Could Rights-Based Safeguards Make Stormont Functional?

Could RIGHTS-BASED safeguards make STORMONT functional?

A seminar hosted by the Equality Coalition and the Transitional Justice Institute, supported by the LSE Gender, Justice and Security Hub.

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Welcome

Siobhán Wills, Ulster University

We are very pleased to co-host this event with the Equality Coalition. The event is supported by the Gender Justice and Security, funded by the Global Challenges Research Fund, and we're very grateful for that hub support.

A major theme of our work at Ulster is the importance of partnership, and it is especially pleasing to be working today with such really truly valued partners. The Gender Justice and Security Help has been supporting work in the TJI, Queen's University, Belfast and the Committee on the Administration of Justice. As part of that Rory O'Connell, Fionnuala Ní Aoláin and Lina Malagón interviewed members of Civil Society on the transformative potential of the Belfast / Good Friday Agreement and why that agreement has not been as transformational as many would have been hoped. But our focus today is not just retrospective. We want to look at what a radically transformed future would look like. And we have a fantastic line of speakers who will be offering their own reflections on the successes and challenges of Stormont but more importantly, who have come together for a discussion on how to make Stormont functional and to realise advancements in the areas of human rights, gender equality and social transformation.

Introduction

Patricia McKeown, Regional Secretary UNISON and Co-convenor of the Equality Coalition

The Belfast (Good Friday) Agreement of 1998 (1998 Agreement) Strand 1 institutions are at the time of writing (October 2023) again in a state of suspension. Yet, serious questions regarding the functionality of their power-sharing (consociational) structures were apparent when sitting with no Programme for Government agreed in previous mandates and contestation over the use of vetoes.

The 1998 Agreement has not delivered on some of its genuinely transformative potential (O'Connell, Ní Aoláin and Malagón, 2023). The failure to provide for enforcement mechanisms, the ambiguity in the language of the 1998 Agreement, the tendency for innovations to prioritise process over substance, the failure to address power structures have all been challenges as has the nature and practice of power-sharing, itself one of the cornerstones of the Agreement.

The 1998 Agreement commits to the incorporation of the European Convention on Human Rights (ECHR) and also an ECHR plus Bill of Rights as a cornerstone safeguard over power sharing (as well as importantly applying to the UK Government).

Both were to be linked to the Petition of Concern safeguard in the NI Assembly. The Bill of Rights has, however, never been implemented, the Petition of Concern has never operated as intended (and was subject to some limited reform under New Decade New Approach). There were significant changes to the 1998 Agreement structures at St Andrews including the introduction of an executive level veto. This was not tied to objective rights-based criteria but rather is exercisable on most ministerial decisions and has largely allowed the thwarting of rights and equality initiatives even when backed by majorities in both the Executive and Legislature. Article 2 of Windsor Framework (née Protocol) has led to a new rights-based safeguard over non-diminution in certain 1998 Agreement rights as a result of Brexit.

Legislation has also led to a mechanism for enforceability of the NI ministerial code, including its equality provisions. The question of the system of designations in the Assembly has also increasingly arisen in the context of the rise of designated 'others'.

Within the 1998 Agreement, there is provision for review of the functioning of the structures of the power sharing institutions. Under s29A of the Northern Ireland Act 1998, there is an Assembly and Executive Review Committee (AERC) to review the functioning of the Assembly and Executive. The British-Irish Intergovernmental Conference is also to keep under review the 1998 Agreement institutions.

The purpose of the seminar would be to further explore the recommendations of the Equality Coalition (2022) 'Policy Asks' document relating to Stormont reform, and other academic work, critiques and proposals relating to reforming the present structures within the broad framework provided for by the 1998 Agreement.

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The role the Bill of Rights would play in underpinning sustainable power-sharing

Anne Smith, Senior Lecturer, Transitional Justice Institute and School of Law, Ulster University

Introduction

I have been asked to speak about the role the Bill of Rights for Northern Ireland could have played in preventing or precluding issues that have destabilised power-sharing. Before outlining how a Bill of Rights would underpin the power-sharing institutions on a more sustainable footing, I have also been asked to speak to the current state of play with the Bill of Rights.

The current state of play with the Bill of Rights

The Belfast (Good Friday) Agreement 1998 (1998 Agreement) commits to the incorporation of the European Convention on Human Rights (ECHR) and also an 'ECHR plus Bill of Rights' arrangement as a cornerstone safeguard over power-sharing (as well as importantly applying to the UK Government). Both are to be linked to the Petition of Concern safeguard in the Northern Ireland (NI) Assembly. Under the 1998 Agreement, the Northern Ireland Human Rights Commission (NIHRC) was invited to consult and advise the British government on what rights should be included in a proposed Bill of Rights for NI. Reflecting the 1998 Agreement's mandate, the NIHRC launched the Bill of Rights process on 1 March 2000, and submitted its advice on 10 December 2008. The British Government's response to the advice in 2009 was dismissive (Northern Ireland Office, 2009).

The current state of play with the NI Bill of Rights

- NIO's response Nov 2009
- 'Disappeared from view' until the New Decade, New Approach, 2020 'opened a door'
- Ad hoc Committee on a Bill of Rights
- Appointment of a panel of experts to assist the committee was to be appointed but...

The Bill of Rights 'disappeared from view' until the New Decade New Approach Agreement of 2020 'opened a door' with the creation of a formal political process (Harvey, 2021). It did this by creating a dedicated Ad Hoc Committee of the Assembly (the Committee) composed of the five main political parties. The Committee was to be assisted by a panel of five experts to be appointed by the Executive Office. However, these appointments were not made due to the DUP's opposition to one of the appointees (Committee on the Administration of Justice (CAJ), 2022; Irish Legal News, 2021). In June 2021, the Committee agreed it supported the creation of a Bill of Rights in principle in light of the evidence it received, but could not make a decision on what approach a Bill of Rights should take in the absence of advice from the panel of experts. Subsequently, the DUP disagreed with this decision (NI Assembly, 2022).

The Committee published a report in February 2022 (NI Assembly, 2022). The findings reaffirmed what we already know only too well: human rights of many individuals and groups in NI are not sufficiently protected and revealed that the DUP is the only party amongst the five main political parties against the creation of a Bill of Rights.

The Committee's findings are also supported by an Amnesty International poll, carried out by Savanta in September 2023 that shows a Bill of Rights is one of the top five issues adults in NI wants the UK government to prioritise: 'A significant number also want to see stronger rights protections being brought into law in Northern Ireland, through the long-awaited Northern Ireland Bill of Rights, as set out in the 1998 Agreement some 25 years ago' (Irish Legal News, 2023).

However, despite overwhelming cross-community and political support from the majority of the main political parties, there has been no further progress.

The UK government is declining to introduce legislation until there is political consensus at Stormont. This is despite the explicit directive in the 1998 Agreement 'that a Bill of Rights for Northern Ireland must be legislated for by the UK Parliament.'

