

The divorce referendum 2019

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Abstract

When Ireland removed the prohibition on divorce from its constitution in 1995 by way of a referendum, the result was achieved with a razor thin margin after a difficult campaign. The circumstances in which the 2019 referendum on divorce took place were very different. After the hotly contested marriage equality and abortion referendums, a proposal to liberalise the divorce regime by removing the paragraph relating to the mandatory separation period from the constitution, and to enact legislation to halve that period, was uncontroversial. The amendment received widespread support from both the public and the political elite. The campaign was muted and largely overshadowed by the local and European elections that were taking place at the same time. On 24 May 2019, 82 per cent of the electorate voted in favour of the Thirty-Eighth Amendment. This result can be seen as another step in the ongoing project to modernise the Irish constitution.

Keywords Referendum; divorce; Irish politics; marriage; family rights

1. Background to the referendum

On Friday 24 May 2019, the Irish electorate voted in favour of the Thirty-Eighth Amendment to the Constitution. This Amendment constituted a change to existing provisions regarding divorce in Ireland in two important ways. Firstly, by providing Dáil Éireann with a mandate to legislate for the recognition of foreign divorces within the Irish State. And secondly, by removing any reference to a required period of separation between the couple, thus leaving parliament free to legislate on the matter.

When it was first written, article 41.3.2 of the 1937 Constitution stated 'No law shall be enacted providing for the grant of a dissolution of marriage.' Given that any change to the constitution requires the approval of the people, as expressed in a referendum, this made it necessary to consult the electorate prior to any liberalisation in this area of family law.

Two referendums were held on the issue. The first, in June 1986, asked the electorate to vote on an amendment providing for the dissolution of a marriage where there was no reasonable possibility of reconciliation, and where the couple had been separated for at least five years cumulatively. The Yes side had a sizeable majority in the polls at the outset of the campaign but this lead narrowed progressively, and nearly two-thirds of the votes were cast against the amendment. The failure of this attempt to legalise divorce was partially blamed on a lack of clarity of the consequences of a Yes vote, and various governments responded by introducing legislation to clarify issues relating to marital breakdown, thus preparing the ground for a future referendum (Girvin, 1996).

In October 1995, then Minister for Equality and Law Reform Mervyn Taylor proposed the Fifteenth Amendment to the Constitution (No 2) Bill 1995 in Dáil Éireann. This proposed removing Article 41.3.2

from the Constitution and replacing it with language providing for dissolution of a marriage in cases where the spouses had lived apart for four years out of the previous five.

The referendum was held on 24 November, at the end of a particularly arduous campaign. Opinion polls conducted in early 1995 had indicated that a majority of the electorate would vote to allow divorce (Kennedy, 1995). The main political parties were in favour of legalising divorce (Girvin, 1996), and the umbrella group for the voluntary organisations campaigning for a Yes (Right to Remarry Campaign), comprising actors such as the National Women's Council of Ireland and the Free Legal Aid Centres, was proactive in getting its message out. However, despite the strong position of the Yes side at the outset, and in a repeat of the 1986 campaign, support for the introduction of divorce was progressively eroded.

The No side, led by key figures in the Catholic Church, stressed that the amendment represented a threat to Irish family tradition (Girvin, 1996). It mounted a very robust campaign, one that included a successful legal challenge to the use of public money by the Government to fund the Yes campaign, in what became known as the McKenna judgment (Newman, 1996). As time went on the campaign became increasingly bitter and personal. Prominent No campaigner, Richard Greene, leader of Muintir na hÉireann, a short-lived socially conservative micro-political party, argued that the Jewish faith of Fine Gael TD Alan Shatter and Minister Mervyn Taylor contributed to their support for the introduction of divorce in Ireland since they 'may not have a full understanding of Christian marriage' (Cleary, 1995).

On the eve of the vote, the two sides were level in the opinion polls and the result was deemed too close to call (Walsh, 1995). The referendum passed but only just, with 9,114 votes deciding the outcome out of over 1.6 million cast.

The reaction from the Yes side was jubilant. Frances Fitzgerald of Fine Gael called the result 'a defining moment in the separation of church and state' (Murdoch, 1995). A subsequent legal challenge to the result was mounted by Des Hanafin, a former Fianna Fáil Senator and chairman of the Anti-Divorce Campaign. However, the Supreme Court unanimously rejected the challenge in June 1996 and, after the passage of The Family Law (Divorce) Act, 1996 the first divorces began taking place in 1997.

The question of divorce in Ireland was considered settled and there was little appetite for revisiting the matter. Progressive campaigners instead focused on issues such as abortion and marriage equality, with corresponding successes in referendums held in 2018 and 2015 respectively (Murphy, 2016; Field, 2018). Though the existing divorce legislation was looking increasingly anachronistic, modernizing restrictions around the dissolution of marriage was not a priority for successive governments. Instead, it was thanks to the intervention of a single government minister that the referendum took place at all.

