Submission to Assembly and Executive Review Committee on *Designations and the appointment of the First Minister and deputy First Minister*

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- ***Scoping the removal of the designations requirement (to be replaced with a requirement for weighted majorities on defined key votes or in situations where a reformed Petition of Concern has been invoked).***

Community designations are, arguably, the most contentious aspect of the Northern Ireland power-sharing arrangement, and, as the most corporate aspect, likely the most difficult to modify. While community designations serve an important accommodative role in the context of a deeply divided society, they may risk further entrenching divisions between communities and have often been perceived as unfair by those whose votes count for less in cross-community voting situations. A shift to weighted majority voting rules and away from community designations would have several benefits: it decouples legislative votes from community identities, thereby removing a possible source of entrenched divisions; it allows for the possibility of evolving and issue-based coalitions to form on key issues on a vote-by-vote basis in the Assembly; and it allows for the equal counting of votes from all members of the Assembly.

Yet, the move to weighted majority voting is complicated by at least two factors. First, the question of what constitutes "defined key votes" and the process by which to determine the scope of such votes is not easily resolved. One option is to restrict weighted majority rules or cross-community votes to a set of predetermined issue-areas. Typically, this would include symbolic identity issues such as culture, language, and education and/or to issues of shared concerns such as the budget and security (see McEvoy 2013). This is likely to restrict the use of special voting rules to exceptional circumstances and to minimize misuse of such procedures. However, it faces the serious problem of potentially excluding issues which the parties perceive as vital to the protection of their interests, but which are not found on the predetermined list of protected areas. It is extraordinarily difficult to compile a full and comprehensive list of such areas. For example, economic policy, infrastructure, transportation, and health care are all issues that directly affect minorities but which under such an approach may not be considered as "key votes." If parties feel that the rules are no longer able to protect their interests, they may lose confidence in the power-sharing arrangement. Rather than pre-defining "key votes," an

alternative strategy is to keep open the issues to which special voting procedures would apply. This has the advantage of allowing parties to respond to issues as they gain salience and to address key issues that may not have been anticipated when the original list was compiled. As the experience of the Petition of Concern between 2007-2017 suggests, this kind of permissive approach is not without its risks. However, there are rules that can help to restrict usage to exceptional circumstances while not pre-determining which issues count as "key votes." One option would be to require parties to articulate a justification for why proposed legislation should be subject to a weighted majority and/or subject it to an adjudication process (e.g., review by legislative committee) (McCulloch 2018).

A second problem with a weighted majority is figuring out the precise threshold at which it should be enacted. The number needs to ensure that legislation has broad cross-community support (e.g., it does not unduly restrict one of the communities from weighing in) while also not making it the purview of a single party to have the power to block proposals. Somewhere between 60% and 65% may be able to accomplish this. Yet, it is worth noting that there will variability along these two fronts (e.g., demographic weight of communities; parties' seat-share) over time. This may entail the need to periodically revisit the level at which the threshold is set.

It is the relationship between community designation and the Petition of Concern which has proven most controversial, and it is worth considering whether further reforms to the Petition of Concern may address some of the concerns with the use of community designations. The regularized use of this mechanism in the Assembly between 2007-2017 is not an inevitable feature of veto rights. In some respects, it is true that all veto mechanisms contain a degree of contentiousness in that they challenge traditional conceptions of majority rule. Further, they may contribute to legislative immobilism through excessive use, including on issues ostensibly not relate to community interests; they may contribute to polarization between parties on key issues by exposing or inflaming deep lines of division; and they risk alienating those who cannot access veto power and who may thus see the system as unduly disadvantaging them and silencing their voices. Vetoes are intended to function as a protective device, deployed with moderation, as a policy of last resort to facilitate inter-group cooperation and the protection of community interests. However, vetoes have sometimes become a blocking strategy, as when they deny the protection of a group's vital interests, or where the veto is used to arrest the legislative agenda. The design of veto rules influences whether the device functions in a protective or blocking capacity (see McCulloch and Zdeb 2020).

Legislative mechanisms on par with the Petition of Concern are used in most power-sharing systems, including, for example, in Belgium, Bosnia & Herzegovina, Burundi, Kosovo, Lebanon, North Macedonia, and South Tyrol. In many instances, vetoes have served their protective purpose. One example is Belgium, where members of one of the linguistic groups can sign a justified motion (i.e., a motion with reasons) declaring proposed legislation to be "of a nature to gravely damage relations between the Communities" (Belgium Const. Art. 54). The motion must be signed by at least three-quarters of the group and the proposed legislation is then referred to the Council of Ministers (composed of an equal number of Dutch and French speakers); the council then

has 30 days to render its justified recommendation, which can include revisions to the bill. It is worth noting that this is a “suspensive” or “delaying” veto in that it only facilitates a review of the bill, not its demise. This ‘alarm bell procedure’ is rarely used. A similar approach is used in South Tyrol. If a majority of members of one of the linguistic groups consider a bill to be “prejudicial to the equality of rights between citizens of the different linguistic groups or to the ethnic and cultural characteristics of the groups themselves,” they can request a vote by linguistic groups (Special Statute for Trentino-Alto Adige Art. 57). If the law still passes, the majority of that group has 30 days to contest the law before the Constitutional Court, though this has not yet happened.

Another example is North Macedonia, which uses a double-majority voting system. Laws with a significant impact on non-majority communities require a double majority: an overall legislative majority plus “a majority of the votes of the Representatives claiming to belong to the communities not in the majority in the population of Macedonia” (Ohrid Agreement, Art. 5). Its use is restricted to a set number of issue-areas, including laws directly affecting local self-government, culture, language, education, personal documentation and use of symbols (though parties have not always agreed on when the double-majority rule should apply). It also defines veto holders not by name but only as communities who are not in the majority, which may require smaller minority groups to work together to ‘bundle’ their veto power. The double-majority principle does not regularly contribute to legislative immobilism, in part because the composition of governing coalitions means that the government typically has enough votes to ensure the double-majority threshold is met.

