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Petitions of Concern

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Introduction

Northern Ireland's current system of government is consociational in nature.¹ Pursuant to the Belfast Agreement, public power is to be shared between British unionists and Irish nationalists, the jurisdiction's two politically salient ethno-national "segments". To this end, proportional representation in the Assembly is coupled with inclusive power-sharing in the Executive, the former facilitated by an STV electoral system while the latter is realised by an algorithm (the d'Hondt formula) for allocating ministerial posts in a way that is roughly proportionate to the number of seats a party wins in the Assembly.² Power-sharing and proportionality are then complimented by a mutual veto scheme. Certain "key" decisions in the Assembly are made on the basis of "cross-community consent", requiring either a majority of designated Unionists and Nationalists, as well as a majority in the Assembly, or a weighted majority of 60% of members, including at least 40% each of designated Unionists and Nationalists.³ In addition, any Assembly decision may be subjected to the cross-community consent decision rules where a "Petition of Concern" is brought by at least 30 MLAs.⁴ In a similar vein, the Ministerial Code provides that

¹ Brendan O'Leary, "The Nature of the Agreement" (1998) 22 *Fordham International Law Journal* 1628; Donald Horowitz, "The Northern Ireland agreement: clear, consociational and risky" (2001) in John McGarry (ed.), *Northern Ireland and the Divided World: The Northern Ireland Conflict and the Good Friday Agreement in Comparative Perspective*, 89-108.

² See Northern Ireland Act 1998, s. 18(5); Northern Ireland Act 1998, s. 38.

³ See Northern Ireland Act 1998, ss. 4(5), 17, 30, 39, and 41.

⁴ See Northern Ireland Act 1998, s. 42.

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decision-making within the Executive Committee may be subjected to cross-community decision rules at the request of at least three Committee members.⁵

The Petition of Concern veto is the focus of this paper. The Northern Ireland Assembly and Executive Review Committee has recently considered changing or eliminating the Petition of Concern in light of criticisms that it is unfair, impedes legislative productivity, and is prone to abuse. With reference to the experience of other consociational democracies, this paper will assess the strengths of the latter two criticisms and outline some options for reform.

The Petition of Concern Veto

As the summary above indicates, decision-making within the Northern Ireland Assembly is subject to two distinct kinds of veto powers: an automatic veto for particular pre-defined matters, or “key decisions”, and the Petition of Concern veto, which can be activated by 30 MLAs regardless of subject matter. Both kinds of veto powers empower designated Nationalists and Unionists (as opposed to designated “Others”). Both are also “true” vetoes in the sense that they can effectively block a decision (rather than merely delay its passage). But the Petition of Concern differs in that its subject matter is open-ended.

The exclusive nature of the veto powers – the fact that they only empower Nationalists and Unionists – has attracted a good deal of criticism; many would argue that the cross-community decision rules are unfair to those who do not identify with either of the two main communities.⁶ But the distinguishing characteristic of the Petition of Concern – its undefined scope – invites two additional lines of criticism. Because the Petition of Concern can be applied to any decision, it threatens to impede the productivity of the Assembly in ways that cannot be precisely anticipated. The potential for over-use is exacerbated by the fact that the veto may be played (as Mark Durkan recently put it) “like a joker”, trumping decisions that clearly have nothing to do with protecting the distinctive interests of either of the two main communities.⁷ Let us consider these two lines of criticism in more detail.

The Impact on Productivity

It is a kind of natural law of political science that the addition of veto powers in any political system tends to promote “policy stability”; as the number of ideologically distinct “veto players” expands, the “win set” (the policy space in which the preferences of the veto players overlap) tends to shrink and, consequently, so too do the prospects for altering the policy status quo.⁸ In a consociational setting, some policy stability is a necessary by-product of a more consensual style of decision-making. But too much policy stability can lead to regime instability; a political system that cannot get the basic things done may collapse altogether.

Thankfully, the Petition of Concern does not appear have endangered Northern Ireland’s system of government in this way, at least not thus far. As it happens, the Petition of Concern has mostly been used to block divisive motions within the Assembly which, although of symbolic or

⁵ See Northern Ireland Executive Ministerial Code, s. 2.12.

