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Setting the Franchise for a Northern Ireland Referendum on Unification: Discretion, Determination and the Common Good

A RESPONSE TO ‘THE FRANCHISE IN IRISH UNIFICATION
REFERENDUMS’ BY CHRISTOPHER MCCRUDDEN, ORAN DOYLE
AND DAVID KENNY

Conor Casey

Max Weber Fellow, European University Institute

Oran Doyle, David Kenny and Christopher McCrudden have provided an invaluable contribution to the recent output of thoughtful debate and reflection about the future constitutional status of Northern Ireland and on concrete questions concerning how potential future referendums on its status should be organised. The authors probe the critical, but perhaps surprisingly

Author’s email: Conor.Casey@eui.eu
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under-explored question of who should be allowed to vote in any referendums held to consider whether Northern Ireland should leave the United Kingdom and unify with Ireland. The authors highlight how the Belfast / Good Friday Agreement (hereafter ‘the Agreement’) and Northern Ireland Act 1998 (‘the Act’) provide little in the way of firm guidance on this question.

The Agreement and Act provide that Northern Ireland shall not cease to be part of the United Kingdom unless a majority of the people of Northern Ireland voting in a poll approve unification. The Act provides that the scheduling of the relevant poll is the responsibility of the secretary of state for Northern Ireland but that the secretary of state *must* exercise this power to set a poll date if ‘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.’ But the crucial question of who may participate in the poll is left, via Article 4(1) of Schedule 4(1) of the Act, to the capacious discretion of the secretary of state who ‘shall specify...the persons entitled to vote’.

This discretion is not unbounded of course. The Agreement and the Act’s discussion of the future status of Northern Ireland is, as the authors note, quite clear in at least one critical respect—that it is for the ‘people of the island of Ireland alone’ to determine if unification and a transfer of sovereignty over the territory should come about. That is, the people of Northern Ireland voting in respect of this question for Northern Ireland and the people of Ireland voting to settle this question for the Irish state. This puts outer limits on the secretary of state’s statutory discretion. For example, any move to construct a franchise that included a UK-wide voting base would be a ‘clear breach of the UK’s international law obligations’ under the agreement. And aside from any adverse political backlash it would spark, statutory discretion exercised in this manner would also invite legal challenge on the basis it is being exercised *ultra vires* the Act giving effect to the Agreement.

But outer bounds aside, the discretion of the secretary of state seems very broad indeed. As the authors point out, although one can discern limits on it from the underlying principles of the Act and the Agreement, it remains the case neither offer detailed guidance on what factors should govern construction of the franchise. Nor is there any other existing legislation bearing on the question of the legal scope of the secretary of state’s discretion. The authors also outline how ‘soft law’ in the form of best practice guidelines produced by respected international human rights/good governance bodies equally do not provide clear direction for how this statutory discretion ought to be exercised in respect of issues like setting the voting age and the entitlement of foreign nationals to participate.

What we are left with then is a zone of considerable political autonomy to structure the franchise loosely cabined by legal directives. In the idiom of the classic legal tradition, we can say the secretary of state enjoys wide scope to make a ‘*determination*’—a legal ordinance issued by a political authority making more concrete the general principles of a broader statutory and constitutional framework, in a manner that should be both faithful to the framework and conducive to law’s ultimate purpose of securing the common good.¹ Core conditions of virtually any articulation of the common good are peace, social stability and promotion of civic friendship instantiated through a broadly shared belief by citizens in the fundamental legitimacy of their political process (whatever its perceived imperfections). It is, in the end, concern for these conditions which should orient and structure the capacious discretion of the secretary of state: to avoid constructing the franchise in a manner which would undermine trust in the poll’s integrity or erode a sense of shared agreement that it enjoys legitimacy as a non-partisan mechanism for definitively settling the question of Northern Ireland’s constitutional status.

Given these considerations, there may be considerable prudence in following what the authors highlight as the now considerably consistent practice² in the UK of aligning the franchise for referendums with ‘the franchise for legislative elections taking place over the same area as the given referendum’.³ In other words, as McCrudden, Doyle and Kenny note, a practice whereby ‘UK-wide referendums use the UK parliamentary franchise, while Scottish and Welsh referendums use the franchise for the Scottish Parliament and Welsh Assembly’.⁴ This would mean alignment of the unification referendum franchise with that used for elections to the Northern Ireland Assembly; an approach the authors note found favour with the UCL Constitution Unit’s Independent Commission on Referendums.⁴

If this franchise is followed—an arrangement crucially none of the major parties of the nationalist or unionist community have ever mounted sustained opposition to—then potentially divisive and destabilising questions like setting the voting age, the enfranchisement of EU and non-EU foreign nationals, or

¹ John Finnis, ‘Natural Law theories’, *Stanford Encyclopaedia of Philosophy* (2020), <https://plato.stanford.edu/entries/natural-law-theories/> (accessed 7 April 2021).

² But as the authors note, not an unbroken one, given that the referendum in Northern Ireland on the Agreement adopted the Westminster franchise.

³ *Interim Report of the Working Group on Unification Referendums on the Island of Ireland* (UCL, 2020), 178.

⁴ The Constitution Unit is a non-partisan research centre based in University College London. The Commission members were volunteers drawn from academia, politics, media and civil society groups. The Commission was aided by a Secretariat of academic experts. See <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/independent-commission-referendums> (7 April 2021).

prisoners, may be settled without inviting serious political recrimination. Conversely, without a clear collective preference expressed through something like a unanimous Assembly resolution, a significant departure from consistent UK practice and crafting a de facto franchise may be riskier from the point of view of maintaining social stability and the perceived legitimacy of the polling process across all segments of the polity. It may be riskier as departure from a status quo adhered to without much controversy for Assembly elections may be regarded as giving an advantage to one 'side' of the unification debate. This could create a potentially destabilising perception that any hypothetical de facto franchise will be based on opportunistic demographic calculation about which categories are more or less likely to vote in favour of a unity referendum, rather than a good faith attempt to capture what the people of Northern Ireland can best be described as including or excluding.⁵ It is easy to imagine the serious negative ramifications such a narrative could generate both in the run-up to, and in the aftermath of, any poll.

But as the authors note, there are political risks on all sides of this question which must be prudently grappled with. Regardless of the path adopted in the end, it should at least be uncontentious to suggest it ought to be chosen well before a referendum is held; and through political judgement informed by caution, consultation, and above all an orientation toward the common good, of which peace and social stability are central conditions.

Read the article by Christopher McCrudden,
Oran Doyle and David Kenny, 'The Franchise in Irish
Unification Referendums',
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⁵ For example, the clear nationalist/unionist split in a 2012 Assembly resolution calling for Westminster to legislate for a reduction in the Assembly voting age shows that there is likely concern in the unionist political community that current demographic trends ensuring the extension to the franchise to 16–17-year-olds may represent a significant boon for those in favour of unification. See <http://www.niassembly.gov.uk/assembly-business/official-report/reports-12-13/06-november-2012#8> (7 April 2021)