Written Evidence submitted by Professor Richard Wilford for the Northern Ireland Affairs Committee’s inquiry into Devolution and democracy in Northern Ireland – dealing with the deficit (DDD0037)

Introduction

The invitation to appear before the Committee identified three specific questions, together with a more general question concerning future options should the Executive not be restored and that could be designed so as to provide for accountability and democracy under a restored Direct Rule (DR) regime.

It does seem prudent to anticipate the continuing or future absence of a NI Executive. Currently, NI is poised between devolution and direct rule, a sort of ‘limbo’ that has created a vacuum bereft of local accountability and scrutiny. This condition cannot last indefinitely. DR is the default option, but previous experience suggests that the quality of scrutiny afforded by this model of governance does not match that provided by the devolved institutions, primarily the NI Assembly.

If DR is to be re-introduced via the UK’s renewed power to suspend the devolved institutions (repealed in 2006), new legislation will be required. However, it may be necessary to alter DR’s ‘classic’ application by identifying means through which local input into the task of scrutinizing policy and decision making can be realized.

An Irish Role?

A much more vexed issue is whether and to what extent, and by what means, a role should/could be identified that enables the Irish Government to participate in holding DR to account. Such provision, if any, is fraught with risk, not least because of its constitutional implications. Moreover, the three-stranded nature of the 1998 Belfast Agreement precludes the Irish Government from intervening in the internal affairs of NI (strand one). That said, the British-Irish Intergovernmental Conference (BIIC) established by the Belfast Agreement enables the Irish Government to put forward views and proposals on non-devolved matters. However, any effort to extend its remit to include a role for the Irish Government in strand one matters would be fruitless given that sovereignty re NI resides exclusively with the UK. Neither it, nor the British-Irish Parliamentary Assembly nor the British-Irish Council, are appropriate vehicles that afford Ireland a role in scrutinizing strand one matters.

Whilst some see the BIIC as a vehicle for greater involvement of the Irish Government in circumstances where the devolved institutions cease to function, this seems moot, to say the least, especially in relation to strand one matters. While the Irish Government can express a view re the internal affairs of NI—it is a co-guarantor of the 1998 Agreement—there is no legal basis enabling it to participate in the scrutiny of those affairs.

To provide for such a role would sail perilously close to joint authority or even the looser formulation of ‘joint stewardship’ essayed (but not clearly defined) by Messrs Blair and Ahern in 2006. Perhaps Garret Fitzgerald’s formulation re the Irish Government’s future role coined at the time of the 1985 Anglo-Irish Agreement—‘less than executive, more than consultative’—may serve as a rough guide.
The immediate task seems to be one that tempers or, more positively, improves the orthodox form of DR by identifying means through which a local form of scrutiny/accountability can be grafted onto its implementation.

Lessons from the past

As Members will be aware, since 1998 Executive stability has been somewhat fitful, though much less so since 2010, albeit that the DUP boycotted Executive meetings for a period in 2015 (as did Sinn Féin in 2008). However, on each of these occasions Direct Rule was not reintroduced, unlike in early 2000 and October 2002 (following two 24 hour suspensions in August and September 2001).

The restoration of DR in October 2002 was the most protracted, lasting 55 months, and provides some guidance on how the UK Parliament sought most recently to respond to the need for accountability of NI business during the hiatus. It may be observed that the rather improvised response to the situation by the UK Parliament during that period underscored the extent to which NI business (with the exception of key pieces of primary legislation) had been somewhat marginalised since the very first introduction of DR in 1972. 1

The somewhat improvised arrangements at Westminster certainly helped to bridge the democratic deficit, although the focus of successive Secretaries of State has, from the first, been on the question of how to restore some model of self-government to NI rather than on how to develop Parliamentary means of managing NI business during DR.

Post-1972, however, Parliament had evolved means of tackling NI legislation and policy in the absence of devolution such that they can be re-activated if/when required. That said, it could be observed that the extent to which the scrutiny and accountability of NI matters at Westminster was rather anaemic, that is until the creation of the NI Affairs Select Committee in 1994 – and it is worth noting that its creation lagged well behind the equivalent committees for both Scotland and Wales (both established in 1980 following the introduction of the new generation of select committees announced in 1979).

