

Submission to Working Group on Unification Referendums on the Island of Ireland

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Background: Michael Gallagher is Professor of Comparative Government at Trinity College, University of Dublin, where he specialises in comparative political institutions and in Irish politics. Among his publications is *The Referendum Experience in Europe* (Palgrave Macmillan, 1996), co-edited with Pier Vincenzo Uleri.

Summary: Rather than make suggestions on every single question, I will confine myself to those in Section 3 and Section 5h:

- there is a strong case for holding referendums both before and after detailed negotiations: before to ascertain whether there is a willingness to proceed in principle, and afterwards to make a decision on a specific package reached through such negotiations;
- a turnout requirement would not make sense, but there is a case for requiring the agreement of a qualified majority rather than a simple majority.

3. How would referendums North and South be structured?

a. At what point or points in the decision-making process would referendums take place, both in Northern Ireland and in the Republic of Ireland?

b. In particular, would referendums take place before detailed negotiations on the form that a united Ireland would take or afterwards or both?

In my opinion the only feasible approach, once the decision has been taken to proceed to referendums (and that point may be some distance away as of January 2020), is a three-stage process. First, referendums north and south on the general principle of whether the existing constitutional status of Northern Ireland should be retained or whether the two jurisdictions on the island should become one. Second, if the answer in both jurisdictions is in the affirmative, there would be a period of discussion and negotiation out of which would emerge some recommendation as to the future constitutional structure of a united Ireland. (If no agreement is reached, or if those taking part in such discussions do not include all significant strands of opinion, the majority would have to decide whether to abandon the project or to continue even in the absence of consensus.) And third, such an agreed package would be put to the people, north and south, for approval or rejection.

Proceeding in any other way would be problematic. Clearly it would not make sense, nor would it be politically realistic, to convene political representatives from all backgrounds to discuss the governmental shape of a future united Ireland in the absence of a definite signal from the people of both existing jurisdictions on the island, as expressed in a referendum, that this is the outcome they favour. Similarly, it would be unwise to repeat the Brexit approach taken in the UK, where an initial vote in favour of an idea in principle is taken subsequently by proponents as endorsing every possible specific method of implementing the idea. In this context it is perfectly conceivable that, for example, some unionists who voted against the idea in principle might find a final negotiated package to be more attractive than they had expected, or that some nationalists who voted in favour of the idea in principle are disappointed by the specific package agreed by the negotiators. Hence the desirability of both securing an initial green light for the negotiation process to take place and, assuming a final package is agreed through such negotiations, securing agreement for that specific package through a referendum.

The model would be the New Zealand referendums on adopting a new electoral system in the early 1990s. In 1992 New Zealanders voted heavily (85–15) in a consultative referendum in favour of the principle of changing from SMP (first-past-the-post) to a PR system, but did not commit themselves to any specific version of PR. The following year, after further deliberation, there was a binding referendum with a straight choice between the status quo and one specific alternative, namely mixed-member proportional, as used in Germany. The majority voted in favour of change but by a much narrower margin, 54–46. This two-stage approach to constitutional reform avoids the risk of endless and unresolvable debate as to which precise options are mandated by a vote in favour of a broad principle such as ‘establish a united Ireland’ or ‘leave the European Union’.

c. Would referendums take place simultaneously both north and south on the same matters, or would there be differences?

Referendums north and south would have to take place simultaneously to avoid any risk of a first-mover advantage or disadvantage. Clearly it would be desirable that the proposal put to the people in both jurisdictions would be identical. There might be complications arising from the differences in constitutional practice: in the UK the referendum is unregulated, so any proposal can be put to the people, whereas Bunreacht na hÉireann mentions the referendum only in the context of specific constitutional change (Article 46) or the rejective referendum (Articles 27 and 47.2.2). That said, the phrasing of Article 47.2.1 seems to envisage the possibility that other kinds of referendum may take place, though these would be subject to the same terms and conditions as Article 27 referendums.

Indeed, while this is looking further ahead than seems realistic as of January 2020, the second referendum confirming acceptance of the package might in effect be a vote on an agreed new all-island constitution, in which case it could be either a package of amendments to the current (1937) constitution or, rather like the 1 July 1937 plebiscite, a vote to adopt an entirely new constitution.

5. Design features of the votes themselves

h. What thresholds should be used?

Turnout thresholds are usually undesirable and there seems no benefit to introducing them here, and indeed no need given the salience of the issue. A number of countries (for example Italy and several post-communist states) have turnout requirements; if turnout does not meet a pre-set threshold, the referendum has no legal effect. This is not a model to be copied. The consequence of such a threshold is that opponents of a measure are torn between coming out to vote No in the hope of defeating the proposal and simply not voting in the hope of thereby invalidating the exercise. It can also lead to what seem to be anomalous outcomes; in Italy, for example, with a turnout requirement of 50 per cent, a proposal backed by 49 per cent of the electorate and opposed by no-one is not deemed to have been passed, whereas one backed by 26 per cent of the electorate and opposed by 25 per cent is.

A more contentious issue here is whether, given the magnitude of the change contemplated – a transfer of sovereignty from one jurisdiction to another – a simple majority would suffice, or whether a ‘super-majority’ should be required in order to ensure that, within Northern Ireland, a proposal cannot be passed with the support of just one community even if it is almost unanimously opposed by the other community. A simple majoritarian approach would run counter to the consociational principles that underlay the 1998 Good Friday / Belfast Agreement. There would thus be a case for prescribing that both the initial ‘in principle’ referendum and the second referendum on a specific package should require something more than 50 per cent support, perhaps 60 per cent, for the proposal in order to this to have any effect; anything less than that, in either jurisdiction, would be taken as rejection of the proposal due to insufficient support.