⁶ See Ian O’Flynn, “The problem of recognising individual and national identities: a liberal critique of the Belfast Agreement” (2003) 6 *Critical Review of International Social and Political Philosophy* 129; see also Alex Schwartz, “How Unfair is Cross-Community Consent-Voting Power in the Northern Ireland Assembly” (2010) 61 *Northern Ireland Legal Quarterly* 349.

⁷ HC Deb, 18 Nov 2013, col 1021.

⁸ See generally George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press, 2002).

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expressive significance, do not actually have any immediate legislative consequences.⁹ The use of the procedure to block legislation is arguably a more serious concern but it is also much less frequent. Technically, according to research conducted last year by Ray McCaffrey, the Petition of Concern had (as of March 2013) been used 24 times with respect to legislative bills.¹⁰ But, as McCaffrey points out, this raw figures gives a false impression because often a separate Petition is tabled in relation to a number of specific amendments or clauses pertaining to the same bill. After discounting for such instances, there were actually only 8 distinct pieces of legislation affected by a Petition of Concern during that period.¹¹ There is also a somewhat exaggerated perception that the Petition of Concern procedure has been used with increasing frequency in recent years. It is true that during the first several years of post-Agreement devolution (from 2 December 1999 up until the Assembly's temporary suspension from 14 October 2002) the Petition of Concern was used more sparingly – only seven times and never more than three times in a single year.¹² It is also true that recent years have seen a worrying trend; since the Assembly's powers were restored in 2007 up to March 2013 there were 49 uses of the procedure, with particularly dramatic spikes in 2010-11 (when there were 20 such instances) and again in 2012-13 (when there were 11).¹³ But if one discounts for multiple uses of the procedure relating to the same bill, the overall uses between 2007 and March 2013 drops down to 32, which yields an average use of 0.07 Petitions per plenary. This is only a slight increase from the average use of 0.04 Petitions per plenary during the first period (December 1999 – October 2002). Moreover, although we cannot know the true extent to which the Petition of Concern has had a chilling effect on legislative decision-making, it is also worth noting that the Assembly's legislative output compares favourably with its counterpart in Scotland. The Northern Ireland Assembly has successfully enacted 86 pieces of legislation since its powers were restored in 2007.¹⁴ Over the same period of time, the Scottish Parliament (which enjoys a wider range of competencies than the Northern Ireland Assembly and has no equivalent to the Petition of Concern) has enacted only 15 more.¹⁵

The Potential for Abuse

Although the Petition of Concern has not yet paralyzed Assembly, the veto is open to abuse and so the worry is that there is nothing to prevent it from being employed increasingly to obstruct the “normal” work of the Assembly in the future. Here it is important to remind ourselves of the purpose of a consociational veto. The purpose of a consociational veto power is to protect distinctive group interests, in the case of Northern Ireland, the distinctive *ethno-national* interests of the two main communities. There are essentially three categories of decisions that touch on those interests. First of all, there are decisions concerning language, culture, and symbols that have an obvious ethno-national resonance. Decisions about what flags to fly from Northern Ireland's government buildings, for example, or decisions relating to the promotion and legal recognition of the Irish or Ulster Scots languages, would also fall in this category. Second, there are decisions which relate to the legacy of the conflict in Northern Ireland. This category would include decisions relating to victims and survivors of the conflict, the commemoration of members

⁹ See for example Northern Ireland Assembly Official Report (Hansard) 10 April 2001, “Display of lilies in Parliament buildings”; 6 June 2000 “Motion on Union flag” (Petition of Concern); 11 December 2007, “FIFA eligibility”.

¹⁰ See Ray McCaffrey, “Additional Information of Petitions of Concern” (Belfast: Northern Ireland Assembly, Research and Information Service Briefing Paper 66/13, 2013) “Table 3”.

¹¹ These were: Criminal Justice Bill; Welfare Reform Bill; Planning Bill; Local Government Disqualification Bill; Justice Bill; Armed Forces and Veterans Bill; Caravans Bill; Victims and Survivors (Disqualification) Bill.

¹² McCaffrey, *supra* note 10, “Table 2”.

¹³ *Ibid.*

¹⁴ See <http://www.legislation.gov.uk/ni>.