2. The proposed amendment

Fine Gael TD Josepha Madigan had long been critical of the mandatory separation period required by the constitution. As a local councillor and family law solicitor, she wrote an article in *The Sunday Times* arguing that a referendum on the subject was long overdue (Madigan, 2014). On 6 July 2016, less than five months after she was elected to Dáil Éireann, she introduced a private member's Bill that proposed halving the length of time that couples had to wait prior to seeking a divorce. In a preview of what would ultimately be the central pillar of the Yes campaign of the referendum, Ms Madigan positioned the measure as a compassionate response to marital breakdown (Flanagan, 2016). Though

some were in favour of an even shorter waiting period, the proposal was welcomed by members of the legal profession (Gartland, 2016).

In April 2017, the government agreed to adopt Ms Madigan's proposal and sent it to the Oireachtas Select Committee on Justice and Equality. While the Bill had received government support, there appeared to be little urgency to hold the necessary referendum. Taoiseach Leo Varadkar had declared his intention to hold a series of referendums throughout 2018 and 2019, but the repeal of the Eighth Amendment to the Constitution (concerning abortion) was prioritised and it was not until January 2019 that Cabinet approved the holding of a referendum to amend Articles 41.3.2 and 41.3.3 of the Constitution. The date was subsequently announced as 24 May, the same day that the local and European Parliament elections would be held.

On 26 March the government formally decided on the wording for the amendment that would be put to the electorate. It announced that the amendment would replace Article 41.3.3 of the constitution with the following subsection: 'Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.' This change would allow for the promised clarification around the recognition of foreign divorces. In addition, Article 41.3.2ⁱ, the paragraph dealing with the compulsory period of separation prior to divorce, would be deleted. The government also published its draft version of its General Scheme of the Family Law (Divorce) (Amendment) Bill 2019 which would amend existing legislation in the event of a Yes vote. The Bill would reduce the mandatory separation period from four to two years.

In April, the final version of the bill on the Thirty-eighth Amendment to the Constitution was passed in both houses of the Oireachtas, and with the date of the vote already announced and the details of what the electorate would be voting on now clear, campaigning on the referendum could begin in earnest.

3. The referendum campaign

The 2019 divorce referendum campaign represented a marked contrast both with the previous referendums on the issue, and with the 2015 marriage equality and 2018 abortion referendums. More than two decades after the highly controversial and bitterly fought campaign over the introduction of divorce, the question of the liberalisation of existing arrangements was of little interest to the public and the low-key campaign on the issue reflected this.

The key players on the Yes side had changed little since 1995. Again, an all-party consensus was operating, with campaign messaging framing the Yes vote as a compassionate response to the difficult circumstances of marital breakdown. Sinn Féin, the Labour Party, the Green Party, and the Social Democrats joined Fine Gael in calling for a Yes vote. And while Fianna Fáil also supported a Yes, in a field of muted campaigns, theirs was particularly lacklustre.

In addition to the political parties, a variety of voluntary and non-governmental organisations, formed the umbrella group Coalition for YES, declaring their support for the amendment. The coalition consisted of groups such as Lawyers for Yes, the National Women's Council of Ireland, the Children's Rights Alliance, One Family, and the Irish Council for Civil Liberties. They stressed that a reduction in the waiting period would reduce the financial burden of marital breakdown, while also protecting women and children in positions of vulnerability.

While a Yes vote was advocated by a vast swathe of political and non-political actors, with a core message emphasising compassion, visibility of the campaign was low. Despite launching their

campaigns, political parties and the Coalition for YES did not adopt the multi-pronged strategy of recent referendum campaigns. More traditional methods, such as erecting posters, were engaged in only to a very limited extent and the Yes campaign seems largely to have engaged in the dissemination of its message through social and traditional media. However, the simultaneous local and European Parliament election campaigns attracted much more public interest. As a result, the referendum received little coverage from traditional media.

The No side, in sharp contrast with the 1995 referendum, failed to mount a robust challenge. Indeed, few groups declared their opposition to the Amendment and those that did were poorly organised and funded (Bray, 2019). In an echo of some of the more outlandish messaging of the 1995 campaign, Richard Greene of the Alliance for the Defence of Family and Marriage (ADFM) warned that a Yes vote could put pressure on the housing market and health sector due to the potential increase in the number of divorces. The group candidly acknowledged that it did not have sufficient funding to instigate a national campaign. Instead, it asked opponents of the Amendment to download campaign material made available on its website for printing and distribution. Caitríona Lynch, the former president of Curam, an advocacy group for stay-at-home parents, reflected on the changes in the decades since the last referendum, stating bluntly: 'The culture has changed utterly. I don't know anyone who would put a penny into a No campaign' (Bray, 2019). David Quinn of the Iona Institute, a Catholic advocacy group, explained that he opposed the removal of restrictions on divorce from the Constitution but not the reduction of the four-year waiting period (Kenny, 2019). In any event, the organisation decided not to actively campaign and confined its activities to advocating for the benefits of marriage.