The Committee infrastructure for NI business at Westminster wasn’t, though, wholly bloodless. The NI Committee (NIC) established in 1975 did enjoy a pre-legislative role re draft Orders-in-Council and its functions were subsequently transferred to the NI Grand Committee (NIGC) created in 1996. During periods of DR post-1998, the NIGC has scrutinised draft Orders relating to devolved matters, whereas during devolution its remit generally extended only to reserved matters. The NIGC also has some legislative powers in relation to NI-exclusive Bills (consideration of a Bill’s key policies pre-Second Reading in the House) and it can consider such a Bill following its Report Stage on the floor of the House. It also enjoys powers to consider delegated legislation although, like the aforementioned powers, they are rarely exercised. Indeed, re delegated legislation, this work is ordinarily undertaken by the Delegated Legislation Committees.

1 For a full analysis of Parliamentary responses to NI matters under Direct Rule see Derek Birrell (2009), Direct Rule and the Governance of Northern Ireland, Manchester University Press.
Whilst such provision re secondary legislation has been accommodated at Westminster, the heavy reliance on Orders-in-Council is rarely entirely satisfactory given that Orders cannot be amended. The strength of the NIGC and, indeed, the NIA Select Committee (NIASC) re scrutiny/accountability, lies with their potential to engage in pre-legislative scrutiny.

Other means of addressing NI matters at Westminster are, of course, available: PQs, oral and written, and debates, both on the floor of the House and at the Grand Committee, the latter having demonstrated a readiness to meet in NI, as has the NIASC.

There are, then, the lineaments of a committee system re NI matters extant at Westminster (including the House of Lords and via the remits of all Departmental Select Committees, not least the PAC), but their capacity/opportunity to subject such matters to an appropriate and healthy measure of scrutiny during the absence of an Executive do not measure up to the efficiency and effectiveness of a Stormont-based system. The innovation of a sub-committee of NIASC during the early phase of DR between 2002 and 2007 which was intended to lighten the load on the full Committee and extend its scrutiny of devolved matters, though welcome, proved to be short-lived.

**Specific /General Questions**

**NI at Westminster?**

Much can be inferred, I think, from the above. While Westminster has proven to be responsive in developing the means of scrutinizing NI business both before and since 1998, those means while necessary were insufficient. Given the (conditional) sovereignty of the UK Parliament re NI (the consent principle) it is right and appropriate that the primary responsibility for undertaking the scrutiny/accountability role resides at Westminster. The issue, it seems to me, is how the current provision at Westminster may be supplemented at the local, NI level.

It seems sensible to re-invent the hitherto short-lived practice of establishing a sub-committee of NIASC to improve the efficiency of the scrutiny role. This, however, may require an increase in the overall size of the Committee—perhaps to fifteen members—to afford a more manageable workload. Among other things, an expanded Committee and a standing sub-committee would enable members to visit NI more frequently in order to hold evidence-gathering sessions and present its reports: such undertakings would provide a ‘Westminster in NI’ character to the work of the Committee rather than the ‘NI at Westminster’ perception that DR invariably prompts.

Perhaps more ambitiously, the Committee may wish to consider whether MLAs could be accorded ‘observer’ status at its sessions with the opportunity to be consulted about the matters under consideration. (The same provision could also be extended to the NI Grand Committee.)

**A revived Assembly?**

While Westminster may be the focus of institutional efforts to improve scrutiny and accountability, a more local presence is advisable, if only to create an opportunity space for nationalist/republican politicians currently absent from Westminster.

One possible route to that end may lie with the precedent set by the James Prior initiative that established the 1982-86 Ni Assembly. While the broader purpose of the initiative was to restore
devolution on a ‘rolling’ basis, the Prior scheme created a system of scrutiny committees in the Assembly that were intended to improve the accountability of DR, not least by scrutinizing Draft Orders laid by the NIO.

However, the Assembly and its committees were hamstrung from the outset by an SDLP boycott (there was no provision in the scheme for an ‘Irish dimension’) and the fitful attendance of the then major Unionist party, the OUP. Both Prior and his successor as Secretary of State, Douglas Hurd, appeared before the Assembly during its existence and until the 1985 Anglo-Irish Agreement (AIA), the scrutiny committees did function.

The key weakness of the Prior Assembly was its absence of political legitimacy within the wider nationalist community which, in itself, weakened the potential heft of the committees. Its qualified legitimacy was ultimately eroded by adverse Unionist reaction to the AIA.

Drawing in some measure on that precedent, the Committee may wish to consider whether, in the absence of an Executive, the Assembly’s statutory committees could be resuscitated to enhance departmental scrutiny (such a measure could also include some of the standing committees, notably the PAC). There is a (currently dormant) committee system at the NIA to provide such scrutiny. While the committees also enjoy the power to table legislation, in the absence of devolution this power cannot be exercised. However, they could engage in the task of pre-legislative scrutiny during DR. To that end, some linkage might be considered between the committees and NIASC.

