

Stabilising Northern Ireland's Agreement

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As critical admirers of Northern Ireland's Agreement, we consider here how it may be best stabilised following the uncertainty of the first phase in efforts to implement it (1998–2003) and the new challenges offered by the results of the 2003 Assembly election.¹ Appropriate default options must be considered if the Agreement is ineradicably ruined, but that moment has not yet materialised. The Agreement will, of course, work best if all parties and governments fulfil their obligations on its implementation. We begin by outlining these responsibilities. We then detail ways in which the Agreement's rules for electing the First Minister and Deputy First Minister and for passing key measures could legitimately be changed under the Agreement's review process. Our goals here are to enhance the stability of the political institutions, and to address the concerns of those who see the current rules as unfair.

Parties to the conflict: responsibilities and incentives

The considerations we address here are both normative and strategic, implying courses of action that are both morally appropriate and potentially politically advantageous. These may be considered separately for the two main national communities and for their respective patron-states.

Under the Agreement, Sinn Féin (and the loyalist political parties) are obliged to use their good offices to ensure the comprehensive decommissioning and disarmament of the paramilitary organ-

isations respectively associated with them. This expectation was implicit in the entire negotiating process. It was understood, however, in both the timetable attached to the implementation of the Agreement and its negotiation (which prompted Jeffrey Donaldson's withdrawal from the UUP negotiating team), that the starting date for decommissioning was not specified. And, as importantly, that its completion, two years after the referendum that endorsed the Agreement, would not occur until all other parties to the Agreement, particularly the UK government, had fulfilled their obligations, especially by bringing the new institutions into being and executing the reforms and confidence-building measures that are an integral part of the peace process (particularly the reform of policing, the administration of justice and the new human rights protections). In the security field it was rightly understood that decommissioning would have to apply to loyalists as well as republicans, and that decommissioning would be matched by extensive demilitarisation.

In this article we are not concerned to establish which parties are to blame for the failures of fully reciprocal action in these matters to date. We observe, impartially, that in the first two years after the referendum, republicans, loyalists and the UK government were all in default of the spirit and sometimes the letter of their obligations under the relevant provisions of the Agreement. The UK government looked as if it would deliberately fail to fulfil its own commitments on policing reform, and had been tardy in its approach to the reform of the

administration of justice and in encouraging a new human rights system. Aside from the Loyalist Volunteer Force's one act of compulsory decommissioning when one of its members was caught *in flagrante* with weapons, no loyalist organisation has engaged in any decommissioning. The IRA's position in this period was widely seen as conditional, equivocal and ambiguous. But, that said, it is reasonable to argue that when all major aspects of the Agreement for which it is responsible are fully implemented by the UK government (including the repeal of the suspension power it granted itself outside the framework of the Agreement), it would be fair to have provisions enabling the exclusion from ministerial office in the Assembly of parties that maintain links with paramilitary organisations, or that are judged not to have repudiated such organisations' maintenance of their military capacities. Such provisions should be developed within the existing provisions of the Agreement if at all possible.

So, what should be done as regards Sinn Féin and the IRA and their relationships? Much the best thing that could be done should be done by the two organisations themselves: the IRA should unambiguously declare its war to be over, decommission its weapons in cooperation with the international commission, and unambiguously dissolve its organisation; Sinn Féin should welcome all such announcements and declare current membership of the IRA, or any offshoots of the IRA, incompatible with party membership. But what if these paths continue to be refused *after* the UK government has fulfilled all its obligations on confidence-building and repealed the Northern Ireland Act 2000 (which provides the government's suspension power in violation of the Agreement).

One path is a legal one: the courts could be left to determine whether parties have associations or conduct activities in breach of their ministerial oath of office,

and be empowered to suspend such parties' entitlements to ministerial office until such time as their conduct is deemed fully democratic. This would probably require fresh primary legislation at Westminster, passed outside the Agreement's procedures, and would therefore be open to the valid objection that it is 'extra-Agreement' (in the same way as the Northern Ireland Act 2000). 'Juridification' is, moreover, a difficult road. Once judges start extensively to regulate political parties there may be undesirable repercussions. It is not evident that Spanish judges' decisions to proscribe Basque political parties are either democratic or productive. Juridification might be a less pressing issue if judges were widely regarded as impartial in Northern Ireland, but they are not, in fact, widely representative, and making such decisions might place them in unenviable positions.

