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Configuring Irish Unification Processes

A RESPONSE TO ‘THE GOOD FRIDAY AGREEMENT
AND A UNITED IRELAND’, BY RORY MONTGOMERY

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The issue of Irish unification has recently become the subject of serious political and academic discussion. In trying to understand how unification might take place, people correctly turn to the constitutional section of the Belfast / Good Friday Agreement (the Agreement). In this paper, Rory Montgomery provides a fascinating account of how the constitutional section was drafted, before extrapolating a potential process of unification. His laudable aim is to maximise the likelihood of a stable and peaceful united Ireland, a ‘shared home’ for nationalists, unionists and others.

The challenge is to encourage unionist participation, given that the political leaders of unionism are unlikely to ‘engage in discussion if any doubt remained about the outcome of a Northern Ireland vote’ and possibly even afterwards. Montgomery proposes a process in three stages: referendums north and south, negotiations, a constitutional referendum to design a united Ireland. He envisages the transfer of sovereignty occurring after the constitutional referendum. In elaborating this process and some of the issues it raises, he has contributed significantly to public debate. In that spirit, I seek to identify problems that the proposed process would raise for voter choice and stability. It would also be

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unlikely to achieve its declared purpose: increasing unionist participation in the design of a united Ireland. This analysis draws on the recently published *Interim Report of the Working Group on Unification Referendums on the Island of Ireland*, in particular chapters 4 and 9, of which I was co-author.¹

First, the proposed process would require a lengthy period—probably several years—in which Northern Ireland would remain part of the UK while a new constitution was drafted for a united Ireland. Given that there would have been referendum votes in favour of unification, the effect would be destabilising, with those impatient for unification ranged against those determined to block it.

Second, as Montgomery notes, unification would require an Act of Parliament at Westminster to give effect to the votes, north and south, in the unification referendums. But this very prospect would mean that unionists would retain an incentive to contest unification even after the referendum votes. They would not wish to undermine their position at Westminster by participating in any constitutional design process for a united Ireland. Such strategic behaviour would mirror the approach of some ‘Remainers’ in the UK, who questioned the Brexit mandate from the referendum in 2016 because it was given in ignorance of what form Brexit would take. The same argument could be made with equal plausibility about a vote in favour of a united Ireland where the form of a united Ireland was left to be worked out later.

It is not difficult to imagine such unionist opposition receiving a sympathetic hearing at Westminster. This likelihood would be magnified if the subsequent constitutional referendum were not approved. Would there be a majority at Westminster in favour of ratifying unification where a majority in the north (and perhaps the south also) had just voted against the terms on which it was proposed that unification was to proceed?

This scenario points to a third issue, anticipated by Montgomery who asks what would happen if a majority in Northern Ireland, or the island as a whole, voted in the second constitutional referendum against changes that were designed to accommodate a united Ireland. The answer to this hypothetical is clear: unification must proceed anyway. Under the Agreement, referendum votes north and south provide a full mandate for unification that cannot be conditional on any subsequent act of approval. The United Kingdom would be in breach of international law if it failed to give effect to unification in these

¹ Available at: <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland> (5 December 2020).

circumstances. But following the Internal Market Bill, it cannot be assumed that this breach of international law would carry much weight at Westminster.

This leads to a fourth issue. What would happen in the Oireachtas? Ireland is under an obligation to give effect to the referendum votes even if the UK does not. This raises the real possibility that unification would proceed as a matter of Irish law but not as a matter of UK law, returning Northern Ireland to the status of contested territory.

Underlying these points is the fact that the initial unification referendums envisaged by Montgomery would necessarily authorise unification on *some* terms. Those could be the existing Irish constitutional structure, with a simple expansion of territory to include Northern Ireland. Or they could involve default changes that would apply in the event of unification being approved while the subsequent constitutional referendum was rejected. A decision about the default position would need to be made prior to the unification referendums. This identifies the fifth issue. Prior to the unification referendums, unionists are almost certain not to participate in any discussions about the design of a united Ireland. But this is when the default terms, which could apply indefinitely, would be settled. This further reduces the likelihood that this process would encourage the meaningful participation of unionists to which Montgomery aspires.

For all of these reasons, Montgomery's proposed process—despite its noble intent—should not be adopted. It requires people to vote blind, is destabilising in the short-term, maximises the chances that Westminster might reject the results of the referendums, and is unlikely to encourage unionist participation.

There are two alternatives to Montgomery's proposal which are, in my view, preferable. On the one hand, the design work for a united Ireland could take place as far as possible prior to the unification referendums. This would be preferable in terms of public information, making it more difficult to mobilise support at Westminster against a proposal that had been known before the referendum votes. But clearly this provides little opportunity for unionist participation. On the other hand, the design work for a united Ireland could be postponed until after unification. While this would better allow for meaningful unionist participation in designing the future shape of a united Ireland, it would require voters to vote on the principle without knowing the form that unification would take.

Read the article by Rory Montgomery,
'The Good Friday Agreement and a United Ireland',
<https://doi.org/10.3318/ISIA.2021.32b.5>,
and the reply by Montgomery,
<https://doi.org/10.3318/ISIA.2021.32b.7>.