Largely absent from the campaign was the Catholic Church. This represented a notable departure from the 1995 campaign where representatives of the Church were front-and-centre and were often in conflict with individual members of government. During the 2019 campaign, some prominent members of the Church extolled the benefits of marriage in general and lamented the lack of government initiatives to reduce marital breakdown generally (Little, 2019; Farsaci, 2019) but there was no organised opposition.

Due to a lack of interest on the part of the electorate, only limited polling on the issue took place. However, just two weeks before the referendum, opposition to the amendment among the public appeared scant. An *Irish Times*/Ipsos MRBI poll whose results were published on 11 May found that just 8 per cent of respondents intended to vote No in the referendum, with 77 per cent stating that they would vote Yes and the rest undecided or intending not to vote (Leahy 2019b).

Despite this commanding lead, prominent members of the Yes campaign warned against complacency. Peter Ward, Chairperson of FLAC, cautioned that in the 1986 campaign a Yes victory had also been anticipated (FLAC, 2019). And in a similar vein the Minister for Justice stated that a victory should not be taken for granted since 'any referendum can be a difficult endeavour' (Leahy, 2019a).

4. Results

In the end, such concerns about complacency on the part of Yes supporters proved unfounded. Early on the morning of Sunday 26 May at Dublin Castle, it was declared that the amendment had passed with just over 82 per cent of the vote (see Table 1). The result represents overwhelming support for the liberalisation of divorce laws in Ireland, but voter turnout confirms that this issue was of low salience to the electorate. Just under 51 per cent of the electorate voted in the divorce referendum, compared with a turnout of above 60 per cent for the abortion referendum in 2018, the marriage

equality referendum in 2015, and both of the previous referendums on the issue of divorce (Murphy, 2016; Field, 2018).

Table 1. Results of the 2019 divorce referendum

	Number	%
Electorate	3,397,636	-
Turnout	1,727,056	50.8
Votes in favour	1,384,192	82.1
Votes against	302,319	17.9
Spoiled/invalid votes	40,545	2.3

Source: referendum.ie

The result had been predicted in the handful of polls that were carried out in the run up to the vote, and had been clearly signposted by the Red C exit poll, commissioned by RTE/TG4. Using a sample of 2,920 Irish citizens who had voted in the referendum, this found that 87 per cent reported that they had voted Yes (Red C, 2019).

The poll further found that gender was not an important predictor of support for the Amendment, though women were marginally more likely to vote Yes (91 per cent of female respondents compared with 85 per cent of male respondents). By contrast, the exit poll indicates that age is an important factor in explaining how people voted. As the overwhelming national vote suggests, every age category voted Yes by a sizeable margin. However, the share of individuals who voted No was higher among those aged 65 and over (22 per cent of respondents), compared with younger voters. The results from the divorce referendum suggest that social conservatism is higher among this group, even on an issue that was so uncontroversial.

The electorate of each of Ireland's 31 councils voted in favour of the amendment, with Dún Laoghaire–Rathdown returning the highest Yes vote in the country at just shy of 87 per cent. Table 2. presents the regional distribution of the vote for the 2019 and 1995 referendums. There is overwhelming support for the liberalisation of divorce in general, but some cross-regional variation in the level of that support is in evidence, suggesting that some areas of the country remain more socially conservative than others.

Dublin had the highest proportion of Yes voters in both the 1995 and 2019 polls, followed by the rest of Leinster, while voters in the Connacht–Ulster region returned the highest share of No votes in both referendums. In the rural counties of Monaghan and Leitrim, for example, just under a quarter of voters opposed the liberalisation of Ireland's divorce laws, compared with under 14 per cent in Dún Laoghaire–Rathdown (Referendum Ireland, 2019). Of course this pattern has been much more pronounced on more controversial issues (Roscommon–South Leitrim was the only constituency in Ireland to vote No to marriage equality [Murphy, 2016]), but this was also in evidence at the similarly uncontroversial blasphemy referendum (Moore, 2019).