The second path is the internal political one. It is embedded in the Agreement. It provides for the Assembly to determine whether a party entitled to ministerial nominations is in breach of its oath of office—which incorporates commitments to exclusively democratic means. But, complain unionists, this provision operates under the constraint that it requires cross-community consent. And so, they correctly maintain, in the 1998–2003 Assembly Sinn Féin was protected from the possibility of suspension from the executive by the decision of the SDLP to support inclusive government (as long as the Agreement was not fully implemented). As a result of the 2003 Assembly elections Sinn Féin now has this protection mechanism within its own hands: it can veto any attempt to exclude its ministers from office. It may well be, however, that the political route is still the best way to handle republican decommissioning. If the rest of the Agreement is unambiguously implemented while the IRA remains in existence, maintains its organisational capacity, and engages in

punishment beatings and self-styled policing operations, then Sinn Féin will eventually pay an electoral price, North and South—perhaps a more extensive price in the South than in the North, but a price nonetheless. We believe that as long as it is interested in expanding its electoral base there will be strong incentives for Sinn Féin to repudiate the present case for the existence of the IRA, and for the SDLP to vote for Sinn Féin's suspension from office until such time as the IRA decommissions and dissolves itself, even if that vote has no immediate consequence. We think, and have regularly argued, that the electoral process creates strong incentives for Sinn Féin to deliver the IRA's final dissolution or to disassociate itself from its twin.² We still think that is the case, and believe that the party's successes in 2003, especially its overhauling of the SDLP, owed much to significant decommissioning by the IRA.

The third path is intergovernmental, and is the one that has recently been accepted by the two governments. It is the establishment of an independent and international commission (the Independent Monitoring Commission) to determine, after due deliberation, whether a party is in breach of (Mitchell's) democratic principles. We believe that such a commission has merits, though there must be some possibility that a four-member commission might be stalemated 2–2 in making an appropriate and convincing determination. That said, we believe that this political mode of deciding on the merits of finding a party in breach of the Mitchell principles is better than the juridical route—though it too suffers from the fact that it has not yet been agreed inside the procedures for review within the Agreement. We would expect, however, that the SDLP, although presently reluctant, will embrace this idea even if the republican movement remains recalcitrant. We would commend one important change to the existing proposed measures if they are progressed:

any future suspension of a party's entitlement to office, and the duration of that suspension, which would be triggered by the determination of the international commission, should require ratification by the two sovereign governments in the British–Irish Intergovernmental Conference (BIIC).

The loyalist parties that made the Agreement have proven electorally brittle. One, the Ulster Democratic Party, has dissolved itself; the other, the Progressive Unionist Party, has a tough future, having seen its representation in the Assembly halved, to one MLA, in 2003. Loyalists have no immediate prospects of ministerial office; in consequence, the Agreement's incentives do not affect their conduct in the same way as republicans. Electoral imperatives encouraged the start of republican decommissioning; loyalists do not have such incentives with anything like the requisite intensity. Their paramilitary organisations have merely committed themselves to decommission on receipt of confirmation of the IRA's dissolution. We believe there will be some loyalist decommissioning after the completion of IRA decommissioning, but also that loyalist—and republican—organisations that reject the Agreement, or that fail to implement decommissioning, must be dealt with by the new police service, fairly, impartially and effectively. The ambiguous status of the loyalist organisations that are on formal ceasefire should be reviewed by the new police service in conjunction with the two governments. The firm and impartial handling of current crimes by loyalists will considerably strengthen the IRA's disposition to dissolve.

The unionist community was divided by the negotiation and the making of the Agreement. It remained divided in the referendum over its adoption. And public support for the Agreement has wavered significantly within the unionist community. As we write it is low, outweighed

by those disappointed by or hostile towards the Agreement. But sufficient support to make the Agreement work has been there when progress has been evident. Unionists, according to surveys we have conducted, are and consider themselves likely to be supportive of the Agreement if it generates both peace and prosperity.³ For reasons that we have made clear elsewhere we think that it remains possible to vindicate this belief.⁴

The unionist community's political allegiances are largely divided between two parties. One of these, the formally pro-Agreement UUP, has been deeply internally divided. At regular intervals its leader David Trimble has breached the Agreement, both in principle and in spirit, to manage the rejectionists within his party. He delayed executive formation even though according to the terms of the Agreement that process did not require prior decommissioning of weapons by the IRA. He rejected outright the recommendations of the Patten commission on policing—established under the terms of reference of the Agreement. He refused to nominate ministers to attend and carry out their functions on the North/South Ministerial Council—and was found before the courts to have acted unlawfully in doing so. He helped persuade Secretary of State Peter Mandelson to embark on the disastrous path of diluting the Patten commission's recommendations—which, of course, made attaining republican decommissioning of their weapons less rather than more likely.⁵ He encouraged him to pass the Northern Ireland Act 2000, which was in breach of the UK's treaty obligations with the Irish government, and with both the letter and spirit of the Agreement, and which has subsequently been used to suspend both the institutions of the Agreement and legally scheduled elections—against the express wishes of the Irish government. This is a pro-Agreement leader with some difficulties in being whole-heartedly pro-Agreement.

