The challenge of preparing a bill of rights for Northern Ireland

Robin Wilson

The author

Dr Robin Wilson was co-initiator of the Opsahl Commission on ways forward for Northern Ireland, whose 1993 report provided the broad template for the Belfast agreement, including by generating the concept of ‘parity of esteem’, critical to the section on a bill of rights. The think tank he established after the paramilitary ceasefires secured official support to conduct a research project exploring the concept, which reported in 1997.

He was a member of the Standing Advisory Commission on Human Rights, which made a key submission to the independent commission on policing arising from the agreement, its foregrounding of human rights in the new policing dispensation reflected in the critical fourth chapter of the Patten report. After the Northern Ireland Human Rights Commission was established, he was rapporteur for the working group on culture and identity set up (with others) by the NIHRC during its first consultation on a bill of rights.

Since the aftermath of ‘September 11’ and the wars in former Yugoslavia, he has been an expert adviser to the Council of Europe on intercultural integration. He was one of the principal drafters of the standard-setting White Paper on Intercultural Dialogue launched by the 47 member states of the Council of Europe in 2008, has subsequently advised its 145-strong Intercultural Cities programme and has been the principal drafter of a forthcoming template for the member states in developing national intercultural integration plans.

His PhD exploring the architecture of the Belfast agreement, in comparison with the prior power-sharing experience of 1974 and those in Bosnia-Hercegovina and North Macedonia, was published as The Northern Ireland Experience of Conflict and Agreement: A Model for Export? (Manchester University Press, 2010). He has translated the institutional learning of the Council of Europe on intercultural integration into a further monograph, Meeting the Challenge of Cultural Diversity in Europe: Moving Beyond the Crisis (Edward Elgar, 2018).

He is currently acting editor-in-chief of Social Europe.

The argument

1. One of the little-recognised facts about the Belfast agreement is how little attention was given to the detail of its content, as compared with the years-long ‘peace process’ which surrounded it. This was in sharp contrast to the 1974 power-sharing experiment, when much attention was paid, in a special cabinet committee on Northern Ireland chaired by the prime minister, to the detail of the architecture, which was subject to public deliberation via a green paper (provided in advance to the Irish government) and a white paper, before the parliamentary debate on the enshrining Northern Ireland Constitution Act. By contrast, one key official involved in
the private negotiation of the Belfast agreement, in the days between the delivery of a draft by London and Dublin to the talks chair the weekend before Easter 1998 and its conclusion on Good Friday, described the approach of the parties as ‘cavalier’. The only aspect of the 1974 dispensation negotiated in private over a weekend was the north-south arrangement, which was to prove its Achilles heel when the strike against the executive, fuelled by paramilitary intimidation, brought it down. Otherwise, the executive then worked far better than any established since the Belfast agreement, with a strong bond developing between the chief executive and deputy chief executive, the body accepting collective responsibility at its first meeting and subsequently agreeing to integrate the education system (Wilson, 2010).

2. This brief encapsulation of what remains to my knowledge the only PhD exploring in depth the architecture of the agreement in this longitudinal and international comparison is offered to put in question the canonical status ascribed to the detail of the Belfast agreement since. As with 71 per cent of the population in the north, and the higher proportion in the south, I voted for the agreement in a spirit of travelling hopefully, rather than because I had scrutinised in depth the concept of ‘parity of esteem’ and decided it should, specifically, be endorsed. In fact, the research project on that theme which my think tank published in 1997 threw up major problems: the notion of ‘parity of esteem’ took for granted that there were, in a simple sense, two monolithic ‘communities’ in Northern Ireland, that there was a one-to-one correspondence between religious household of origin and nationalistic (‘unionist’ or ‘nationalist’) political identification and that there was some way of determining equality of recognition for each ‘tradition’—even though defined by their difference from one another—and that such balance would somehow foster reconciliation rather than the endless jockeying for power exacerbating sectarian polarisation.