Table 2. Regional distribution of vote in 2019 and 1995

Region	2019		1995	
	% Yes	% No	% Yes	% No
Dublin	86.0	14.0	63.6	36.4
Leinster	83.0	17.0	48.1	51.9
Munster	80.7	19.3	43.9	56.1
Connacht-Ulster	78.8	21.2	40.8	59.2

Total	82.1	17.9	50.3	49.7
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Source: referendum.ie

There was little response from the amendment's opponents, which was unsurprising given the lacklustre No campaign and the sense of inevitability about the result. However, key figures from the Yes campaign hailed the result. Josepha Madigan stated that the vote was evidence of the solidarity of the Irish people with those who experience marital breakdown, calling the result 'emphatic' and 'unequivocal' (Doyle, 2019).

5. Understanding the result

The result of the referendum is a continuation of Ireland's liberalisation of its stance on social issues. In marked contrast with the bitter fight to introduce divorce to Ireland in the 1980s and mid-1990s, this referendum was seen as uncontroversial and the passage of the amendment inevitable. This view of the referendum is due to a number of factors. Firstly, the proposal received broad support among both the political elite and a wide range of voluntary and non-governmental organisations. These actors outlined a range of positive effects that would arise from the passage of the amendment, while the core message of campaigners was that a Yes vote represented a compassionate response to individuals in difficult circumstances.

Secondly, it should be noted that the referendum was seen as uncontroversial in part because the proposal that was being put to the electorate *was* relatively uncontroversial. The No campaigns of 1986 and 1995 had skilfully raised fears that the introduction of divorce would lead to a tidal wave of marital breakdowns across the state, with a range of attendant consequences for the children of the marriages and, more broadly, for Irish society as a whole. In the years after 1997, when the first divorces began to take place, it became clear that these fears had been unfounded. Eurostat (2019) reports that in 2015 0.7 divorces per 1,000 persons took place in Ireland, far below the EU-28 average of 1.9. Put simply, divorce was a low-salience issue for the electorate.

Thirdly, the referendum was uncontroversial due to the near total absence of a No campaign. A vigorous campaign against the 1995 amendment substantially eroded the lead of the Yes side. In 2019, most of the groups that had been so active in the 1995 campaign did not oppose the referendum, while the defence of the existing arrangements mounted by a handful of them was weak due both to a lack of resources and a lack of public interest. In particular, it is important to note the changed role of the Catholic Church in the campaign. The involvement of church figures and religious groups with the No side in 1995 was extensive, and that campaign saw bitter and personal clashes with members of the government. In 2019, only a handful of prominent members spoke publicly on the issue at all, and when they did their statements typically framed the proposal as a red herring that distracted attention from the very real necessity for government to do more to support families. Treasurer for the Alliance for the Defence of the Family and Marriage, Séamas de Barra, explicitly tied the lack of opposition to the referendum to 'campaign fatigue from the abortion referendum' that had taken place the previous year (Walsh, 2019).

Certainly, in spite of the two other elections taking place that day, voters did not flock to the polls, and it is likely that turnout reached just under 51 per percent only because of the local and European elections. Turnout in 2019 exceeded that of the blasphemy referendum (approximately 44 per cent)

but fell far short of that enjoyed in the marriage equality and abortion referendums, with both exceeding 60 per cent.

6. Conclusion

The campaign to introduce divorce in Ireland was a bitterly fought one. After one failure at the ballot box in 1986, the second referendum almost a decade later was subject to legal challenges and personal attacks on prominent campaigners. In the end, a Yes vote squeaked by with a margin of 9,114 votes and divorce became legal in the Irish state, subject to a mandatory separation period, for the first time since it had been explicitly prohibited by the 1937 constitution.

In the period since 1995, the dire predictions of No campaigners had failed to come to pass and the four-year separation period as required by Article 41.3.2 increasingly came to be seen as anachronistic, though there was little appetite to revisit the issue. It was due to backbench Fine Gael TD and former family law solicitor Josepha Madigan proposing a private member's Bill in 2016 on the issue that the 2019 referendum was held.

The Thirty-Eighth Amendment proposed removing the reference to the mandatory period of separation prior to divorce from the constitution, thus enabling parliament to pass legislation that would halve it, and amending Article 41.3.3 in order to facilitate the recognition of foreign divorces in Ireland.

The referendum campaign on the issue is best described as low-key and one-sided. In the time since the previous referendum, attitudes in Ireland had become substantially more liberal and as a result the issue was of low salience to the electorate and the outcome was seen as a foregone conclusion. Support for the amendment was to be found across all political parties, as well as a large swathe of interest groups. Few groups opposed it and those that did showed little desire to fight a campaign after the rigours of the previous year's battle over the abortion referendum. In addition, the local and European Parliament elections were scheduled to take place on the same day and these campaigns necessarily diverted attention away from the vote on divorce.

In the end, the passage of the amendment with overwhelming support from the electorate reaffirmed Ireland's shift away from social conservatism. It also represents yet another success in the ongoing project to modernise a constitution that remains out of step with contemporary Irish society.

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