

Comments on Interim Report of Working Group on Unification Referendums on the Island of Ireland

I very much agree with virtually all that is said in the Working Group's extremely impressive interim report. My few comments and questions are not criticisms. As the report makes very clear, most of the fundamental issues are ultimately for political, not legal, decision, and so cannot be definitively settled at this stage.

I assume for the purposes of this contribution that both jurisdictions would vote in favour of unification. Most of what follows is about the configuration of referendums.

I agree with the five criteria proposed for assessing the configurations, and think that the five described represent a sufficient variety of options. The weights to be attached to the criteria may differ between the period before referendums and that afterwards. It will be difficult, for obvious reasons, to give full effect to the principle of inclusivity in the former period. However, I believe that in the latter it should enjoy particular weight, both in its own right and as a contribution to stability. To my mind, that points in the direction of configuration no. 4, the strengths of which are well summarised in the report. Unionists - who would almost certainly not be a monolithic bloc after a referendum, with a large number, one would hope a majority, being prepared to work on the shape of a united Ireland which would best suit them - should be given every opportunity to participate in a process before unification took effect.

The choice should of course be as informed as possible - though I expect that for most voters, especially unionists, issues of identity and allegiance are likely to trump more detailed considerations. As the report proposes, this would require much prior research and analysis, and a sufficiently long and well-structured run-in to referendums. However, the likely absence of adequately representative pro-union participation imposes limits on this phase.

I agree that the two Governments - consulting as widely as possible - should before referendums reach detailed agreement on the subsequent process (though I recall that the rules of procedure they drew up before the start of the 1996-8 negotiations were then modified to take account of the views of the parties).

As regards the very many substantive issues there would be a particular onus on the Irish Government, working with as many other pro-unity actors as possible, to set out its thinking. However, the level of detail and precision attainable might vary considerably. In many cases it could be better to think in terms of sets of options, or annotated agendas, rather than specific proposals.

This leads to the difficult question of default arrangements. I can see the necessity for them. However, to the extent possible they should not be pre-emptive or unduly detailed. There would be need to be clarity on the minimum changes required to the Irish Constitution, as mentioned in the report. Indeed, those changes might be put to the vote in a first referendum in the South, on a contingent basis where possible (as in 1998). However, on many other matters, in particular those of policy or otherwise not requiring constitutional change, it might be unwise or unnecessary to address them prescriptively before referendums. This would reflect the principle of inclusivity. It would also, as a matter of practicality, allow for thinking to evolve in the light of further discussion and analysis. Moreover, even if full consensus (however defined) were not achievable in a post-referendum process, the balance of views on the specific issues would have become clearer.

I believe that this more cautious approach to setting out the constitutional, political and policy contours of a united Ireland does not violate the principle of informed choice, and to the maximum extent honours that of inclusivity.

The complex questions around the franchise are well described in the report. For me, a critical issue is who would vote in a second referendum either on changes to the Irish constitution or to a new constitution. This must allow for the equal participation

of voters in Northern Ireland, including those not choosing to identify as Irish citizens. I can see that there may well be major legal difficulties with this, but it would be essential to overcome them.

A related question is whether and if so how to give particular weight to the views of people in Northern Ireland on matters which primarily concern them, in particular the maintenance or otherwise of devolved institutions.

I have a few other brief comments or questions:

- While all referendums in Ireland since the adoption of the 1937 Constitution have been on its amendment, am I right in thinking that the Oireachtas could legislate for a non-constitutional plebiscite?
- For a variety of reasons the BIIGC has been sporadic and ineffective in its operation. As part of the 1998 Agreement, it has always sat rather awkwardly with the DUP. Its roots in the Anglo-Irish Agreement also raise hackles. I think a separate process of inter-governmental discussion would be better.
- I am glad that the report recognises the limits, as well as the strengths, of Citizens' Assemblies. I agree that they are best when they focus on a limited set of reasonably well-defined options - maybe in this instance symbolic issues rather than public finance, for example. As a member of the secretariat of the Forum for Peace and Reconciliation, I think that it could in some ways be a useful precedent inasmuch as it provided for engagement by political parties, civil society and social partners, researchers and individual citizens.
- I agree that it is hard to see how a period of joint sovereignty or joint authority would be legally possible or politically workable.
- The absence of a legal role for the Irish Government in the decision to call a referendum in Northern Ireland is a major lacuna of the Agreement. However,

in practice it would be essential. Given the outcome of the *McCord* case it would seem that agreement between the two Governments could be viewed as an essential element in SOSNI's decision-making.

- While I would preferred the term “referendums on a united Ireland”, as closest to the wording of the Agreement, I am glad that the Working Group speaks of “unification” and not “reunification” –Ireland was indeed previously united as a political entity, but only under the Crown.

One factual point (3.13): Séamus Mallon was not one of Colum Eastwood's predecessors as leader of the SDLP.

Rory Montgomery

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