3. These problems have only loomed larger in the intervening decades, against the backdrop of the proliferation of ‘peace walls’ on the ground and the serial suspensions of the democratic institutions established by the agreement. They have been all the more glaring in the context of clear evidence in the Northern Ireland Life and Times Survey of the consolidation of a section of public opinion which declines to be identified as ‘unionist’ or ‘nationalist’. This ‘neither’ group consistently emerges as the largest, particularly among women. It is also the case, of course, that ‘parity of esteem’ presumed in one sense a monocultural Northern Ireland, since it is blind to the members of national and ethnic minorities who have arrived in the region since the agreement, whether as European Union migrants or as asylum-seekers and refugees.

4. There is yet another reason, moreover, why it has been impossible to agree on a bill of rights, despite numerous consultation exercises, in the decades since the agreement—even leaving aside issues of sectarian animosity. In the same year, the UK Parliament passed the Human Rights Act which finally incorporated the Council of Europe’s European Convention on Human Rights into domestic law, short-circuiting what had previously been exhausting appeals to the European Court of Human Rights in Strasbourg, often arising from claims against the ‘security forces’ in
Northern Ireland. Henceforth, the convention could be called in aid in domestic proceedings: now claims based on a convention article can go straight to the High Court in Belfast. All such human-rights conventions are necessarily framed in individualist terms, so that there is an individual plaintiff (or group of individuals) who can make such claims. But ‘parity of esteem’ is inherently a communalist notion, operating in the arena of identity politics rather than having any legal referent. So were a Northern Ireland bill of rights to embody it, there is an inherent problem of *locus standi*: who would present themselves as the voice of one or other ‘community’ and how would that person’s status (as compared with others making a competing claim) be adjudicated?

5. There is, however, a solution to this conundrum. If the European Convention on Human Rights protects the rights of all residents of the Council of Europe member states by virtue, in the abstract, of their shared humanity (including individuals who have no citizenship status), the Council of Europe has also recognised the need to enshrine rights associated with affiliation to concrete communities. To do so it has found the formula ‘persons belonging to …’ In other words, the reality of particular communal associations is recognised but it is made clear that the bearer of rights is the individual who freely deems herself to belong to such a community. This is the language used in the Council of Europe’s *European Charter for Regional or Minority Languages* of 1992 (mentioned, of course, in the agreement) and the *Framework Convention for the Protection of National Minorities* of 1995. The language parallels that of the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

6. This individualist approach has two particular benefits, as manifested in the framework convention. First, it makes plain that no discrimination should follow from being a person belonging to a community and, equally, none should follow from a person declining to be so defined. It therefore allows of a right of ‘exit’ from being defined in communal terms without consent, as well as a right of voice if such an affiliation is embraced. Secondly, the convention obliges the states-party to it to pursue ‘intercultural dialogue’ in a spirit of tolerance. This phraseology was to prove the wellspring of the new paradigm of intercultural integration, developed by the Council of Europe over the succeeding decades (Wilson, 2018), successfully trialled on the ground by the burgeoning Intercultural Cities programme, its universal validity indicated by the programme’s expansion to cover all the continents.

7. The framework convention and the languages charter, integrated into and congruent with the wider body of human-rights standards, can fill the vacuum represented by ‘parity of esteem’ as a relativistic notion which it has proved impossible objectively to define or operationalise. In neither case, though, are these conventions justiciable: no individual in Europe can take a case under them to court to vindicate their rights. This does not, however, prevent a Northern Ireland bill of rights having the primary function of incorporating the charter and framework convention into domestic law. The effect would be that, for instance, should an Irish-language speaker feel the Department of Education was not furnishing adequate Irish-medium education for her child, she could take that claim to the High Court for impartial
adjudication under the convention and the department would have to respond to that claim in a reasonable manner. This approach would certainly be in the spirit of the agreement, in the sense of offering equality of human dignity to every individual, and would be a straightforward, simple and effective way out of the endless stasis on the bill of rights. The fact that these conventions carry international legitimacy and already have associated monitoring bodies makes this approach far superior to endlessly trying to reinvent the wheel.

8. Nor is this a new proposal. The working group on culture and identity established by the NIHRC during its first consultation on a bill of rights recommended just this outcome—that the Council of Europe Framework Convention for the Protection of National Minorities and its European Charter for Regional or Minority Languages be incorporated into Northern Ireland law via the bill of rights and thereby rendered justiciable. Nothing in the intervening decades has emerged as a viable alternative.

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