This insistence on local political consensus has therefore now turned into a 'political veto' and has resulted in stagnation and political stalemate (CAJ, 2022). This additional prerequisite outside the terms of the 1998 Agreement of consensus from both unionist and nationalist parties on any rights included in the Bill of Rights is preventing progress. The Bill of Rights therefore remains one of the most significant pieces of 'unfinished business' of the 1998 Agreement (Farrell, 2013).

What If?

This is unfortunate as had a Bill of Rights been introduced many of the issues that destabilised power-sharing could have been addressed by it. Some of the issues (these are by no means exhaustive) include: marriage equality; adoption restrictions; abortion law; minority language rights; dealing with the past; victims and survivors; parades; the misuse of Petitions of Concern; flags and identity; and, of course, there is now the added complication of Brexit and the uncertainties around human rights protection that will flow from it. Campaigns on some of these major social issues (such as marriage equality, reproductive and minority language rights) had notable successes via the Westminster Parliament.

However, that does not mean we do not need a Bill of Rights. A Bill of Rights supplements and complements existing legislation and provides an overarching cohesive legislative framework. A Bill of Rights could have underpinned the power-sharing institutions on a more sustainable footing by informing how power is exercised and how policies are designed.

In doing so, a Bill of Rights supports good governance by creating a rights-informed structure of accountability and creates positive obligations on states. In short, a Bill of Rights could act as a useful check against abuses of power.

Furthermore, as noted above, the Bill of Rights also applies to the UK government. This means had a Bill of Rights been introduced, it could have prevented the UK government from introducing the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The NIHRC's (2008) advice recommended a provision should be drafted to ensure that: **"Legislation must be enacted to ensure that all violations of the right to life relating to the conflict in Northern Ireland are effectively investigated. Any mechanisms established must be fully in compliance with international human rights law."**

Conclusion

I do not want to overstate the significance of such a constitutional document. However, I argue that in times where there is so much uncertainty about the protection and safeguarding of rights in the UK; and in the particular context of Northern Ireland where human rights have been central to the peace process, and the institutions and legal protections it established, a Bill of Rights can have normative and practical power in advancing forms of governance that are rights-based.

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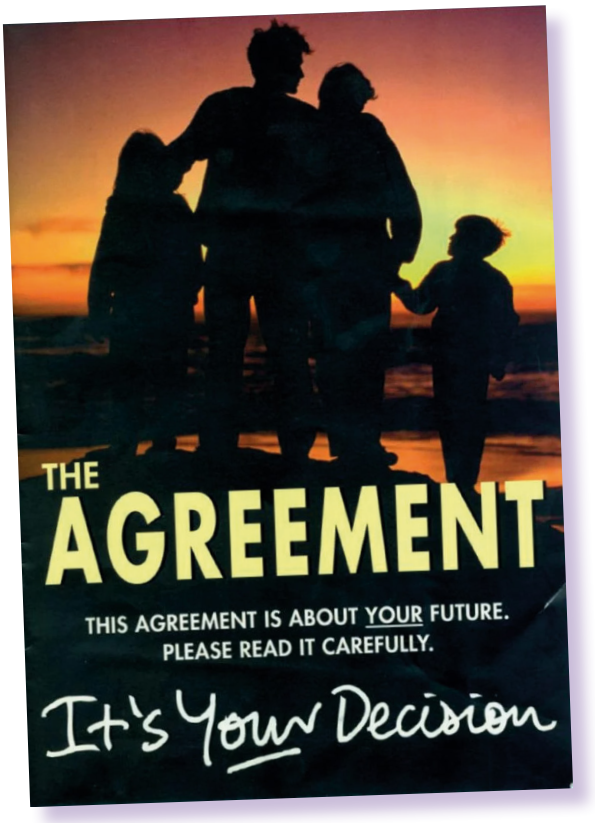
Stormont's vetoes – Turning equality on its head?

Daniel Holder, Director of the Committee on the Administration of Justice

My contention here is that the 'safeguards' originally envisaged under the Belfast (Good Friday) Agreement 1998 for Stormont have not been duly implemented, to the extent that what we have now are instead essentially political 'vetoes'. This has turned the original intention of the 1998 Agreement on its head.



Starting with the 1998 Agreement commitments to incorporate the European Convention on Human Rights (ECHR) and for a Northern Ireland Bill of Rights, only one of them was implemented. The ECHR was incorporated in law through the Human Rights Act 1998. The Bill of Rights was meant to look very much like that, except it was meant to cover a series of additional rights. What they have in common is they are safeguards that are objective being grounded in the legal standards of human rights law. They are not subject to subjective political interpretation because, whilst some people try, you cannot just make human rights up.

This presentation will turn to the five mechanisms envisaged as safeguards, and the extent to which they have become subjective vetoes namely:

- Petition of Concern (NI Assembly)
- St Andrews Veto (NI Executive)
- Agenda Veto (NI Executive)
- 'Call in' (NI Councils)
- Equality Impact Assessments & the 'Good Relations' Duty (public authorities)

Some of the mechanisms were to act as counter-majoritarian safeguards within the 1998 Agreement to prevent one community dominating the other. We will briefly explore the extent to which this has worked or, to the contrary, how such safeguards have in practice resulted in maintaining the position of dominant groups (CAJ, 2023).

It should also be noted that the 1998 Agreement includes various review mechanisms, such as the British-Irish Intergovernmental Conference, and, in particular, where difficulties arise which require remedial action, the 'Review Procedures Following Implementation' section states:

7. If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction.

It was therefore envisaged that the two governments could review the institutions and take remedial action. Another commitment in the St Andrews Agreement led to the establishment of an Assembly committee to review the functioning of the institutions - the Assembly & Executive Review Committee. So, the framework for the institutions can be amended by mechanisms within the peace agreements themselves.

Petition of Concern

The 1998 Agreement provides that Executive and Legislative authority was to be "subject to safeguards to protect the rights and interests of all sides of the community." One of those key safeguards was to be the Petition of Concern (PoC) and it was expressly to be linked to 'equality requirements.' Every time a PoC was tabled, it was to trigger a Special Procedures Committee, known as the *Ad Hoc Committee on Conformity with Equality Requirements* which would then scrutinise the piece of legislation or measure challenged by the PoC against the ECHR and NI Bill of Rights. For this mechanism to function fully, it therefore needed the Bill of Rights to be in place.

Yet, the limitations were broader than that. In practice, the PoC was never properly put into place at all due to poor legislative implementation. The mechanism instead became a political veto where 30 MLAs simply sign a bit of paper saying we want a PoC, giving no reasons, and that would trigger what is called the 'cross-community vote.' No PoC has ever led to the setting up of the Ad Hoc Committee on Conformity with Equality Requirements and its intended scrutiny role. Instead, the PoC was turned into a subjective a nationalist-unionist veto over the particular measure in question.