When due allowance is made for Trimble's difficulties in managing his party two thoughts should be uppermost in the minds of those who want to be clear eyed about the Agreement. First: it is not sensible to provide incentives for politicians who are in difficulties with their own party to play institutional havoc. The UK government has finally promised that it will, in principle, remove the suspension power it gave itself in contravention of the Agreement. Well and good, and the sooner the better. Its decision to suspend the institutions and then to postpone elections for the Assembly in the cause of 'saving David' worked against its other objective: to ensure that republicans delivered on their commitments. In addition, it cannot be democratic for the UK government to determine electoral processes on its judgement calls on how the Northern Irish will vote: Westminster determination is, after all, supposed to have been superseded by self-determination under the Agreement. Second, we will only know the Agreement's institutions are secure when their offices are held and tested by those most initially opposed to or suspicious of them. In the immediate aftermath of the 2003 Assembly elections in which the DUP and Sinn Féin achieved majority status within their respective blocs, there has been considerable pessimism about the Agreement's prospects. However, we think there is a reasonable prospect that the DUP's leaders will think twice about utterly wrecking the Agreement—although it will be vital that other appropriate incentives are in place to clarify the leaders' minds. To work the Agreement, representative unionist politicians, including the secondary leadership of the DUP, need demonstrable evidence that it will benefit them, and that it will guarantee the dissolution of the IRA.

We indicate below where the two governments might encourage the full liberalisation of the Agreement's consociational

institutions (as regards designation; the rules for passing key measures; and the rules for electing the First Minister and Deputy First Minister). We emphasise, however, that the British government's completion of policing reform is crucial in consolidating the Agreement. Without it, the IRA is most unlikely to fulfil its necessary acts of completion, and there will not be political stability. In the Joint Declaration of May 2003, the UK government provided a framework for settling policing questions. It has, in effect, repudiated Mandelson's handling of the Patten commission's recommendations in 2000–01. It is committed, in the context of a peaceful settlement, to a robust Policing Board; a representative police service; effective cooperation between the new PSNI and Ireland's Garda Síochána; the reform of Special Branch; normalised and community policing; and the devolution of policing and criminal justice.

The devolution of responsibility for policing will be the final proof that the settlement has taken root. It is to take place in the next Assembly provided it is 'broadly supported' by the local parties. There is no possibility of such support unless the IRA decommissions fully—it may be calculating that it would be prudent not to do so until it has a deal that trades decommissioning in return for the devolution of policing. There is, however, little possibility of broad support if policing were to become the preserve of either nationalist or unionist ministers. We recommend therefore that policing become a joint responsibility of the First Minister and Deputy First Minister, who could also take a justice portfolio and organise their joint office to have these two jurisdictions, justice and policing, separated within their offices but reporting to both of them. We find this a better idea than the most obvious alternatives: a single justice department headed by one minister; a justice department rotated between different parties; and separate justice and policing departments, each

headed by a minister from a different tradition. We think it would be correct and prudent politics on the part of Sinn Féin to propose a Deputy First Minister (or a junior minister with responsibility for policing within the Office of the First and Deputy First Ministers) who has no record of involvement in the IRA.

The May 2003 Joint Declaration, together with previous proposals on the administration of justice, and developments in the pipeline on human rights, prefigures a transformation of the administration of justice along the lines we have supported elsewhere.⁶ It remains regrettable, however, that under-resourcing has slowed the work of the new Human Rights Commission; and more unsettling that the appointment process has led to the over-representation of persons opposed to the spirit and letter of the Agreement. But it remains the case that on balance both policing and justice reforms look primed to fulfil the promise of the Agreement. Public inquiries, present and promised, may partially redress the grievances of the relatives of the victims of unlawful state-sanctioned killings by the police and army or through collusion between public officials and paramilitaries.⁷ The merits of a truth and justice commission to achieve reconciliation lie beyond our fields of research competence: we are not opposed to such a commission, but note that it is not required by the Agreement. Nevertheless, republicans and nationalists have taken some satisfaction from the fact that a series of inquiries and investigations by the UK authorities have demonstrated to international satisfaction the partial and defective nature of the unreformed RUC.