¹⁵ See <http://www.legislation.gov.uk/asp>

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of the security forces or paramilitary organizations, and truth recovery for conflict-related deaths. Third, there are decisions which relate to the constitutional structure and institutions set up under the Belfast Agreement. This category would include decisions relating to the North/South Ministerial Council, the Civic Forum, and the Northern Ireland Human Rights Commission. In all such matters, Unionists and Nationalists will predictably have very different preferences informed by their respective ethno-national perspectives. The veto procedure ensures that neither group will be able to impose those preferences on the other by simple strength of numbers.

For the most part, the Petition of Concern has been used to manage matters of this kind. But because the scope of the veto is open-ended, it is capable of being used to block decisions which have nothing to do with community specific interests. It is no surprise then that the Petition of Concern has occasionally been abused in this way. Virtually no one is innocent of this charge; Nationalists, Unionists and even the “Others” have all been guilty of tabling pseudo-Petitions of Concern on occasion. To take a recent example, Sinn Fein, Alliance and the Green Party tabled a Petition of Concern in relation to a proposed amendment to the Criminal Justice Bill (an amendment supported by both the SDLP and most Unionists) that would have further criminalized the procurement of abortions except in certain pre-defined circumstances.¹⁶ Although one might applaud the defeat of the amendment as a victory for enlightened and progressive politics, the procedural means by which it was achieved are suspect from the perspective of consociational theory; there is no distinctly unionist or nationalist aspect to the question of whether a woman should have the right to make decisions about what happens within her own body. The DUP has also abused the procedure on several occasions, including, *inter alia*, to block motions supporting the right of same-sex couples to marry and to block several proposed amendments to the Planning Bill.¹⁷

Options for Reform

In light of the above considerations, it is worth considering how the Petition of Concern procedure might be reformed to curb the potential for abuse. Here I would offer two possible remedies, each coming with its own caveats.

Option 1: Defining the Scope of the Veto

One way to curb the potential for abuse of the Petition of Concern is to restrict its use to certain specified subject-matters. Macedonia provides one example of this approach. Pursuant to the terms of the Ohrid Framework Agreement, legislative bills that “directly affect culture, use of language, education, personal documentation, and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and boundaries of municipalities” must be passed by an overall majority plus a majority of the representatives of the country’s various minority groups.¹⁸ The consociational system that existed in Cyprus between 1960 and 1963 provides another example of this approach. Under the 1960 Cypriot Constitution, the President (a Greek Cypriot) and Vice President (a Turkish Cypriot) each had a veto over legislation on matters of foreign affairs, defence, or security.¹⁹ In addition, decisions of the House of Representatives concerning

¹⁶ Northern Ireland Assembly Official Report (Hansard) Session 2012/2013, 12 March 2013 “Criminal Justice Bill: Further Consideration Stage”.

¹⁷ See e.g. Northern Ireland Assembly Official Report (Hansard) 01 October 2012, “Marriage Equality”; 25 June 2013, “Planning Bill: Consideration Stage”.

¹⁸ Constitution of the Republic of Macedonia, Amendment X, Art. 1.

¹⁹ The Constitution of the Republic of Cyprus, Arts. 57(3) and 50. For background, see Marios L. Evriviades, “The Legal Dimension of the Cyprus Conflict” (1975) 10 *Texas International Law Journal* 227-264; Thomas Ehrlich,

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electoral laws, duties and taxation, and municipalities were subject to a cross-community consent decision rule that required parallel majorities of both Greek and Turkish representatives.²⁰

Now there are (at least) two potential problems with defining the scope of the veto in this way. First, as Cyprus' brief experience with consociationalism illustrates, restricting communal vetoes to pre-defined matters does not necessarily remove the potential for destabilising abuse. By 1961, Turkish Cypriots were concerned that their quota in the public service was not being filled in a timely fashion, and so, to gain leverage over what they perceived as Greek Cypriot obstinacy, the Turkish Cypriot members of the House of Representatives exercised their veto to block the introduction of new tax laws needed to replace pre-1960 laws which were due to expire.²¹ Greek Cypriot President Markarios responded by applying the old laws anyway, insisting that the Turkish veto over tax laws could not be used to barter over other unrelated demands.²² A political crisis followed and the system famously collapsed amidst renewed ethnic violence.