Its use to block equality and rights initiatives and for party political purposes, and the significant increase in its use from 2011 as a veto of choice is what ultimately brought it into disrepute.

During the first Assembly mandate (1998 - 2003), the PoC was only used seven times. From 2007 - 2011, it was used 33 times. Then from 2011 - 2016, it rocketed to 115 uses.

See tables from The Detail (2016) below.

Far from the mechanism operating as a minority rights safeguard, the then largest party that represented the hitherto dominant group, tabled the vast majority of these PoCs. At this time, the DUP had the numbers to secure a PoC on its own, signing 82 of the 86 on its own. The two nationalist parties together tabled PoCs 29 times. 'Others' rarely used it.

PETITIONS OF CONCERN 2011-2016	
PARTY	NUMBER SIGNED
DUP	86
Sinn Féin	29
SDLP	29
Green	4
Alliance	3
UUP	2
NI21	2
Independent Unionist	1

The subject matter of the PoCs are given below. The Welfare Reform Bill by far tops the poll with 49 PoCs, 47 of them by the DUP separate amendments to the Bill. Most notoriously in our sector, it was used five times to block marriage equality initiatives. And it was used three times for the party-political purpose relating to complaints against MLAs.

LEGISLATION AND MOTION	NUMBER OF PETITIONS OF CONCERN	YEAR TABLED
Welfare Reform Bill	49	2015
Education Bill	10	2014
Local Government Bill	7	2014
Marriage Equality	5	2012-2015
Criminal Justice Bill	4	2013
Assembly & Executive Reform (Assembly Opposition) Bill	4	2016
Planning Bill	3	2013
Justice Bill	3	2015
Complaints against MLAs	3	2012 / 2014-2015
A5 Dual Carriageway Project	2	2011

The controversial use of the PoC in this way led to numerous reviews of its operation. The Assembly and Executive Review Committee's review of it came up with reform proposals which, in practice, only really saw results by the time of the New Decade, New Approach (NDNA) deal in 2020. Legislation was tabled which made limited reforms: it would be no longer possible for just one party to table a PoC, at least two parties were needed; misconduct sanctions against ministers or MLAs would now be out of scope; and reasons must be given when tabling a PoC.

Most parties wanted much broader reform, and for it to properly operate as a safeguard, with objective criteria in line with human rights-based standards, and an independent body adjudicating on PoCs (the Human Rights Commission) was proposed. But this did not happen.

However, with the minimal reforms, the short mandate of 2020-2022, and the general disrepute in which the PoC was viewed, it is notable that there was only one attempt to use it during this term (by the DUP/TUV on the integrated education bill) which, incidentally, failed.

St Andrews Veto

While the use of the PoC declined, the use of what we are calling the St Andrews Veto (SAV) started to rise.

This mechanism was introduced as part of the 2006 St Andrews Agreement as a DUP requisite before agreeing to take up the First Minister's office. Its express purpose from the DUP's perspective was to stop 'ministerial solo runs,' i.e. Ministers taking decisions without the rest of the Executive being on board. The example most highlighted was the decision of Sinn Féin's Martin McGuinness as Minister of Education to abolish the 11+ transfer test.

The SAV in effect changed the role of the Northern Ireland Executive. The Executive already had a decision-making role in ministerial decisions that were 'cross-cutting' across departments. The new SAV dramatically extended this provision by requiring most ministerial decisions (with a few exceptions, such as quasi-judicial decisions by the Justice Minister post 2010) to have the support of the full Executive if they were 'controversial' or 'significant'. These concepts are not objective human rights law terms, being quite woolly, subjective and elastic lay terms.

For ministerial decisions to be subject to this SAV, they also had to be on matters outside the agreed Programme for Government. We have not had a Programme for Government for over a decade, therefore almost all 'significant' or 'controversial' decisions in this time fell within the scope of the SAV.

Ministers are under a legal duty to refer any decision that may be 'controversial' or 'significant' to the full Executive, where any three ministers (including the First or deputy First Minister) can require the Executive vote to be taken on a so-called 'cross-community' basis. In practice, both a majority of designated unionists and a majority of designated nationalists need to be in favour, while designated 'others' do not get a vote. A unionist or nationalist party with three ministers can veto things on its own. The actual use of this veto is the tip of the iceberg. Ministers are likely not to take a decision if they know they would be legally required to refer it to the full Executive and it would be blocked in this way.

The SAV was used six times during the 2011-2016 mandate including on the Irish language bill, Irish language and Ulster-Scots strategies - despite both being legal obligations, with the Courts subsequently finding the Executive had acted unlawfully. It was only used once in the Assembly term of 2016 - 2017 - to block a consultation on equal marriage. Post NDNA, it was used six times by DUP to block votes on Early Medical Abortion Services, an Executive request to extend the Brexit transition period and an extension to COIVD measures.

There was some reform in the *Executive Committee (Functions) Act (Northern Ireland) 2020* that excluded planning decisions from the SAV's scope, but the veto is still pretty much intact.

My favourite example of caselaw on SAV is the then environment Minister Edwin Poots MLA's challenge to one of his own decisions. Poots asked for post-Brexit port checks to be stopped on the grounds that the Minister who had authorised them had erred in overstepping his powers by not referring the matter to the Executive, i.e. Poots himself.

Executive Agenda Veto

A further mechanism is what we have called the Executive Agenda Veto. Paragraph 2.11 of the Ministerial Code provides that inclusion of ministerial proposals on the agenda for the NI Executive must be agreed by both the First and deputy First Minister. In practice, this means either the First or deputy First Minister can block an item being discussed at the Executive meeting, so that no decision at all can be taken on it.

Examples of use from 2020 we recorded were:

- Irish/Ulster-Scots languages strategies blocked for over 30 meetings.
- Budget blocked at numerous meetings December 2020 to January 2021.
- Legislation on welfare gaps blocked 17 times.
- Opt-out organ donation blocked in 2021.
- Upskirting and abuse legislation blocked in 2021.

The Fresh Start Agreement 2015 provided for a limitation on the use of this veto but it was non-binding and never implemented.

'Call in'

Another mechanism is the 'call in' at local councils. It is still one of Stormont's safeguards because the Assembly legislated for it under s41 of the Local Government (Northern Ireland) Act 2014. 'Call in' was an attempt at a minority rights safeguard. 'Key decisions' at Council can be 'called in' by 15% of Councillors, either on procedural grounds or because it is contended that a decision would 'disproportionately affect adversely' a section of the inhabitants of the council area.

In relation to this latter category, the 'call in' is sent to a lawyer to make a legal determination as to whether the key decision in question meets the threshold of 'disproportionality affect adversely' a named section of the community.

If the lawyer determines that it has been met, the decision has to be taken by a 'super' majority of 80% of councillors.

