



REVIEW OF EUROPEAN PARLIAMENT CONSTITUENCIES



**SINN FÉIN SUBMISSION
TO THE
CONSTITUENCY COMMISSION**



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Summary: Sinn Féin believes that the citizens of the six counties of the north should continue to have representation in the European Parliament post-Brexit in line with the commitments made by all parties to no diminution of rights; that this can be achieved via the two extra seats that are due to be allocated to the Irish State as per the decision of the European Council on 28 June 2018; and that the north should be a dedicated constituency for the purposes of the election of the two MEPs.

Introduction

On 23rd June 2016 the people of the north voted to remain in the EU. They did so because it is in their best interests politically and economically. Brexit poses a huge threat to the future of the people of Ireland in terms of a potentially reinforced land border on the island, the north being forced out of the European Single Market, barriers to trade, potential devastation of agriculture, not to mention the implications for the Peace Process and the Good Friday Agreement.

Although there has been progress on trade issues, with the proposed backstop an insurance policy that will keep the north in an all-Ireland framework aligned to certain rules of the Customs Union and the Single Market, it is time that the same was applied to citizens' and political rights which are as important as trade for those who live in the north.

The very reason why the review of the European Parliamentary constituencies is happening is because of Brexit. That cannot be ignored in the deliberations of the Constituency Commission. It is important to note that while the Commission is obliged to have regard to the matters in its Terms of Reference, it can consider other legally and politically relevant matters. The people of the north want to know they can exercise their rights as citizens of an EU member state post-Brexit. This will require additional measures to the trade issues that are currently being discussed, and one of these is the ability of the people of the north

to continue to elect MEPs to the European Parliament. This is a proposal that has cross-party support.

The leader of Fianna Fail, Micheál Martin, in January 2018 called for the north to keep its EU political representation, adding ‘why would people object to Northern Ireland continuing to have representation in the European Parliament?’ The Fine Gael MEP Seán Kelly said in June 2018 that ‘the idea is "worth exploring" and something he has no difficulty with given that the majority of people in Northern Ireland voted to remain in the EU in the referendum two years ago.’¹ There is a general acceptance that the north is a unique case.

The Good Friday Agreement is the defining document and agreement which sets out the relationship between the people of this island and the people of these two islands and that includes the people in the North. We must all embrace the reconciliation phase of the Peace Process. To reach out, to listen and to find the common ground.

That requires leadership. That requires being able to reach out the hand of friendship and it requires being able to negotiate, agree and deliver political accommodations. The EU has a role, and continues to play a role, in the Peace Process, and it is imperative that this is continued. One way of securing this relationship is to maintain the representation of the north in the European Parliament.

Citizens’ Rights Post-Brexit

There can be no diminution of the rights of citizens of the north post-Brexit. This has been acknowledged by both Britain and the EU in the December 2017 Joint Report which outlined the joint commitments of both parties.

In relation to the north, the Joint Paper said:

“52. Both Parties acknowledge that the 1998 Agreement recognises the birth right of all the people of Northern Ireland to **choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland** [our emphasis]. Both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people and, in

¹ Conor Mc Morrow. ‘Extra European Parliament seats for NI ‘worth exploring’ – Kelly’. RTE News. 13 June 2018.

the next phase of negotiations, will examine arrangements required to give effect to the ongoing exercise of, and access to, their EU rights, opportunities and benefits.

53. The 1998 Agreement also includes important provisions on Rights, Safeguards and Equality of Opportunity for which EU law and practice has provided a supporting framework in Northern Ireland and across the island of Ireland. The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union, including in the area of protection against forms of discrimination enshrined in EU law. The United Kingdom commits to facilitating the related work of the institutions and bodies, established by the 1998 Agreement, in upholding human rights and equality standards.”²

This sentiment was echoed by Taoiseach Varadkar following publication of the Joint Report when he made the following promise to the people of the north:

“I want to assure you that we have protected your interests throughout these negotiations. Your birth right as Irish citizens, and therefore as EU citizens, will be protected. There will be no hard border on our island. You will never again be left behind by an Irish government.”