In effect, the experience and administrative capacity exists to facilitate the performance of the statutory committees. The key question is whether all Assembly parties share the political will to take this path. In particular, the Committee might consider whether some expression of the ‘Irish dimension’ can be found sufficient to encourage nationalist parties to participate in such a model while at the same time avoiding the alienation of the Unionist parties. Squaring that particular circle may, however, prove impossible. It would, though, inject life into the Assembly by providing MLAs with a potentially meaningful role and thereby ameliorate the common and popular view that they are being paid for sitting on their thumbs.

As far as civic society is concerned, the civic space in NI is vibrant and densely populated. Provision for a Civic Forum was made in the 1998 Agreement but it fell into abeyance in 2002 and has been superseded by the proposal (the Stormont House Agreement) to establish a compact Civic Advisory Panel whose role is to act in an advisory capacity to the Executive: the Panel has yet to be established. Whether the nascent Panel might have a scrutinizing role to play in the absence of devolution via its advisory purpose is perhaps something that may be considered. But it is intended to be a small body (6 members, I think) and would lack capacity/resource to perform a meaningful role.

There is a wide range of civic bodies that could conceivably have a scrutiny role, albeit filtered through, primarily, NIASC: perhaps the proposed sub-committee of the latter could be tasked to liaise with them?

In the absence of devolution, or more narrowly of the devolved strand one institutions, the status and legitimacy of the wider architectural infrastructure created in 1998 would be in question. Although, via a side agreement in 2002 between the UK and Ireland, the strand two north-south bodies continued to operate during the DR period, they did so on a largely care and maintenance basis. Whether such provision (originally each of the institutional expressions of the 1998 Agreement were intended to stand or fall together) creates a precedent for the continued existence of, say, the Assembly in the absence of an Executive is unclear. More to the point perhaps, it seems unlikely that the political will exists and is shared by all NI’s political parties to facilitate such an arrangement.

Measures to avert DR in the future

Perhaps the first point to make is that no matter how elegant the institutional design of NI’s devolved institutions may be, without a spirit of accommodation to animate those institutions they will rest on insecure foundations. That said, and given the institutional design created by the 1998 Agreement, experience has demonstrated that the original model is capable of being reformed. That is to say, the Belfast Agreement is not a straitjacket.

Since its implementation, broadly agreed changes to the design/operation of strand one institutions have been accomplished. These include changing the means by which the First and deputy First Ministers are appointed; the appointment procedure for the post of Justice Minister; provision for a formal Opposition; the facilitation of sub- and joint statutory committees; the introduction of topical questions; the demise of the Civic Forum. There are other changes one could mention (Executive re-configuration, the reduction in the number of MLAs), but the point is that the institutions have not been and are not set in stone.

Executive Reform

As to future reform, much attention has focused on the means through which (d’Hondt) the Executive is formed (there are alternative methods of ensuring the proportional allocation of ministerial posts). The key purpose of the adoption of d’Hondt was to facilitate inclusivity within the Executive: this is a cornerstone of the 1998 Agreement. Any measure that either damages or is perceived to damage that purpose carries considerable risk.

To make what may seem a pedantic point, participation in the Executive has from the first been a voluntary matter so one might argue that the option of a voluntary coalition is inherent within the original design. (During the first phase of post-1998 devolution, the DUP acted simultaneously as both a part of government and as an opposition within the Executive.) That is underscored by the decision of both the UUP and SDLP to leave the Executive during the last mandate and instead opt for an oppositional role. As things stand, if a party secures sufficient seats/votes that render it eligible for participation in the Executive then it has to decide whether or not to exercise its option of taking a seat/seats.

Some advocate that reform of the Executive should provide for what has been termed ‘a coalition of the willing’. I.e, that following an election inter-party negotiations should take place designed to agree a programme for government (a period now extending to 14 days) and that if a sufficient number of parties can so agree and are capable of carrying a cross-community vote in the Assembly,
then they can proceed to form an Executive. In effect, it would dispense with the automaticity of the d'Hondt process and thereby threaten the principle of communal inclusiveness.

Such change would require the amendment of the primary legislation (the NI Act 1998) that implemented the Belfast Agreement. Any perception that such a change was used by some parties to, primarily, exclude another or others, would jeopardise not just institutional but also political and social stability. I think the point here is that while an Assembly would be inclusive does it follow, necessarily, that the same principle should underpin an Executive? I think it does.