What if the local parties cannot agree on the implementation of the Agreement? What if the Review process leads to an impasse? These questions are on everyone's minds, and must be addressed by the officials and ministers of the two sovereign governments. The governments of Ireland and the United

Kingdom are the key guarantors of the Agreement. It is a legal fact that if the Assembly and the North/South Ministerial Council—which are mutually interdependent—cannot function, then the British–Irish Intergovernmental Conference reverts to the functions and capacities its predecessor enjoyed under the Anglo–Irish Agreement.⁸ It is worth publicly highlighting this fact, if only to concentrate the minds of the DUP’s leadership. Destroying the local Northern Ireland dimension of the Agreement and the North/South Ministerial Council will merely restore the institutional content of the 1985 Anglo–Irish Agreement, albeit with two important qualifications. The first is that the transformation of Ireland’s constitution is now entrenched—though there is nothing to stop the Irish government proposing new amendments to the constitution that would reflect the demise of the Agreement. The second is that the failure of the Agreement’s Assembly will not, and should not, preclude the UK and Irish governments from deepening their cross-border and all-island cooperation, through or outside the British–Irish Intergovernmental Conference. All reasonable readings of the Anglo–Irish Agreement (1985) and subsequent intergovernmental documents, declarations and treaties, especially the Downing Street Declaration (1993), the Framework Documents (1995), the Agreement itself (1998) and the British–Irish Agreement (1999) place duties on both governments to promote and extend cross-border and all-island cooperation. Such cooperation would be better than an immediate shift towards full joint sovereignty arrangements—though it would have the character of functionally delimited *de facto* joint sovereignty arrangements. Such cooperation should, in the interests of legitimacy, operate most evidently in the functions agreed for North–South and East–West cooperation in the 1998 Agreement. The Irish government would be right to emphasise these possibilities if the Agree-

ment were to break down, both to temper possible hubris within the ranks of the DUP, and to shield the parties of government in Ireland from electoral competition from Sinn Féin.

The incentives of this default scenario would be clear. The pro-devolution DUP would face the fact that no effective working of the Agreement’s institutions by the Assembly would mean no devolution, period, and the growth in the scope and influence of the BIIC. This default scenario is not just one with negative incentives for unionists. Sinn Féin has proven, contrary to the suppositions of many, to like devolution, albeit as ‘a transitional arrangement’ in their political discourse. Its leaders know it will flourish best within the framework of a working Agreement, rather than one in default.

But we think these incentives of a well presented default scenario are not enough. The governments must also bind themselves.

The Agreement of 1998 recognised the right of the Irish people to national self-determination, although it qualified the classical interpretation of this right – namely, that it be exercised within a single all-Ireland unit on a majoritarian basis. Nonetheless, according to the Agreement, and the presently correct reading of Ireland’s laws and constitution, the partition of Ireland now rests on a decision of the people of Ireland, North and South. And any decision to end partition will be taken on the same basis; that is, it will require concurrent endorsement, South and North. The institutions of the Agreement are a product of Irish choices, North and South, and not the choices of Great Britain’s parliament or people. So in a formal legalist understanding of the present situation, all that separates formerly militant Irish republicans and the British state on the question of self-determination are questions of trust. The UK government has agreed that as part of the full implementation of the Agreement it is willing to repeal the

Northern Ireland Act 2000 (the ‘Suspension Act’). But, it is not enough that this Act be repealed, as and when the rest of the Agreement is implemented by all parties. It would not be enough because the Act was proof that the United Kingdom’s understanding of the Agreement did not, as promised, respect the right of the Irish people, North and South, to self-determination—as expressed in their respective endorsements of the institutions of the Agreement. In Westminster’s eyes every element of the Agreement—including the portions unionists strongly like—is revisable, and alterable, according to the current will of the current UK parliament. There is nothing in the UK’s constitutional arrangements to stop a future Parliament behaving as Minister Mandelson persuaded it to do.

It is therefore desirable to have the full Agreement with any outcomes of an agreed Review—but without the UK Northern Ireland 2000 Act—entrenched in a treaty that would be attached as a joint and justiciable protocol to whatever new European constitution may be proposed and agreed in the immediate future. This is the sole easy means to constitutionalise the Agreement, which cannot be otherwise constitutionalised in the UK’s constitution-free system. Each member state’s constitution has to be compatible with the European Union’s new constitution and this would be the best way of ensuring no clash of laws between the UK and Irish states. This proposal would constitutionalise the Agreement so that a unilateral suspension of any of the Agreement’s institutions by the UK or Ireland would be regarded as a breach of the EU constitution by the appropriate court. If these ideas were followed and implemented, then as a matter of legal fact it would be true that the partition of Ireland—if it continued indefinitely—and its re-unification—if that happened in the future—would both be the products of Irish national self-determination, North and

South. The Agreement would be constitutionalised—and protected from the unilateral actions of either the UK or Irish Parliaments. It would also, arguably, be consistent with the volitions of two types of nationalist, Irish nationalists and British unionists.