The Taoiseach's remarks have particular significance with regard to voting rights and procedures for the people of the north post-Brexit, as such procedures are a matter of Irish law. This was made clear by the President of the European Commission, Jean-Claude Juncker on 22 June 2018 when he said that 'eligibility to vote and stand as candidates in elections to the European Parliament is determined by Irish law...'³ The responsibility to ensure continued representation for citizens of an EU member state resident in the north falls to the member states of the EU – in this case, the Irish State.

In January 2018 the Human Rights Consortium (HRC) published a paper entitled *Brexit, Human rights and Northern Ireland*. The HRC is a not-for-profit coalition of civil society organisations from across the north. It was established in 2000 and has 'almost 170 member organisations from a range of community and voluntary grassroots groups, NGOs and Trade Unions, drawn from all sections of the community'.⁴ It pointed out that

“Chapter V of the EU Charter sets out a range of EU citizens' rights – all of which are at risk in Brexit. For example, the right to vote and stand as a candidate in elections to the European Parliament in Member States in which she or he resides (under the same conditions as nationals of that state), is dependent on

² EU Commission. *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*. TF50 (2017) 19: 8.

³ EU Parliamentary Questions 22 June 2018. E-002232/2018.

⁴ Human Rights Consortium. *Brexit, Human Rights and Northern Ireland*. 2018: 3.

residing in a member state of the EU. After Brexit, even though Irish citizens in Northern Ireland will retain their EU citizenship as a birthright, they will not be able to vote in European Parliament elections unless they are resident in an EU state (unless some special arrangement is envisaged for Irish citizens who reside in Northern Ireland)."

The reason why Irish citizens in the north will be unable to vote in European elections is because the Irish State does not allow Irish nationals not resident within the State to vote in any elections.⁵ It is the norm across the EU to allow for such voting, and there are only five other EU states that deprive their nationals of the right to vote in national elections if they are living outside the jurisdiction, and only Britain and the Irish State deprive their nationals of voting in European elections even if they are resident in another European state.⁶ However, under the terms of the Good Friday Agreement, the rights of citizens in the north need to be protected post-Brexit, and this includes the right to participate in European elections.

The constitutional basis of the EU, the Lisbon Treaty, is quite explicit with regard to the rights of citizens to participate in the democratic institutions of the EU. Article Nine states that '[e]very national of a Member State shall be a citizen of the Union'. This is elaborated upon in Article Ten which says:

"Article 10

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen."

The expression of one's rights as a citizen therefore requires access to the democratic institutions. It is not an 'added extra' but something that is fundamental to the constitutional and functioning treaty of the EU itself.

⁵ An Irish national is deemed to be non-resident for the purpose of the electoral register if she or he is absent from the State for more than eighteen months.

⁶ Eva-Maria Popcheva. *Disenfranchisement of EU citizens resident abroad*. PE 564.379. Brussels: European Parliament. 2015: I.

Furthermore, the right of citizenship of an EU member state contains a stand-alone right to vote in European Parliamentary elections. This was borne out by the European Court of Justice in its 2015 ruling on the *Delvigne* case where it stated that Article 39 of the European Charter of Fundamental Rights, along with Article 14(3) of the Treaty of Lisbon, meant that citizens of an EU member state had a specific right to vote in European Parliament elections. That right can be limited by national law, but the limitations must be proportionate and reasonable.

After March 2019 it will not be possible for Irish citizens in the north to vote in EU elections. This is not in any way reasonable or proportionate. Our proposal to extend the European Parliament franchise to Irish citizens in the north is consistent with state practice across the EU and in line with the democratic principles set out in the treaties.

European Elections and Irish Law

While there are constitutional issues with regard to external voting for Irish elections, there are no impediments on external voting for European elections. It is a matter of legislation as to how the State interprets its EU obligations. There is not a single legal barrier, nationally or internationally, to stop the north from having a separate European Parliament constituency or for people in the north to be able to vote in European elections.

Elections to the European Parliament are governed by the *European Parliament Elections Act 1997*. Article 29 of the Constitution says that the State must comply with its obligations under EU Treaties, but is not prescriptive as to how it does so. It is open to the Irish State to adopt wider provisions, including extending the franchise to citizens of a non-EU member state residing in the six counties. Such a move is essential if the Irish State is to honour its commitments under the Good Friday Agreement in terms of parity of esteem between the north's two communities.