This concept in law 'disproportionately affect adversely' is similar to the concept of 'adverse impact' in NI equality law, where it means a form of discriminatory detriment, something objective and measurable. Disproportionate would indicate it is a significant discriminatory detriment.

'Call in' was to be given much greater legal certainty by secondary legislation, the *draft Local Government (Standing Orders) Regulations (Northern Ireland) 2016,* which would have tied 'call ins' to inter alia decisions incompatible with ECHR rights or the Section 75 Equality Duty. However, these Regulations were blocked by a PoC.

CAJ is currently involved in proceedings against the Information Commissioner relating to a Belfast City Council 'call in'. A legal determination on a DUP 'call in' appears to have held that having to look at Irish alongside English on a sign constituted a disproportionate adverse effect on a section of the community. We are keen to see the reasoning for that determination. There is a risk again that the purpose of an equality safeguard, a minority rights safeguard, has been turned on its head, as it is in practice blocking the realisation of policy intended to progress minority language rights.

Equality Impact Assessments

The final safeguard is our equality impact assessments, a core safeguard of the 1998 Agreement, legislated for by the Section 75 of the Northern Ireland Act. They constitute the statutory equality duty whereby public authorities in assessing policy are to impact assess equality impacts against that concept of adverse impact, i.e. does a particular policy constitute an adverse impact - a discriminatory detriment, something objectively measurable, which can be tied into the case law on discrimination.

The Northern Ireland Office, though, with some sleight of hand, added a 'good relations' limb to the Section 75 duties. The words 'good relations' are not mentioned in the 1998 Agreement, but they were added to the legislation.

As result of concerns raised at the time by CAJ, UNISON and other members of the Equality Coalition, the 'good relations' duty was subordinated to the equality duty on the face of the legislation. This should have prevented lay notions that a policy promoting equality can be trumped by a lay interpretation that it would be bad for good relations as it is politically contentious.

Unfortunately, that safeguard seems to have been ignored, and we have documented precisely this happening with lay definitions of good relations being brought into policy because of an 'adverse impact', i.e. what is politically contentious or what makes a political party angry. **The duty to impact-assess policies for adverse impacts is only provided for in the legislation for the equality duty, not the good relations duty. Yet 'good relations impact assessments' are nevertheless undertaken by many public authorities under a lay definition.** In effect, the good relations duty is being used as a veto over equality-promoting policies (CAJ, 2013).

This returns us to the question of the presentation - has the intention of the 1998 Agreement for rights-based safeguards in practice been flipped on its head?

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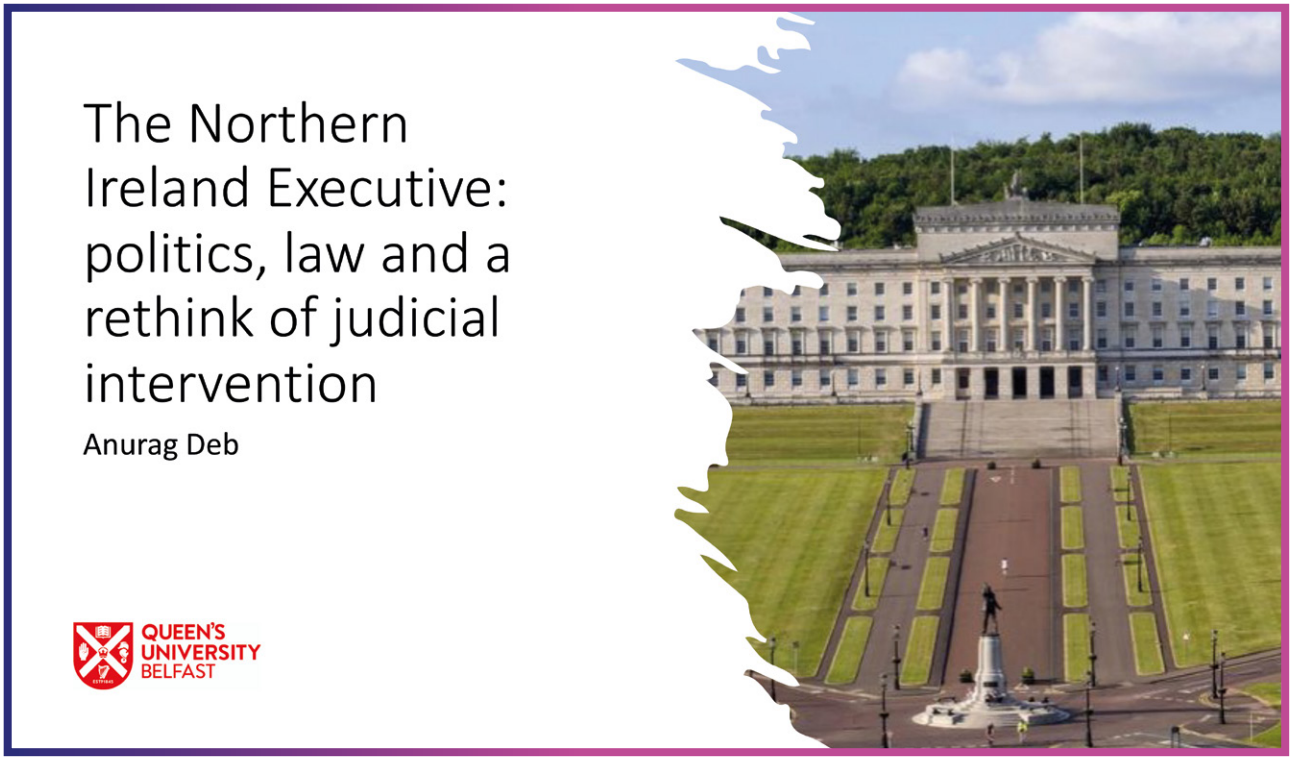
The Northern Ireland Executive: Politics, law and a rethink of judicial intervention

Anurag Deb, PhD Candidate, School of Law, Queen's University Belfast

I want to look at the Stormont Executive, specifically comparing it to other governments in the UK to argue that the courts should not treat the Executive like other governments in the UK. This is because Stormont was not made in the image of Westminster and so it should not be treated like Westminster.

How the Stormont Executive Committee differs to other UK arrangements

The Executive Committee is not an executive body but a committee of the Assembly with the power to call up witnesses and take evidence, like other Assembly committees. The Scottish, UK and Welsh governments are all cabinets and do not have this power.



Individual departments in the Executive also have their own distinct legal personalities as decision-makers. The departments can be sued in their own right, which does not happen in Britain. If you sue the Department of Health in the UK, you are suing the Secretary of State for Health. The Department there is an extension of the Secretary of State, but here, the Department of Health is under the direction and control of its ministers at all times, and it is a separate legal entity.