Assembly procedures: the case for revision

There is a strong case for reviewing the Assembly’s rules for electing the First Minister and Deputy First Minister, and for passing key measures. Under current rules, the election of the First Minister and Deputy First Minister requires concurrent majorities of nationalist and unionist members of the Assembly. The passage of key measures requires 40 per cent support within each of the two major blocs (nationalist, unionist) and 60 per cent overall. To render the rules operable, members must ‘designate’ themselves as ‘unionist’ or ‘nationalist’, though they may also opt out and designate themselves as ‘other’. As liberal critics of the Agreement point out, the rules have unfair elements. They privilege nationalism and unionism over other forms of identity. In practice, we do not think that this privileging is of significant empirical consequence in explaining the distributions of support across nationalists, unionists and others. Even without such incentives, Northern Ireland’s voters have overwhelmingly supported nationalist and unionist parties for over a century. Nonetheless, the rules arguably create disincentives for voters to change their behaviour in the future. That is because there is an incentive for voters to choose nationalists or unionists, as members from these groups will, *ceteris paribus*, count more than ‘others’, or be more pivotal. The rules have the effect of pre-determining, in advance of election results, that nationalists and unionists are

to be better protected than 'others'. The 'others' if they were to become a majority would be pivotal in the passage of all normal legislation, but nationalists and unionists would have a more pivotal role in any key decision requiring cross-community support.

Moreover, the rules help to explain Northern Ireland's recurring crises over executive formation and maintenance. These have stemmed largely from machinations over the institution of the dual premiership. So far, these positions have been held by three moderates: David Trimble of the UUP, and Seamus Mallon and Mark Durkan of the SDLP. Mallon, the (first) Deputy First Minister, used the threat of resignation from his post in 1999 before the executive was even formed.⁹ The unilateral suspension of the Agreement's institutions by the Westminster Parliament in 2000, 2001 and 2002 arose from threatened resignations by First Minister Trimble. The UK felt politically bound to act because the posts of First Minister and Deputy First Minister are tightly interdependent: the resignation or death of one triggers the other's formal departure from office and requires fresh elections within six weeks. The UK government consistently calculated with each threat—or manifestation—of a resignation by Trimble that he might not be able to secure his re-election, either before or after Assembly elections. This prompted the UK government to suspend the Agreement's institutions, in breach of the Agreement.

The impasse that has existed since the Assembly elections of November 2003 can also be traced to the design of the dual premiership. The DUP, which won a majority of unionist seats in the Assembly, now has a veto on the election of a joint FM/DFM team. It is ironic that the dual premiership, elected by cross-community procedures and supposedly a moderating 'integrative' institution, has been the lightning rod for deep tensions between blocs as much as it has been a

mechanism for joint coordination and creation of calm by moderate leaders.

The rule for electing the two prime ministers was primarily designed to assure nationalists that there would be no return to the simple majority procedures of the old Stormont Parliament. However, on two occasions it has been used by unionist opponents of the Agreement to prevent the establishment of a government supported by around seventy per cent of the Members of the Assembly (MLAs). The first occurred on 2 November 2001, when David Trimble and Mark Durkan failed to be elected. They were rescued only because a sufficient number of members of the Alliance party and Women's Coalition redesignated themselves from 'other' to 'unionist', permitting them to win a second vote but allowing critics of the Agreement a good laugh at the nature of the 'designation' rules. The second occurred in the wake of the November 2003 Assembly elections. The rule allowed the DUP to declare that the elections, which reflected high, indeed unchanged, levels of support for pro-Agreement parties, meant the death of the Agreement, or at least its renegotiation.

How might the rules be changed under the Agreement's provisions for review, so that they are fairer and less destabilising?

Everyone should be aware that all voting rules are manipulable in some respect (there is a theorem to this effect in political science), and that there are no universally acknowledged voting procedures that meet all reasonable tests of fairness, consistency and efficiency when there are more than three voters and three options (the Arrow theorem). Constitutional designers and rule makers should, however, be open about their preferences. We believe that a review could proceed in the spirit of an Agreement that was plainly intended to create binational institutions in Northern Ireland, with incentives for inclusive executive power-sharing, and strong protections

for minorities. In practice, that means that supporters of the Agreement should be happy with rules that make it difficult for the 'no unionists' to wreck the Agreement but that grant them a fair share in its institutions, and that help 'yes nationalists', 'yes unionists' and 'others' to govern Northern Ireland with significant consensus. But since the Agreement was endorsed in double referendums, and is an outcome of Irish national self-determination, it is vital that any proposed changes be minimal, and within the spirit of the Agreement.

The concurrent majority rule for the election of the premiers is problematic but it also has legitimacy. It is in the Agreement, and it would be an undesirable precedent if it were to be replaced. It ensures that the FM/DFM team has substantial support amongst the two primary blocs that have been in conflict. For these reasons, there is an argument that it should be kept as the rule of first resort. But we do think that there are several default rules that could be used if, as on 2 November 2001 or in the wake of the 2003 Assembly elections, concurrent majorities cannot be achieved. It would be within the spirit of the Agreement to have such a default rule, provided that this rule was consistent with the design of the Agreement. We also believe that the default rule we propose below is better than the existing rule.