The second problem with limiting the scope of the Petition of Concern veto to pre-defined matters is more particular to the circumstances of Northern Ireland. In the context of Northern Ireland, the boundary between normal "bread and butter" politics and constitutional politics is nebulous; it is very difficult to anticipate what sorts of issues will be injected with ethno-national significance. The open-ended scope of the Petition of Concern has so far managed to catch issues of this kind as they arise, matters which otherwise might have been excluded by an exhaustive list of specified community interests.

Option 2: Subjecting the Veto to Review

A second option for reform is to leave the scope of the veto undefined but make the use of the veto reviewable according to some set of criteria. Here, instead of trying to delineate an exhaustive list of the matters for which the Petition of Concern may be legitimately employed, the idea would be to devise a principled process of review.

The first question then is how to define the criteria of review. One possibility, recently promoted by Mark Durkan of the SDLP, is to tie the use of the Petition of Concern to human rights and equality matters.²³ On this proposal, the Petition of Concern would be used exclusively to vet decisions for conformity with equality and/or human rights norms, "including the European Convention on Human Rights and any Bill of Rights for Northern Ireland".²⁴ Part of the rationale behind this proposal is that, presumably, the Petition of Concern would be used less if the veto only applied where human rights and equality norms were at issue. However, the difficulty with this proposal is that, depending on how it is implemented, human rights and equality criteria may either be too limiting (if interpreted strictly) or too vague (if interpreted broadly). If the criteria are interpreted strictly, for example, to mean that a Petition of Concern can only block a decision that is suspect from the perspective of the ECHR, then virtually none of the Petitions of Concern we have seen so far would have succeeded. If, on the other hand, the criteria are interpreted broadly say, for example, to include the statutory duty under s. 75 to promote "equality of opportunity" (between people of different political opinion, religious belief, ethnic background, etc.) then virtually any decision of the Assembly might be subjected to a Petition of Concern (at least so long as the jurisprudence on the requirements of s. 75 remains rather vague). In the first scenario, the

"Cyprus, the 'Warlike Isle': Origins and Elements of the Current Crisis" (1966) 18 Stanford Law Review 1021-1098; and Christalla Yakinthou, *Political Settlements in Divided Societies: Consociationalism and Cyprus* (New York: Palgrave MacMillan, 2009).

²⁰ The Constitution of the Republic of Cyprus, Art. 78.

²¹ See Ehrlich, *supra* note 19, p. 1041.

²² See Evriviades, *supra* note 19, p. 244.

²³ HC Deb, 18 Nov 2013, col 1021.

²⁴ *Ibid.*

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proposed reform significantly weakens the Petition of Concern as a tool to protect distinctive group interests. In the second scenario, the reform would do little to curb the potential for abuse.

Another approach, which would be more in keeping with the logic of consociational democracy, is to try to articulate a list of the general *categories* of matters that are of particular interest to the two main communities to serve as a guide for review. The body responsible for the review would then consider whether an attempted Petition of Concern falls under one of the listed types or, alternatively, relates to an analogous matter. The broad categories referred to above would be a good place to start: matters relating to symbols, culture, identity; matters relating to the legacy of the conflict; and matters relating to the institutions set up under the Belfast Agreement. The Belfast Agreement itself might also be a useful interpretive tool for such a review; a proposed decision that (apparently) ran counter to the principles of the Agreement would be a legitimate target for a Petition of Concern.

Regardless of the criteria, a review mechanism entails that some individual or collective body will be responsible for interpreting and applying the relevant criteria. Here the choice is, broadly speaking, between a judicialized mechanism and/or an internal political mechanism. Bosnia-Herzegovina's consociational system includes an example of the first kind. Pursuant to the Constitution set up under the Dayton Agreement, a proposed decision of the Parliamentary Assembly may be declared to be "destructive of a vital interest" of any of the three "constituent peoples" – Bosniacs, Croats, or Serbs – by a majority of the designated members of any of those three groups within the House of Peoples (one of two national legislative chambers).²⁵ If so, the decision is vetoed unless the veto is challenged by a majority of one of the other community's delegates, in which case the Chair of the House of Peoples immediately convenes a "Joint Commission", comprising three Delegates, one each selected by each community designation, to resolve the issue.²⁶ If the Commission fails to come to a consensus decision within five days, the matter is then referred to the Constitutional Court, which shall, in an expedited process, review the attempted veto for "procedural regularity".²⁷ In practice, this means that the Court determines if a "vital interest" is in fact at issue and, if so, whether or not that interest is actually threatened by the decision in question. In the absence of an exhaustive list of vital interest matters, the Constitutional Court has had to approach the question of what constitutes a vital interest on a case-by-case basis.²⁸ In any case, the vital interest veto is used very rarely which may be due, at least in part, to the fact that its use is subject to review by the Constitutional Court.²⁹