In considering whether the rules support protective or blocking tendencies, it is worth paying attention to the different constituent parts of veto rules. There are at least five dimensions, each of which can either constrain or encourage veto usage:

1. to whom do veto rights apply?
2. at what stage of the legislative process do vetoes apply?
3. what is required to trigger a veto (e.g., does it proceed directly to a vote or is there a mechanism, like the collection of signatures, which sets the process in motion)?
4. on what issues do they apply?
5. how is the enactment of the veto adjudicated and by whom?

Prior to the changes adopted in the New Decade, New Approach (NDNA) agreement, the Petition of Concern encouraged frequent usage, sometimes outside the bounds of the protection of group interests. It had very few constraining features. It could be applied at all stages of the legislative process; the 30-signature requirement set a reasonably low threshold for enactment, especially when one party could reach the signature count on its own; it permitted the Petition of Concern on any issue; and there was no justificatory clause or adjudication process attached to its usage. The NDNA reforms, including the need to offer reasons for tabling a motion, the requirement of at least two parties signing the petition, the restriction of its use to the second stage, and the two-week consideration period, should help to limit usage to the intended “exceptional circumstances” while not unduly restricting the topics to which the Petition of Concern currently applies. These amendments should be given time to be tested to see if they return the Petition of Concern back to its original protective function before further reforms are considered.

- ***Consideration of the method of appointing the First Ministers and deputy First Ministers as well as the titles, to reflect the joint and equal nature of the office and the principle of partnership.***

The St Andrews Agreement, which calls for a "stable inclusive partnership," sets out the following criteria for the appointment of the First Minister and deputy First Minister:

- "The Nominating Officer of the *largest party in the largest designation* in the Assembly shall make a nomination to the Assembly Presiding Officer for the post of First Minister."
- "The Nominating Officer of the *largest party in the second largest designation* in the Assembly shall similar nominate for the post of Deputy First Minister."

Since these rules came into effect, the largest designation has been Unionist with the largest party in the largest designation being the Democratic Unionist Party. The second largest designation has been Nationalist with the largest party within this designation being Sinn Féin. As unionists and nationalists have historically been the dominant actors in need of political accommodation, this appointment procedure has worked reasonably well to foster a "stable inclusive partnership" between the two dominant communities. Importantly, it prevents the top posts from being captured by only one community. Alongside the innovative and automatic sequential portfolio allocation process for ministerial posts, the appointment procedure has served the causes of peace and inclusion well.

Yet, neither demographics nor party preferences are static. The parties will need to anticipate changes in the status quo which may impact the functionality of the current appointment rules. Possible developments on the horizon, over the medium-to-long-term, include:

- Nationalist may replace Unionist as the largest community designation
- Other may become the largest or second largest designation
- A party with an Other designation may gain the largest or second largest seat-share overall in the Assembly but the designation of Other may not reach the level of largest or second largest designation, thereby excluding one of the largest parties in the Assembly from a leadership post.

While these developments may seem far-off, it is worth considering the impact of these eventualities before they come to pass. Should, for example, the largest party in what is now the third designation surpass the seat-share of the largest party in the second largest designation, this could create a situation of competing legitimacies. In such a scenario, there would direct tension between the principle of party size/seat-share as a means for securing top posts and the principle of community designation as a means of group accommodation. Such an outcome would also highlight that the top two posts (FM/dFM) have always been *de facto* reserved for Unionists and Nationalists, and not Others, even

if the rules do not *de jure* exclude them. There have been strong and compelling reasons for this emphasis on Unionist and Nationalist accommodation but as voters begin to cast support for parties that designate as Other, this could exacerbate a sense of frustration and alienation amongst such parties and their voters for power-sharing as a whole.

At a minimum, it invites further reflection of the role of Others in the Assembly and Executive and how they 'fit' in the power-sharing arrangement. The term "Other" itself also merits further reflection. As a residual and catch-all category, Others are defined by what they are not (e.g., not-unionist, not-nationalist), rather than by what they are. The designation and the parties that adopt it are thus quite diverse and do not necessarily share a unifying identity. On one hand, the ability to designate as Other has allowed for "novel opposition parties to organize in conditions of generalized security" and has pushed the dominant parties to update their party platforms (O'Leary 2018, 235). On the other hand, many parties that designate as Other continue to see a sense of inequality in the system, especially as it relates to cross-community voting rules in the Assembly (see Murtagh 2020). If voter preferences continue to cohere in this direction in the future and the seat-share of such parties expands, the system will need to seek out new and creative ways of supporting Others in accessing decision-making power, a process for which consociationalism has not always been well-equipped.

As to the titles of First Minister and deputy First Minister, presumably the qualifier of 'deputy' has intended to refer to party/designation size rather than to responsibilities and/or esteem since the two posts have more-or-less equal powers. Yet, the current titles suggest a hierarchy. If the intention is to reflect a "principle of partnership" and parity of esteem between the top two officeholders, it would make sense to revise the titles accordingly. Several options, all of which reflect the "joint and equal nature of the office" could be considered. Examples include:

- Joint First Ministers,
- Chief Ministers, or
- Co-Premiers.

A final note is that any recommended reforms to the power-sharing institutions should be accompanied by a careful gender analysis of the proposed changes prior to implementation as well as by an in-depth consideration of how such reforms will impact non-aligned communities.

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