We assume that a default of simple majority rule (50 per cent plus one) is a non-starter. This could lead to an FM/DFM team that was exclusively unionist or, in the future, exclusively nationalist. And its logic is not within the spirit of the Agreement.

We also assume that it would be unreasonable to require concurrent majorities, not just of unionists and nationalists but also of the others. While that default rule would rectify the complaint of the 'others' that their votes are less important under parallel consent, this change would unjustifiably inflate their import-

ance. It would make them the most pivotal or decisive group. Given that the 'others' are currently and probably for the foreseeable future a very small group this change would correct their current grievance, that the present rule discriminates against them, with a rule that discriminates even more heavily against nationalists and unionists.

One obvious default is a voting rule that is also in the Agreement and designed to protect minorities, but that requires a lower threshold of support. This is the Agreement's 'weighted majority' rule: 60 per cent of the MLAs voting, including 40 per cent of both nationalists and unionists. Trimble and Durkan would have been comfortably elected by this rule on 2 November 2001. They secured over 70 per cent support in the Assembly, 100 per cent of nationalist votes and 49 per cent of unionist votes. If this rule had been used after the elections of November 2003 (and the defection of three MLAs from the UUP to the DUP in January 2004), it might narrowly have allowed both nationalist parties to team up with the UUP to elect an FM/DFM team, or for both unionist parties to team up with the SDLP. This default rule would make it likely that parties would try to use it; that is, both unionist parties and both nationalist parties would avoid electing an FM/DFM team under the concurrent majority rule, in the expectation that they could find more 'reasonable' partners under the default rule.

Some may find this option attractive. We think it is arguably undemocratic and potentially counterproductive. An overriding principle of the Agreement is inclusion. As Sinn Féin and the DUP are the largest parties in their blocs there is a sound democratic case that they should have the opportunity to take up the positions of FM/DFM. This would be prudent as well as principled. If Sinn Féin and the DUP did take the positions of FM/DFM, it would bind them to the institutions of the Agreement. It would

further consolidate republican support for constitutional politics, and it would make the DUP think twice about the advantages of destructive behaviour.

The other difficulty with this possible default rule is that it requires members to designate as nationalist, unionist or other—a requirement that the Alliance thinks institutionalises differences. Like the parallel consent rule, it discriminates against the 'others', as their votes are less pivotal.

Alternatively, the FM/DFM team could be elected by super-majority. In this case, it would need to win the support of more than a simple majority of MLAs, say two-thirds. This is the favoured rule of the Alliance, which has pushed for the review.¹⁰ It likes it because it does not require designation and it treats all MLAs as equals. It is also relatively straightforward, and echoes similar rules in other countries' constitutions. Trimble and Durkan would have been elected under this rule on 2 November 2001, and might have been narrowly re-elected after November 2003.

But a super-majority of two-thirds would not ensure stability. The number of votes required to block the election of an FM/DFM team would be a relatively low 36, not much higher than the 30 that rejectionists mustered in November 2001, or the minimum number of 34 (33 DUP, 1 UKUP) that they could muster after November 2003. It might also appear unreasonable, as it would mean that an FM and DFM could not be elected even if they could command as much as 66 per cent support in the Assembly.

This problem could be addressed by dropping the threshold to 60 per cent. The repercussions of lowering the threshold would be to raise the salience of the 'others' and to make it easier to exclude the DUP or Sinn Féin. For the reasons given above we believe that for the positions of FM and DFM this logic is problematic—though as we argue below there is a

case for applying this rule in the Assembly for *almost all* other key decisions.

The d'Hondt rule is also in the Agreement, and is currently used for allocating all the other ministers in the executive.¹¹ If it became the default rule for the election of the premiers, then in the absence of parallel consent, the FM and DFM would go to the two largest parties in the Assembly. We believe it would be best to have this as the rule, but also consider it the best default rule. After the November 2003 Assembly elections, the DUP as the largest party would get the first ministership under the d'Hondt process. The deputy first ministership would go to the second largest party. But, which party is that? After the defection of the three UUP MLAs to the DUP, the UUP and Sinn Féin are now each tied on 24 MLAs in joint second place. The Agreement solves such ties by granting precedence to the party with the higher share of first preference votes, in this case Sinn Féin.

The advantage of d'Hondt is that it is decisive. It tells us which parties get the positions in the absence of inter-party agreement. No protracted bargaining or designation shifts are required to resolve an impasse. Using d'Hondt as the default for the election of the FM/DFM team enhances the prospect of the positions being filled—rather than being used for bargaining to break or renegotiate the Agreement (the DUP's current tactic). If one party refused to take its position, or resigned from it, the post would go to the next largest party that did not hold the other post.