The international treaty between Britain and Ireland, known as the Good Friday Agreement, contains within it a definition of 'the people of Northern Ireland'. It reads:

"The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence."

The paragraph in question states that the British and Irish governments

“Recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted **as Irish or British, or both, as they may so choose,**[our emphasis] and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.”

In other words, the people of the north as defined in the Agreement who are not Irish citizens nonetheless hold the right to be Irish citizens – and therefore after Brexit the right to be citizens of an EU member state. This is further reinforced in Article 2 of Bunreacht na hÉireann. Citizenship is often defined as “the right to have rights”, and the most fundamental element of citizenship is the right to participation.

Given that such a measure is a key component of the Good Friday Agreement, and given the concept of parity of esteem that runs through the entire peace process, Sinn Féin believes that the right to vote in European elections should be granted to all the people of the north post-Brexit – those who hold Irish citizenship and those who have the right to be Irish citizens. It should not be a requirement to become an Irish citizen in order to vote in European elections in the north – the parameters should be those of the Good Friday Agreement as per “the people of Northern Ireland”.

The introduction of any requirement for British people in the north to declare themselves as Irish to attain a franchise in European Parliamentary elections, would contradict the spirit of the Good Friday Agreement. There is already established European case law that gives member states discretion to allow for voting by citizens of jurisdictions that have close links with EU states. One such example is that concerning a case brought by Spain in 2004 to block the decision by Britain to allow citizens of Gibraltar to vote in European elections. Spain made the argument that ‘only citizens of the Union can be recognised as having the right to vote in elections to the European Parliament because of the direct link between citizenship of the Union and the nationality of a Member State, on the one hand, and the enjoyment of rights conferred by the Treaty, on the other.⁷ This was rejected by the European Court of Justice who said that

‘the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and that Articles 189 EC,

⁷ Case C-145/04 Spain v. UK (2006) ECR I-7917: paragraph 39.

190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.⁸

All citizens of the north have an automatic entitlement to Irish citizenship under the terms of the Good Friday Agreement. It is clear that the criteria of ‘close links’ is more than established by the Agreement and by the international treaty between Britain and the Irish State that underpins the Agreement. Furthermore, again under EU case law, the exclusion of British citizens from voting in European elections in the north post-Brexit could not be objectively justified when others in a materially similar position were included. This was the effect of the key decision in 2007 case, *Eman & Servinger*.⁹ These cases, along with independent legal advice that Sinn Féin has received, shows that external voting is certainly permitted and more recently encouraged by the European Commission. Given the rather restrictive practices around voting in the Irish state, this puts us out of step with many other countries in the European Union.

Four options are generally put forward for external voting: voting in person at a polling station; voting by post; proxy voting; electronic or internet voting. It is Sinn Féin’s view that voting in person at a polling station is the most direct way for citizens to exercise their franchise. We believe that such procedures are well within the capabilities of the Electoral Office for Northern Ireland.

Furthermore, Sinn Féin believes that the north can, and should be, a dedicated electoral constituency for the election of two Members of the European Parliament. It is entirely within EU law for the creation of dedicated districts to represent citizens not resident within the State in its democratic institutions. This has been adopted by Croatia, France, Italy, Portugal, Romania and Switzerland.

Conclusion

The decision by the British people to exit the EU cannot undermine the hard-won rights and agreements that underpin the Peace Process. All sides recognise this. Yet we need more than words and press statements. We need genuine commitments and active proposals to protect a hard-won peace. Sinn Féin believes that the creation of a constituency for the

⁸ Case C-145/04 Spain v. UK (2006) ECR I-7917: paragraph 78.

⁹ *Eman and Servinger v. College van Burgemeester en Wethouders van Deng* (2007) I CMLR 4, C-300/04.

north and the allocation of two European Parliamentary seats to this constituency by the Irish government would go a long way to maintaining the essential link between the north and the EU in terms of rights, responsibilities, investment and representation.