The mode of ministerial appointments is set up so that the largest party of the largest designation in the Assembly nominates the First Minister candidate. The largest party of the second largest designation nominates the deputy First Minister candidate. The Justice Minister is appointed by resolution of the First and deputy First Ministers and parallel consent by the Assembly. All other ministers are appointed by the d'Hondt formula.

This ministerial entitlement by statute marks the one of the most important differences between Stormont and Whitehall or Holyrood or Cardiff Bay. Here, it is a statutory right to hold ministerial office depending on your seat strength in the Assembly. It is not political patronage or ideological alignment as it would be in a coalition in Britain. Here, the rival parties have to work together. The Scottish Parliament, for example, can fire the government collectively but here the Assembly cannot. It can withdraw its confidence in an individual minister or censure or sanction an individual minister, but not the Executive as a whole.

Checks on Executive decision-making

Focusing on the legal aspects rather than the political as there is no Assembly at the moment, **the Northern Ireland Act is unique in the UK in that it is a very legalised constitutional settlement. Importantly, the ministerial code at Stormont is justiciable. You can sue a minister for having breached the code.** The equivalent codes in Britain are not justiciable. Also, there is a duty to act collectively - the 'significant' and 'controversial' category of decisions which Daniel detailed earlier. And there is no Executive authority to do 'solo runs', also detailed by Daniel earlier. As a result of the St Andrews reforms, there is also a legal requirement to affirm the Pledge of Office, which includes a duty to act in good faith at all times. Again, this is justiciable and the general principles of judicial review apply to ministers.

The consequence of this arrangement is that it leaves the Executive politically weak by design, disunified and its decision-making frequently is not collective, and there is no collective responsibility. Also, the Executive has less freedom than the UK, Scottish and Welsh governments in terms of ministerial manoeuvrability. The Northern Ireland Act provides for the courts to reach into the substance of ministerial decision-making in a way that would shock most courts across the water. Yet, our courts seem to not understand that.

How courts treat Executive decision-making

I want to contrast three cases to show what I mean: *De Brun & McGuinness's applications for judicial review, Napier's application for judicial review and Robinson.*

De Brun & McGuinness was at the start of the devolution settlement in 2001. It was decided in the High Court by the then Mr. Justice Brian Kerr, the late Lord Kerr. The First Minister refused to nominate Sinn Féin ministers to attend the North-South Ministerial Council as a means to persuade Sinn Féin to exert whatever influence it had over the decommissioning of weaponry by the Provisional IRA. The judge declared this unlawful because the actual factor - decommissioning of weaponry - was not a legitimate consideration in order to nominate ministers to attend the North-South body. He also provided guidance on the future lawful exercise of power which is to consider whether a minister is actively trying to undermine the Belfast (Good Friday) Agreement. So, if a ministerial colleague is acting in such a way to undermine the substance of the 1998 Agreement, the First or deputy First Minister may lawfully refuse to nominate them for the North-South body.

I want to contrast that with the Napier case, which was decided two years ago. This was in relation to the boycott of the North-South Ministerial Council over the Protocol. The DUP at the time set out their policy to withdraw from this Strand 2 institution which was challenged through judicial review by Sean Napier. The court held that it was unlawful and the judge, Mr Justice Schofield in the High Court, severely criticised this wrecking or spoiling tactic. He declared a failure to attend the North-South Ministerial Council and the failure to agree an agenda as unlawful. Essentially, the judge considered the action to be political.

Contrasting these two cases to arguably the most weighty case under the devolution settlement, *Robinson*. This related to the election of the First and deputy First Ministers in 2002 which happened one day outside of a six-week timescale, and so was challenged as being unlawful. The High Court said it was not unlawful, but the Court of Appeal said it was unlawful and the House of Lords then disagreed. The Lords' reasoning rested on the Northern Ireland Act being in effect a constitution with the main purpose to implement the 1998 Agreement which has as a central tenet "participation by the unionist and nationalist communities in shared political institutions." Applying a flexible approach to a strict statutory timescale was to ensure that the institutions do not collapse, so the delay was not unlawful.

What does this show us? Taking a legal realism approach, which acknowledges that interpretation of law reflects the socio-political context in which that law must operate, the socio-political context here is that the purpose of the Northern Ireland Act is to implement the 1998 Agreement. Applying this to Napier and the DUP boycott, three main points show how the boycott subverts the 1998 Agreement:

- There is a duty to take part in the North-South Council - that is absolute.
- There is a duty to discharge all ministerial functions in good faith, according to the Pledge of Office.
- The interdependent nature of the three Strands of the 1998 Agreement means that if one fails, all of them suffer, which prevents the institutions envisioned in the Agreement from functioning.

Is this judicial government?

I say it is not a judicial government for two main reasons. The jurisdiction of the courts to intervene in Executive decision-making is a corollary of the design of the Executive, and not a key mechanism. Courts do not like to intervene in governmental decision-making at Whitehall, for example, because its design is a political evolution over centuries with no prescription of, say, what Cabinet should look like or how ministers make decisions. Here, by contrast, there is a specific statutory design for the Stormont Executive which opens the door to courts to interpret the language of the statutes. Second, and more importantly, this jurisdiction of the courts exists to prevent politics from breaching the requirements of the law. Now, this arguably may be possible in Britain, but it is far less possible here because the Executive composed of elected officials must operate within harder rule of law constraints and explicit statutory boundaries that other UK governments do not operate under.

Why this is relevant for the purposes of discussing rights?

To realise the potential that this sort of legalised decision-making can unlock, there needs to be an approach that is grounded in rights, not just in politics but also in the courts for when the politics fails.

The courts should not look at the Stormont Executive as any other government in the UK because it is different. We need to acknowledge that and that acknowledgement needs to come through substantively in the way the courts deal with Executive decision-making, especially when it collapses.

So, the courts can remedy failures and deficiencies in a way that furthers the 1998 Agreement. The reasoning in de Brun & McGuinness was concerned with trying to ensure that the 1998 Agreement remained stable and that the Stormont Executive functions always from the starting point of compliance with the Agreement. So relief has to be future-facing. Just stopping at a determination of unlawfulness is not enough, as was the case in Napier which resulted in two declarations of unlawful decision-making with no direction for remedying a future collapse, which indeed came to pass.

Future-facing relief is important because derailments are not exceptional, and the periodic occurrence of collapsing governance has to be addressed by the courts by looking to the design of the Agreement.

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Controlling Bodies with Bureaucracy - Abortion in NI: Access, Experience, and Provision

Emma Campbell, Ulster University & Alliance for Choice

On October 21st 2019, a decriminalisation framework for abortion was enacted in Northern Ireland, with the letter of the law based on the verbatim recommendations of the 2018 CEDAW Inquiry into Abortion in Northern Ireland (CEDAW, 2018). Both Health and Justice were Departments which had devolved powers at the time, however CEDAW and wider NI civil society argued that the lack of abortion access in NI was fundamentally a human rights issue and therefore responsibility lay with Westminster.