The use of d'Hondt to allocate other ministries in the Executive helps explain why between 1998 and 2003 the DUP was not able to do with the cabinet what both David Trimble and Seamus Mallon were able to do with the dual premiership. The DUP was not able to threaten boycotts or resignation in the hope of extracting concessions or provoking a Review because the DUP knew that under the d'Hondt

allocation process its ministries would simply go to other parties.

Of course, simple d'Hondt would create the possibility of an FM/DFM team that was exclusively unionist or, particularly if unionism were to fragment, an exclusively nationalist dual premiership.

Two possible provisos might be devised to prevent this undesirable scenario. One, similar to the logic of the Agreement, would have the default rule specify that the FM and DFM must come from the largest parties in each of the nationalist and unionist blocs, with the First Minister being from the party with the largest number of MLAs. However, this proviso would not be regarded as fair by the others. A second proviso might be better. It would specify that the dual premiers cannot be from one bloc, but would come from the two largest parties allowing for this proviso. That would mean that if the 'others' grew in size they might be able to win one of the top two positions, and that it could not be the case that the top two posts are held by one bloc. (A supplemental rule for the election of the premiers only would stop parties changing the designations they proclaimed to the electorate to take any strategic advantage a second placed unionist or nationalist party might gain from declaring itself to be 'other'.)

If d'Hondt, as we envisage it, were the current rule or default rule for the election of the premiers, it would entitle the DUP, as the largest party in the unionist bloc and largest party in the Assembly, to the position of First Minister. Likewise, it would entitle Sinn Féin, as the largest party in the nationalist bloc, to the position of Deputy First Minister. But, if the DUP refused to partner Sinn Féin, then it would presumably forfeit its opportunity for one of the premierships to the UUP. It is possible that the UUP would consider the premiership, in some scenarios, as a poisoned chalice. However, it may well be prepared to take up the offer in return

for transparent decommissioning and effective disbandment by the IRA, particularly if the alternative is government by a strengthened British-Irish Intergovernmental Conference.

Separately, but relatedly, we believe that the rule which requires that the resignation of one premier must trigger the other's loss of office should be reconsidered. This was not in the original text of the Agreement—though we concede that it is consistent with its spirit. We have all seen that this power is a most destructive bargaining chip.

We believe the review should consider a revision: that the resignation of a premier leads to the immediate fresh allocation of the two posts according to the d'Hondt process, plus our favoured second proviso specified above. So, for example, if Peter Robinson resigned, the DUP could either nominate Nigel Dodds to replace him or vacate the position—in which case, on our proviso, it would go to the UUP, and if the UUP declined the offer it would go to the Alliance party and so on. This rule would create a small incentive for executive maintenance, and weaken the incentive to behave destructively. It cannot guarantee executive maintenance, but rules can never do that.

This proposal is motivated by a simple calculation: the dual premiership has been the most vulnerable institution to date. All crises have flowed through it, and each premier or party leader with a majority in either bloc has possessed a nuclear institutional weapon. They have used the weapon. We may want to disarm the leaders to prevent them from having too much destructive power.

An alternative way to remove the premiers' power to manufacture crises would be for the UK to repeal its extra-Agreement and treaty-breaking Northern Ireland Act 2000 (the 'Suspension Act'). If that happened then it would be clear that the resignation of a premier, and the failure to elect a new team of premiers within six weeks, would generate fresh elections.

That would make any premier think very carefully before using the resignation threat.

The election of the First Minister and the Deputy First Minister is the only activity that requires the use of the parallel consent rule—and it has no default rule for resolving a crisis. That is why we have spent such time on it. The other weighted majority rule, 40 per cent support within each of the two major blocs (nationalist, unionist) and 60 per cent overall, is available for all other decisions. It too has merits because it was negotiated as part of the Agreement, but is it the best rule available?

We must reiterate that any proposal of change to make all blocs (nationalist, unionist and other) equal—that is, that a measure would require 40 per cent support amongst each of three blocs as well as 60 per cent overall—would generate two problems. One: it would make the ‘others’, when they are small, much more pivotal than their numbers warrant. Two: it would retain the designation principle, which some reject.

We believe it is worth considering having a simple weighted majority: namely, 60 per cent support overall amongst MLAs for any key decision other than the election of the premiers (and one other matter that we shall specify below). This change would address the designation issue. Cross-community confidence is, however, the key question, and was at the heart of the Agreement’s design. We must ask several questions before considering such a change.

Here is one of those questions: is there likely to be a majority of 60 per cent willing to consider and capable of imposing its will in an undesirable way on a minority?