The process of Executive formation lies at the heart of the current impasse. The veto power enjoyed by the First and deputy First Ministers that can either make or break its formation or, indeed its continued operation is, within the context of a highly polarized electorate, a necessary safeguard. This is perhaps even more so since the change wrought by the St Andrews Act enabling the single largest party to nominate the First Minister (FM): this change has reinforced the sub- even supra-text of Assembly election campaigns, viz the identity of the party that will fill the FM role.

A key test of the political and social stability of NI would be the preparedness of a Unionist party to nominate a deputy First Minister should Sinn Féin emerge as the largest party at an Assembly election. Perhaps consideration might be given to the possibility of enabling a third party to assume one or another role should either of the two larger parties decline to nominate? This though would be fraught with difficulty.

A related question is whether, in the event of either a FM or dFM resigning her/his post over a political disagreement during a devolved mandate, this necessarily means the other post-holder has to step down, thereby collapsing the Executive.

Under the terms of the NI Act and the St Andrews Act the occupants of the posts have to be communally designated, ie a Unionist and a Nationalist (although it is thinkable that a candidate from an ‘Other’ party would be nominated if that party emerged as either the single largest bloc in an Assembly or ‘Other’ candidates constituted the largest or second largest designation). Currently the small number of MLAs who designate as ‘Other’ cover a broad spectrum of ideological and political beliefs: that is they lack the cohesion of a single party. Finding an agreed candidate from within such a disparate range of parties would be difficult if not impossible.

Without a sea change in electoral preferences, it is a certainty that for the foreseeable future the nominees would have to be drawn from either the Unionist or Nationalist designations. Would a sister party (ie one drawn from the same communal bloc) be prepared to nominate one of its number for the relevant post? If such a party had a relatively small number of MLAs, the legitimacy of a nominee would be questionable.

Applying the Occam’s Razor test, perhaps the solution lies in abandoning the requirement that individual MLAs designate themselves communally, or as ‘Others’. This would entail abandoning the requirement for cross-community support on key matters, instead relying on a weighted majority formula. Philosophically attractive as this may seem, politically it seems an unlikely proposition in the context of NI.

Petition of Concern
A second area of potential reform, and one that is perhaps more likely to secure all-party consent, is change(s) to the Petition of Concern (PoC) procedure. That it requires reform was tacitly agreed in the Fresh Start Agreement (2015). The outcome was akin to a ‘gentleman’s agreement’ rather than a solemn and binding commitment whereby parties agreed: to trigger petitions only in ‘exceptional circumstances’, though the Agreement is silent on what constitutes this test; that the grounds for a petition should be evidence based and demonstrate the disparate (communal?) impact of any proposal. No change was agreed by the parties concerning the required threshold (n30 MLAs) to trigger a petition.

Few would disagree that the PoC provision has been misused, even abused. A return to first principles—that a petition is tabled only on the grounds that any proposal can be shown demonstrably to adversely affect one or another community’s interests—seems the rational way to enable its future deployment, a change that could be effected via Standing Orders. The Speaker would be the arbiter of the admissibility of a proposed petition, with recourse to the courts should the party/parties seeking to table a petition disagree with the Speaker’s ruling.

_Civic Participation_

There is a view that in the event of a future collapse of the institutions measures could be taken to ensure that some measure of local democracy is sustained and which could plug the gaps left by the demise of devolution. Understandably, attention has been focused by some on the role that civic society could perform in such a context. Ideas about deliberative and participatory democracy are to the fore in this debate, via for instance citizens assemblies or citizens juries. Such bodies certainly have a role (planning for a first citizens assembly is well in hand) but it can, I think, only be a consultative/advisory one.

I do have some sympathy with the principles behind such initiatives but will leave it to others to prosecute the case in their favour. I do, though, think it is worth noting that to date in NI the top-down approach to devolutionary design (unlike in Wales and Scotland) has rather diminished the role of civic society in the politics of the region. Mobilizing and channelling the energy of civic bodies in a hitherto top-down political culture and within the context of a divided society is a challenging undertaking.

_Conclusion_

The Committee will be mindful that significant changes to the NI model of devolution would entail amendments to relevant existing primary legislation or even fresh legislation. Arguably, any such changes could be liable to the claim that, like the 1998 Agreement, they be subject to the test of popular sovereignty on both sides of the border. A more prudent, if less imaginative, approach is to design a new model of DR that is more locally expressed, more accessible, more transparent and more responsive and which accommodates in some form the ‘Irish dimension.

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