the rejection of unification.

To conclude, many disagreeable consequences flow from the Interim Report's decision to depart from the simple binary choice outlined in the Agreement. In making the unification referendum about both the principle of unification and the form of a united Ireland, the Interim Report alters the substance of the border poll described in the Agreement. It imposes a northern veto over governance arrangements in a united Ireland, which is inconsistent with the Agreement. And it foists a consensual decision rule on the principle of unification, undermining the Agreement's conception of majority consent. Finally, it encourages the Secretary of State to wait, perhaps indefinitely, before calling a unification referendum, which effectively marginalizes the constitutional option of a united Ireland.

Notes

[1] Giving the lead role to the Irish government is problematic. As I argued in the section on legal context, the High Court's interpretation of the Agreement gives co-equal roles to the British and Irish government in developing governance structures for a united Ireland. Dublin will of course draft and propose the necessary constitutional amendments, but London must first agree to the substance of those amendments. I agree with the Interim Report that the Irish government should take the lead here, but that's not how the High Court has interpreted the Agreement.

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