Nationalists now consistently have over 40 per cent of the popular vote in recent elections, and the Catholic share of the population, which normally votes nationalist, is increasing. In most Assembly elections, these electoral and

demographic facts will translate into nationalists winning over 40 per cent of the seats (or 44 out of 108). In the 1998 and 2003 elections, nationalists fell just short of this mark, winning only 42 seats. But even in these circumstances, which are unlikely to be repeated in future, nationalists could only be outvoted on key measures if virtually all ‘others’ voted with the unionist bloc. As these ‘others’ stand on a platform of impartiality between unionism and nationalism, this is an unlikely scenario. If some ‘others’ consistently voted with unionists against all nationalists they would have difficulty retaining their seats in the next elections. Effectively, then, a 60 per cent weighted majority rule will protect nationalists, now and later. Nationalists, and nationalists and ‘others’, by contrast, fall short of 60 per cent, so they could not coerce all unionists in the foreseeable future. But, under such a rule change the ‘no unionists’ would be unlikely to command 40 per cent support in Northern Ireland—and the Assembly—as a whole, and therefore could not block measures that enjoyed substantial support across nationalists, unionists and others. For these reasons, amongst others, we believe this rule change might be considered.

We add, however, one important proviso. The Bill of Rights envisaged under the Agreement, to be effective, must have the support of a majority of MLAs, and at least 40 per cent of nationalist and unionist MLAs. If the Bill of Rights is to be effective and is not to be hijacked by a coalition of unionists and ‘others’ it must receive the protection envisaged for its passage by the Assembly in the Agreement (that is, either parallel consent or weighted consent). We strongly believe that the Bill of Rights must pass the Assembly with the requisite levels of support demanded under the Agreement—indeed it would be better to have no distinct Bill of Rights than to have a Bill of Rights dictated by a 60 per cent majority of the Assembly that excluded the assent of

nationalist MLAs. This is not an unprincipled argument on our part. It suggests the retention of the original rules of the Agreement for the implementation of the key features of the Agreement, while suggesting appropriate rule changes for making the fully implemented Agreement work effectively.

Conclusion

It is a common and fundamental criticism of consociational institutions, like Northern Ireland's Assembly and Executive, that they are unworkable. Critics of such institutions feel vindicated by the unfolding of events since 1998. However, much of the instability has not been related to the consociational institutions themselves. It has largely been a result of the failure of republicans and the British government to reach agreement on how to settle, and sequence, related steps on decommissioning, policing reform, justice reform, and demilitarisation. We have outlined here in brief how we think these issues should be addressed.

The institutions are also flawed, but it is possible, and desirable, to address these flaws without destroying the institutions. We have argued that the institutions should be entrenched, so that they can no longer be suspended to suit the narrow interests of particular parties. We have also recommended changes to the institutions' decision making rules that would make them fairer and more stable. And we have recommended changes to the offices of the First Minister and Deputy First Minister that would enhance their durability. Some of these changes require measures by the British government that are consistent with the spirit and letter of its obligations under the Agreement. The others can be addressed by the Northern Ireland parties themselves, under the Agreement's provisions

for review. Our proposed rule changes will not guarantee that the institutions will work, but they will make matters more difficult for those intent on wrecking them, and they can be made within the letter and spirit of an appropriately conducted Review.

Notes

- 1 See John McGarry and Brendan O'Leary, *The Northern Ireland Conflict: Consociational Engagements*. Oxford: Oxford University Press, 2004.
- 2 Brendan O'Leary, 'Personal view: ignore the prophets of doom', *Financial Times*, 11 June 2001; 'Elections, not suspensions', *Guardian*, 13 July 2001; 'Reid should not allow a new Unionist boycott', *Irish Times*, 4 October 2001.
- 3 Geoffrey Evans and Brendan O'Leary, 'Northern Irish voters and the British-Irish Agreement: foundations of a stable consociational settlement?' *Political Quarterly*, vol. 71, no. 1, 2000, pp. 78–101.
- 4 McGarry and O'Leary, *The Northern Ireland Conflict*.
- 5 *Ibid.*, Chapter 13.
- 6 *Ibid.*, Chapter 12.
- 7 For a comprehensive analysis of these cases, see Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland*, Belfast, Blackstaff Press, 2000.
- 8 Brendan O'Leary, 'The nature of the Agreement', *Fordham Journal of International Law*, vol. 22, no. 4, 1999, pp. 1628–67.
- 9 See Statement by the Deputy First Minister (Designate), Northern Ireland Assembly, 15 July 1999, 325.
- 10 See *Agenda for Democracy: Alliance Party Proposals for the Review of the Agreement*, Belfast, APNI, 7 January 2004.
- 11 Brendan O'Leary, Bernard Grofman and Jorgen Elklit, 'Divisor methods for sequential portfolio allocation in multi-party executive bodies: evidence from Northern Ireland and Denmark', *American Journal of Political Science*, 2004 in press.