The CEDAW inquiry found the UK government responsible for both grave violations of human rights and systemic abuses through the failure of providing services and criminalising access.

Their recommendations were far reaching and included a duty on the Secretary of State for NI and Department of Education to provide Relationship and Sexuality Education based on best scientific evidence.

The parts that were enshrined in law obliged the Secretary of State for Northern Ireland to ensure that all of these aspects were met in a timely manner. Some of the responsibility, namely commissioning of services and protocols, as well as designation for where to take the abortion medication, were given to the Department of Health and its minister. The new primary legislation, effectively repealed the provisions of the 1861 Offences Against the Persons Act, in order to enable decriminalisation (The Abortion (NI) (No.2) Regulations 2020). However, Regulation 11 introduced the re-criminalisation of medical professionals who perform a termination deemed to be outside the terms of the Regulations. This re-criminalisation was not recommended by CEDAW (2018). When medical professionals conduct procedures outside of the legal framework, such issues are usually dealt with administratively or through the application of professional standards, rather than through creating a criminal offence. Both the Primary legislation and Regulations were in place for some time with well-publicised difficulties, due to the failure of the NI Department of Health to commission the services required.

In January 2021 the NI Human Rights Commission initiated legal action over the failures to commission and fund abortion services in NI (NIHRC, 2021). In response, the Secretary of State laid The Abortion (Northern Ireland) Regulations 2021 which provide an additional power of direction that could compel the commissioning of services (The Abortion (NI) Regulations 2021).

The good news is:

- many abortions take place via Early Medical Abortion and many women and pregnant people are receiving access,
- Secretary of State for NI acted to direct legislation to be implemented and legal avenues, in terms of challenge, are exhausted,
- Safe Access Zones - legislation in place since May 2023.

Blocks

Northern Ireland Health Minister Robin Swann maintained that he could not set abortion services up without support from the Stormont Executive, as the matter was controversial and cross-cutting - that is that it was the responsibility of more than one department. This measure was designed to prevent sectarian decisions and not to create a veto over an area of already legislated for healthcare.

In the judicial review proceedings taken by NIHRC against the NI Executive and the Secretary of State for NI, the High Court heard that evidence from the Department suggested the First Minister and DUP leader Arlene Foster, whose party opposes abortion, had "made clear" that proposals were never going to be passed by the Executive.

Imperfect but well-intentioned 1998 Agreement mechanisms were abused to maintain barriers to progress – as we heard from Daniel's discussion of the St Andrews Veto earlier. This meant that fully commissioned abortion services were not realised, Relationship and Sexuality Education was not brought forward, and Safe Access Zones took 4 years to be implemented.

The frustrating bureaucratic and civil service processes in resistance included continual legal challenges and Departmental delays, including awaiting the legal challenge outcomes. Unexplained Departmental inaction where there was a breakdown in communication and explanation to key stakeholders including the Secretary of State for NI office. Of course, there was also the collapse of Stormont, which helped usher in the initial changes but frustrated progress in its most recent form.

Why does it matter?

This matters because it continues serious human rights violations, it disregards the legal duty of the Health, Education and Executive departments and it impacts on ordinary people's lives every single day, especially those who are already the most marginalised. Additionally, every extra regulation, bureaucratic step or government delay is a barrier which forces people overseas or to wait unreasonably long for appointments.

Insights

The CEDAW inquiry and subsequent change in legislation were intended to guard against the bad-faith use of institutional mechanisms to block progress and access. However, what we continue to witness, despite public support for change and a huge uptake of services, is an unacceptable four-year delay to the full range of services required by law according to the minimum recommendations from the CEDAW enquiry. When the blockages come from DoH, DoE and The Executive Office and by extension through to trusts and service managers, we see a service with huge potential that is stripped of its dignity and true safety for patients.

The institutions are slow and process-driven due to a mixture of cultural legacy from the previous restrictive legislation on abortion, a lack of devolved government and therefore reticence in the civil service, and ministers and senior health providers who are openly opposed to abortion healthcare. In addition, the health service has been driven to a bare bones service due to ideological underfunding and the Covid-19 crisis. This cannot continue and the poor treatment of some people who did not get to see the talented and enthusiastic care providers that do exist continues the shame of our institutional misogyny in governance and reproductive healthcare.

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REPRODUCTIVE RIGHTS

Gender, power-sharing and policy-making

Claire Pierson, Senior Lecturer in Politics, University of Liverpool

Ensuring equality for women and the inclusion of gendered policy issues on the political agenda is in part determined by how institutions are designed and function in practice. "Institutions shape, and are shaped by the political, economic and social forces within which they are embedded" therefore paying attention to the ways in which they are gendered will help us to understand constraints to political activity (Mackay, Kenny & Chappell, 2010). Consociationalism has become the model of choice in institutional design for societies emerging from violent conflict. The model, conceptualised by Lijphart in 1969, provides for the democratic management of divided communities based on the accommodation of politically salient communal identities within a power-sharing political system. Northern Ireland represents a more liberal form of power-sharing where power-sharing partners are determined by the electorate and MLA's designate on entering the Assembly.

Byrne and McCulloch (2012) point to the gender paradox of power-sharing, in their analysis there is no inherent reason why women should not be able to reach equal inclusion under liberal power-sharing, yet experience and evidence suggest negative outcomes for women's descriptive and substantive political representation. However, some research has pointed to more positive outcomes, for example Bell's (2015) research which found that political settlements which adopted power-sharing were often coupled with gender quotas for elections. Feminist research and analysis on power-sharing both internationally and in the Northern Ireland context points to a negative relationship between gender and power-sharing based the fact that ethno-national identity is deemed to be the most politically salient identity and therefore marginalises and subordinates other identities, including gender (Kennedy, Pierson & Thomson, 2016). This hegemony of ethnicity can also act to sectarianise issues in order to make them politically salient, for example politicians stated that abortion (before decriminalisation) was an issue which united all political communities in their opposition to liberal laws (Pierson and Bloomer, 2017).

Accounts of gender and policy-making point towards an ambivalent approach to gender and feminist issues within the Northern Ireland Assembly. Thomson (2017) writes that whilst there appears to be no opposition to liberal feminist norms such as women's participation these are not acted on via concrete mechanisms.

Policy is proofed via a formal approach to treating men and women the same which does not result in equal outcomes, or substantive equality for women.

Formal understandings of equality divorce gender from its historical and contemporary context and ignore material inequalities for women in society. The current Draft Programme for Government does not reference gender equality and there is a lack of data on gender inequalities and outcomes (Gray, et al, 2020). Whilst the Executive Office collected and published data on gender inequality between 2008 and 2015 this data stopped being collected in 2015 when responsibility for gender equality moved to the Department for Communities (Ballantine et al, 2023). Rouse (2016) argues that the lack of delivery on gender equality can be attributed to benign institutional resistance from conservative civil servants or a more malign resistance to implementation at the top. It is clear, however, that there is a lack of budgeting to ensure gender equality is met.

