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A Historic Referendum—but who are the People?

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

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‘The Franchise in an Irish Unification Referendum’ by Christopher McCrudden, Oran Doyle and David Kenny offers a measured discussion of who should be entitled to vote in Northern Ireland in a future unification referendum. The question is not entirely at large, insofar as Section 1 of the Northern Ireland Act requires the consent of a majority of ‘the people of Northern Ireland’. The task of the authors, therefore, is to determine the meaning of that familiar but ultimately ambiguous phrase, in the context in which it appears, as a guide

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to decisions that the secretary of state for Northern Ireland might take in due course. In doing so, the authors properly consider the high significance and potential sensitivity of any such referendum, drawing insights from a combination of domestic and international sources, consistently with the hybrid character of the arrangements to implement the Good Friday Agreement, of which this requirement is part.

In the end, the authors favour compliance with what they identify as a principle generally (although not invariably) followed in the UK, of adopting for referendums the franchise already in place for elections over the same geographical area. If this were followed, as I understand it, the franchise for a unification vote in Northern Ireland would be largely based on residency and would include citizens of the United Kingdom, Ireland and countries of the Commonwealth while excluding residents who are citizens of other countries. The authors acknowledge this solution is not entirely problem-free given, for example, the potential for a parallel constitutional referendum in Ireland on a different franchise. On the other hand, as they observe, basing the Northern Ireland franchise on current electoral arrangements would avoid other problems. In particular, by removing the need to design a new franchise, it would preclude a partisan struggle over formulations that would favour particular referendum outcomes, on one side or the other.

If a referendum on Irish unification ultimately is held, the overwhelmingly important consideration, to which the franchise is relevant, is for the outcome to be accepted as legitimate. This would be a historic referendum, for an unusual purpose, in a distinctive context. It may be that generic guidance on referendum practice, including from the Venice Commission, to which the authors refer, is less useful in this case. Nevertheless, as the authors suggest and for the reasons they give, it may also be that the imperative for legitimacy is best served by adopting franchise arrangements that are already established and familiar. There may be nothing or, at least, not enough, to be gained from negotiating franchise rules anew, with an eye to the particular character of this referendum. I am sympathetic to the position that the authors take on these issues. This referendum would be a risky occasion on which to indulge reforming impulses in order to, for example, anticipate the franchise in a united Ireland or even to ‘upgrade’ the scope of the electorate in Northern Ireland itself.¹

¹ Reform directions of this kind are canvassed, although not in the present context, in Jo Shaw, ‘Citizenship and the franchise’, Ayelet Shachar, Rainer Baubock, Irene Bloemraad and Maarten Vink (eds), *The Oxford handbook of citizenship* (Oxford, 2017), 290, citing Ruvi Ziegler and Rainer Baubock.

If there were to be variations on the electoral franchise in order to constitute 'the people' for the purposes of the referendum the article nevertheless notes, without endorsing, two possibilities for change. One is the minimum voting age; the other is the voting rights of prisoners in custody. A further two might be added.

The first is prompted by the inclusion in the current franchise of citizens of Commonwealth countries who are resident in Northern Ireland, coupled with the exclusion of citizens of other countries, except Ireland, who may have been resident for the same period or longer. The ready extension of voting rights to citizens of Commonwealth countries is a distinctive characteristic of the franchise in the United Kingdom, reflecting the earlier logic of empire. In modern times it might be justified in terms of pluralism, but the pluralism is selective. As matters stand, the United Kingdom remains in a very small category of countries that extends voting rights to non-citizens for national elections. If the existing franchise were changed in Northern Ireland for the purposes of the referendum, there could be a question of whether these voters constitute 'the people' in the context of a vote on self-determination.

A second possible issue concerns diaspora voting. The focus on residence as the qualification for a right to vote excludes those who are non-resident except perhaps, on a temporary basis. In one difficult category of cases, it excludes people with a deep attachment to Northern Ireland living elsewhere in the United Kingdom. In conditions of globalisation, there is an observable trend to extend voting rights to citizens overseas; writing in 2017, Jo Shaw noted 120 countries that did so.² As she also observed, however, it is a challenge to manage diaspora voting in a way that does not give the views of absentee citizens undue weight. This challenge would be significant in relation to Northern Ireland, given the size and historical depth of the diaspora. There may be particularly strong arguments against diaspora voting in a referendum on the reunification of Ireland, as the lived experiences of those on the island shape opinion in new directions. This is another issue that might be added to the mix if the franchise were to be altered, nevertheless.

Read the article by Christopher McCrudden,
Oran Doyle and David Kenny,
'The Franchise in Irish Unification Referendums',
<https://doi.org/10.3318/isia.2021.32b.18>

² Shaw, 'Citizenship and the franchise'.