There is no reason to think that the judiciary in Northern Ireland would not be able to review the use of the Petition of Concern in a similarly responsible manner. The challenge is how to provide for this kind of review without making the whole process terribly expensive and time-consuming. An efficient alternative to involving the regular courts would be to set up a special statutory tribunal, composed of sitting judges, to decide such matters on an expedited basis.

Regardless of how the review mechanism is designed, there are several potential pitfalls with judicializing the veto. Although judicial review may ultimately work to prevent certain abuses of the procedure, it also opens the procedure up to an additional kind of abuse. Depending on how time-consuming the process is, Petitions of Concern might be tabled or challenged merely to delay a matter for strategic reasons. And even if the Assembly opted for a special tribunal, the decisions of that tribunal would, in all likelihood, be subject to judicial review in the regular courts,

²⁵ Article IV 3(e), Constitution of Bosnia Herzegovina.

²⁶ Article IV 3(f), Constitution of Bosnia Herzegovina.

²⁷ *Ibid.*

²⁸ See the Court's decisions in U-12/12; U-9/08; U-7/06; U-10/05; U-8/04; and U-2/04. The Court was unanimous in all but two (U-7/06 and U-10/05) of these decisions.

²⁹ See Birgit Bahtić-Kunrath, "Of veto players and entity-voting: institutional gridlock in the Bosnian reform process" (2011) 39 *Nationalities Papers* 899-923, p. 902.

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thereby expanding the potential for further delay and expense. Furthermore, one might also worry about the politicising effect that such a procedure might have on the judiciary. Arguably, if judges were to intervene in the workings of the Assembly the composition and politics of the judiciary might become a matter of greater political contestation.

In light of these concerns, the Assembly could opt instead for an internal, and therefore political, review mechanism. The simplest mechanism of this kind would rely on the Presiding Officer to vet Petition of Concerns; he or she would be empowered to reject a Petition of Concern where it appears that the procedure is being abused to block a matter that fails to satisfy the relevant criteria. A key advantage of this option is that there is already a precedent for this kind of review in the Assembly. Pursuant to the terms of the St. Andrews Agreement, 30 Members of the Assembly may ask for a Ministerial decision to be referred to the Executive Committee on the grounds that the decision may have contravened the Ministerial Code or if it relates to a matter of “public importance”.³⁰ But before the matter is sent to the Executive Committee the Presiding Officer must first certify that the decision in question does in fact relate to a matter of “public importance”.³¹ The very same sort of mechanism could be instituted as a check against frivolous or inappropriate use of the Petition of Concern. To assist the Presiding Officer, guiding criteria of the sort described above could be agreed to on a cross-community basis. This proposal relies on the trust that the parties apparently have in the impartiality of the Presiding Officer (although one might legitimately worry that giving the Presiding Officer this sort of power could jeopardize that trust going forward).

Conclusion

There are important trade-offs involved in any veto mechanism and there is no generic design that is appropriate for all divided societies. The addition of a political mechanism for reviewing the Petition of Concern, relying on the putative impartiality of the Presiding Officer, is arguably the simplest and most efficient remedy for curbing the potential abuse of the veto. It is also a remedy which might plausibly win cross-community support – Unionists and Nationalists have previously agreed on a very similar mechanism to curb frivolous challenges to Executive decision-making. That being said, there is no perfect fix. There is also a plausible argument that it is better to leave well enough alone on the grounds that the defects of the existing procedure are not sufficiently serious to warrant any reform. Ultimately, this is a question that the Assembly itself is best situated to answer. Hopefully, this paper provides some helpful guidance about the “pros and cons” involved in some of the various alternatives.

³⁰ Northern Ireland Act 1998, s. 28B(1).

³¹ Northern Ireland Act 1998, s. 28B(3).