Beyond formal approaches to gender equality and a lack of data at the institutional level, there continues to be a lack of progress on development of policies which would tangibly effect women and progress action on gender equality. NI's Gender Equality Strategy expired in 2016 and whilst there has been consultation with an expert panel and a co-design group with recommendations produced in 2020 there continues to be no current Gender Equality Strategy.

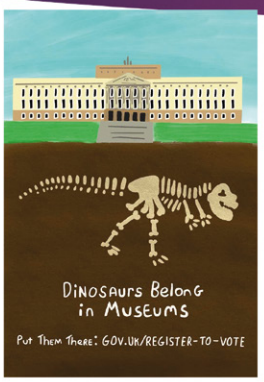
Northern Ireland is the only region of the UK without a childcare strategy and also the only region without a specific women's health strategy.

Whilst in 2021 the Executive Office began the process of drafting a Strategic Framework to End Violence Against Women and Girls the consultation period on this document only ended in October 2023 and a policy is not currently in place. Women's Aid, a lead agency on domestic abuse had their core funding cut by the NI Department of Health in September 2023, threatening the future of service provision. Whilst abortion was decriminalised by Westminster in October 2019, the Department of Health refused to commission services resulting in the Secretary of State having to step in to ensure the provision of services (Pierson, 2022).

However, politicians do believe that they are acting on behalf of women's interests. Haughey (2023) surveyed MLA's who indicated, across the political spectrum, that they acted on behalf of women's organisations (an overall score of 5.5, where 7 indicated 'great importance' was found, with no significant difference based on party affiliation). There is evidence to suggest that some critical actors are pushing forward issues of gender equality, in particular in the form of Private Members Bills. In 2022, the Period Products Bill was proposed by SDLP MLA Pat Catney. The bill places a duty on the Department for Communities to make period products available to those who need them.

In 2022, the Department of Education confirmed funding of more than £400,000 to provide free period products to schools. In 2023, the Abortion Services (Safe Access Zones) Act was passed. Introduced by Clare Bailey of the Green Party, it protects the right of women to access abortion and associated sexual and reproductive health services through the creation of buffer zones outside of health service locations. The Domestic Abuse and Civil Proceedings Act 2021 was introduced by Naomi Long of the Alliance Party and criminalises abusive behaviour that occurs on two or more occasions against an intimate partner, former partner or close family member.

In conclusion…



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- Gender has to be centred within any mechanisms to restore or reform the Assembly.

What would this look like?

- Quotas
- Gender friendly working practices
- Reforming veto mechanism

It is likely that any mechanisms to restore or reform the Assembly will ignore gender. This is a mistake. Discussions need to focus on questions of quotas and representation, working conditions and ensuring that gender equality is integral to good policy-making. Without centring questions of what a 'gender-friendly' Assembly could look like in discussions of reform gender equality will continue to remain side-lined and optional.

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Dayton and the Belfast (Good Friday) Agreement – New beginnings or more of the same? Contexts compared

Leo Green, PhD candidate Transitional Justice Institute

Introduction

This brief submission has been extracted from a recently completed comparative study of the outworking of consociational power-sharing governance structures in both Northern Ireland (NI) and Bosnia & Herzegovina (BiH). The primary focus of the study included a testing of the capacity of such arrangements to effect social transformative change through a meaningful domestic application of the international and regional human rights framework, inclusive of measures to enable the realization of substantive equality and reconcile divided communities.

As part of its overall assessment the study considered failures relating to both institutional workings and non-adherence to human rights standards in both regions. Although the study recognises a connection between shortcomings in both respects, it also highlights a common wide range of critical factors at play in determining both the general and specific outworking of power-sharing governance in both regions.

Overview

Almost three decades after the conclusion of peace in Bosnia & Herzegovina (BiH) and Northern Ireland (NI) both countries are locked in a seemingly permanent political crisis and disputes about the legacies of past conflict. Although their respective peace agreements - the Dayton Peace Accords (1995) and the Belfast (Good Friday) Agreement (1998) – are justifiably eulogised for their role in facilitating an end to seemingly intractable conflicts, questions remain regarding the capacity of their power-sharing governance arrangements to effect progressive social change.

Whilst the respective contexts within which conflict took place and peace was concluded in both countries differ greatly, the outworkings of their peace agreements are strikingly similar. In positive terms, they have provided a relatively solid foundation for a durable peace. In negative terms, however, government performance in both countries remains paralysed by the constitutional battleground, irreconcilable political goals, and zero-sum politics, including endless disputes about rights, reconciliation and legacy issues relating to past conflict.

(from L-R) President Slobodan Milošević of Serbia, President Alija Izetbegović, of Bosnia-Herzegovina and President Franjo Tudjman of Croatia sign the Dayton Agreement peace accord, 21 November 1995.

Unsurprisingly therefore, both countries are beset with dysfunctional government as well as an entrenchment of communal division, and evidence little prospect of transformative change. Several of the more prominent negative outworkings common to both situations are listed in the notes below. Particular to the seminar theme, the notes also identify the critical areas of exploration in the search for remedial change.

Common negative outworkings:

- Institutional dysfunction, regular bouts of immobilism and gridlock in government
- Fluctuating political stability - legislative and political paralysis
- The fortification of elite political actor resistance to political and constitutional change
- Diminishing public confidence in the political institutions
- Increased societal polarisation
- Marginalisation of and discrimination against minorities
- Regressive perspectives on key human rights and equality issues
- Persistent socio-economic, education and health inequalities
- Ongoing exploitation of identity issues for political purposes
- Lack of political agreement on legacy issues and reconciliation

Commentary

Consociationalism is widely regarded as a 'prescription model' for managing ethnically divided societies. Its four core foundational components – grand coalition, the mutual veto mechanism, proportionality, and segmental autonomy are framed as a complementary package which aims to guarantee both representation in government and an 'authentic' role in political decision-making for all the major societal segments.

Both NI and BiH, with particular reference to the durability of their respective peace agreements, are routinely cited as the confirming cases of the efficacy of consociational power-sharing model. As apparent from the sampled common negative outworkings listed above, both instances might equally be conscripted in support of a questioning of its effectiveness and/or demands for a modification or abandonment of some of its operational components.

The power-sharing institutions in both NI and BiH have been in operation for similar periods of time. The related arrangements have been closely monitored – both domestically and internationally – throughout that period. The listing above is drawn from such reports and represents routinely cited criticisms and failings particular to their performance which are repeatedly invoked as supporting demands for change to particular aspects of their application. The comparative study from which these notes are drawn, however, highlights a much wider list of contextual factors at play in determining the outworking of this form of power-sharing than that which derives from shortcomings related to its operational components. These include realpolitik, the motivations of elite political leaders and the dynamics which shape them.

The determining influences of both realpolitik and elite political leader motivations derive largely from historical and current factors which include the depth and durability of the principal societal divisions and the circumstances within which peace was concluded.

With few peace agreements ending in outright victory, the more likely 'peace context' will leave some of the core opposing, and perhaps irreconcilable, conflict aims of key conflict protagonists unresolved and carried over into the political domain.

Characterised within the literature as the 'formalisation of political unsettlement', the dominant post-peace settlement is thus marked by a perpetuation of ongoing political disputes and repetitive bouts of negotiation or attempted renegotiations. Although optimists suggest that the resultant climate throws up a series of critical junctures within which outstanding differences can be resolved, the NI and BiH experiences suggest that such opportunities are simply exploited to further the standing of political elites within their respective groupings, compounding rather than ameliorating divisions in the process. Over the past three decades NI has had at least six supplementary implementation agreements and BiH has experienced four major attempts at reaching agreement on significant constitutional change. None of the attempts in either jurisdiction have impacted significantly or positively on the prospects of progressive change in either region.

Further to the above, the characterisation of both NI and BiH as deeply divided societies begs a critical focus with regard to the search for strategies which will remedially impact on the outworking of powersharing in both regions, including addressing institutional dysfunction and rights and equality deficits.

Although the trajectory of the evolution of segmental divides in both countries, differs greatly in detail and timeframe, it has, over time, in both instances, been shaped and progressively sharpened by colonialism, religion, ethnicity and periodic bouts of inter-ethnic violence, morphing ultimately into competing nationalisms. Beyond the entrenchment of segmental division, the outworking in both regions of this eventual fusion has resulted in ingrained polarisation, unequal distribution of power, societal inequalities and enduring entangled disputes over territory, sovereignty, demands for self-determination and rights protections.

The above said, and of particular importance to the seminar theme, it is worth noting that the categorisation of a deeply divided society relates to more than a description of the source of its deep divisions. Whilst the depth and durability of the division is one critical indicator, the other. and arguably more important, indicator is the organisation and antagonistic outworking of politics along the segmental divisional fault line/s. This then presents as a critical focal point for the search for strategies aimed at addressing the need for change.

Although the efficacy of consociationalism is often tested against the application and outworkings of its four operational components listed above, it is widely acknowledged that its effectiveness is contingent, ultimately, on the ability and willingness of elite political leaders to make it a success. It is also recognised that, whereas the actions of political elites will be determined by their perception of strategic benefit for themselves or their support base. This suggests that the key to change lies with a bottom-up enlisting of support for action to transcend difference and divisions.

Biographies of the speakers

Siobhán Wills is the Director of the Transitional Justice Institute. She was Course Director of the LLMs in Human Rights and Transitional Justice and Gender, Conflict and Human Rights until 2018. She is a Senior Fellow of the Higher Education Authority; a member of the International Law Association Global Health Committee and of the Royal Irish Academy Standing Committee on International Affairs and previously a member of the Royal Irish Academy Social Sciences Committee. From 2014-2018 she was a member of the International Law Association Committee on the Use of Force. Her research interests are protection of civilians, peacekeeping, and use of force.

Patricia McKeown is Regional Secretary of UNISON, the Public Service Union, and one of the most senior trade unionists in Ireland. She is Co-Convenor of the Equality Coalition. She was President of the Irish Congress of Trade Unions from 2007 to 2009 and was also Chairperson of its Northern Committee (from 2005 to 2007). She is a former Deputy Chairperson of the EOCNI. Patricia is a worker representative for Ireland on the EU European Economic and Social Committee.

Anne Smith is a senior lecturer and researcher at Ulster University's Transitional Justice Institute and School of Law. Her research interests are human rights, peace, conflict and transition, with a strong focus on transitional constitutionalism.

Daniel Holder is the Director of the Committee on the Administration of Justice, and co-convenor of the Equality Coalition. Prior to this he worked in the policy team of the Northern Ireland Human Rights Commission for five years. Before that he led a migrant worker equality project run by the NGO the South Tyrone Empowerment Programme and Dungannon Council. He previously worked in Havana, Cuba as a language professional for the University of Havana, press agency Prensa Latina and national broadcaster, ICRT. He has a primary degree in Spanish and Sociology and an LLM in Human Rights Law, both from Queens University.

Anurag Deb holds a master's degree in human rights law from Queen's University Belfast, where he also read law as an undergraduate. In 2019, Anurag was called to the Bar of England and Wales. In 2020, he started his doctoral research at Queen's University, exploring the concepts and values underlying legislative drafting in the UK. Anurag also works as a paralegal at KRW Law, assisting in public law, personal injury and clinical negligence. Between 2020 and 2022, he was a part of efforts to secure climate change legislation in Northern Ireland, resulting in the Climate Change Act (NI) 2022.

Rory O'Connell joined the Transitional Justice Institute (TJI) and School of Law in 2013 as Professor of Human Rights and Constitutional Law. He is the Director of Development & Partnerships – School of Law (appointed 1 September 2023). He held the role of TJI Director from February 2014 to February 2020, and Research Director for Law from July 2017 to September 2023. Rory's research and teaching interests are in the areas of Human Rights and Equality, Constitutional Law and Legal Theory. His latest book Law, Democracy and the European Court of Human Rights (Cambridge 2020) examines the role of democracy in the jurisprudence of the European Court of Human Rights.

Emma Campbell is a Research Associate in Social Studies at Ulster University on the cross-border HEA-funded North/South Reproductive Citizenship project (2022-Present). Her PhD was on utilising art, primarily photography and performance, as a tool for abortion rights along with Alliance for Choice of which she is a co-convenor. Emma is also a member of the Turner Prize winning Array Collective and her individual practice is embedded in queer & feminist art and activism. Largely focusing on the issues raised by the lack of abortion access on the island of Ireland and attitudes fostered by colonialism and deep religious conservatism, she makes work and carries out research that is participatory and active in affecting change.

Claire Pierson is a Senior Lecturer in Politics at the University of Liverpool. She specialises in feminist politics, reproductive justice and gender security. She is currently working on a monograph focusing on gender and feminist politics in Northern Ireland after the Belfast (Good Friday) Agreement and leading a BA small grant on social movements and abortion rights in Malta. She is Chair of the Feminist Studies Association of the UK and Ireland, and a board member of Alliance for Choice Belfast.

Leo Green is a PhD Researcher at the Ulster University. He is in the closing stages of a comparative study of the outworking of powersharing governance arrangements in two deeply divided societies - Northern Ireland and Bosnia & Herzegovina. His research focus tests the capacity of such arrangements to effect social transformative change. He is a former Special Advisor and Political Party Manager at Stormont. He retired from party politics in 2013.

Notes


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