because AV is a majoritarian and disproportional system, it would not be at all appropriate for Northern Ireland’s polarized multiparty system. As we have already seen in relation to eclecti-
cr Paul Mitchell

cr turnouts, the distribution of votes is such that many constituencies are predominantly unionist or nationalist. The imposition of a majority threshold by introducing AV would thus be highly unlikely to induce the vote pooling desired by Unionists. Indeed, there are good rea-
sions to believe that AV would heighten communal polarization, so that the representation of minority communities would be reduced or even eliminated in many more constituencies than is the case under STV (as in 1998). West Belfast returned six members that were all from the same bloc.


38 The DUP formally recommended that the supporters transfer to pro-Agreement parties, though there was no formal transfer agreement with Sinn Fein despite Gerry Adams’ calls for one. Perhaps not surprisingly given the sharp competition with the UUP— and in the context of a first-post-Agreement election— DUP Leader Trimble did not recommend transfers to the SJP. In these circumstances he probably did as much as he could by saying that UUP voters should make up their own minds on transfers on the basis of local circumstances (Irish Times, 24 June 1998).

39 However, note that the UUP has received significant voter support from all in Northern Ireland elections under a variety of electoral systems. The transfers are of course layered with the plurality system (see Mitchell and Gillespie, ‘The Electoral Systems’, Table 4.4).

40 Evans and O’Leary, ‘Northern Irish Voters and the British-Irish Agreement’.

41 Ibid., 90.

42 Michael Gallagher has noted that due to a recent change in the electoral law in the Republic of Ireland, transfers are not always as informative as they used to be because returning offi-
cers are now permitted to perform multiple eliminations of candidates if their combined vote total is less than that of the next lowest placed candidate (Gallagher, ‘The Results Analysed’, 137). The consequence is that the origin of some transfers is indeterminate. Unfortunately, multiple eliminations are also permitted in Northern Ireland, though they were not so that frequent in 1998. The following results relate only to determinate cases.


44 See also, 35. The baronies ended are determinate aggregates transfers— that is, transfers at any stage of the count— rather than transfers withheld by the party of the candidate making the transfers, but with no otherarty candidates remaining in the count.


46 Evans and O’Leary, ‘Northern Irish Voters and the British-Irish Agreement’.

47 Sinnott, ‘Historic Day Blotched by Lost Pull’.

48 We can also note the one case of a Sinn Fein terminal transfer in which the three candidates remaining in the count were unionists (Gerranshag South-Tynan) 37 per cent transferred to the UUP candidate and only 5.2 per cent to the two ‘No’ candidates combined. Irrespective of whether one thinks this should be a pre-condition it is a reality given political distinc-
tions within the UUP.

Introduction

The 1998 Agreement was a major achievement, both for its negotiators and for the peoples of Ireland and Britain, emerging from a political desert whose only landmarks were failed ‘initiatives’. The Agreement’s proposed model of devolu-
tion was consociational, meeting the criteria specified by Arend Lijphart namely, cross-communal executive power-sharing; proportionality rules throughout the governmental and public sectors; community self-government or autonomy and equality in cultural life; and veto rights for minorities. A consociation is an association of communities, in this case British unionist, Irish nationalist, and others, that is the outcome of formal or informal bargains or pacts between the political leaders of ethnic or religious groups. The Agreement was the product of both tacit and explicit consociational thought, and of ‘pacling’ by most of the leaders of the key ethnic-national groups and their respective patron-states.

But the Agreement was not just consociational, and departed from Lijphart’s prescriptions in important respects. It had important external dimensions; it was made with the leaders of national, and not just ethnic or religious communities— unlike most previously existing consociations—and it was endorsed by (most of) the leaders and (most of) the led in referendums across a sovereign border. It was the first consociational settlement endorsed by a referendum that required concurrenmt majorities in jurisdictions in different states. The Agreement foresaw an internal consociation within overarching confederal and federating institutions; it had elements of co-sovereignty in the arrangements agreed between its patron-states; it promised a novel model of ‘double protection’; and it rested on a bargain derived from diematically conflicting hopes about its likely long-run outcome. One supplement must be added: the Agreement’s implementation was vulnerable to attempted renegotiation, and to legalism. When this chapter was composed, these difficulties were manifest in the UK’s unilateral decision in February 2000 to suspend (some of) the institutions of the Agreement.
The Internal Settlement: A Distinctive Consociation

The Agreement established a single chamber Assembly, and an Executive for Northern Ireland. The Assembly and Executive were to have full legislative and executive competence for economic development, education, health and social services, agriculture, environment, and finance (including the local civil service). Through 'cross-community agreement' the Assembly was entitled to expand these competencies; and, again through such agreement, and with the consent of the UK Secretary of State and the Westminster Parliament, the Assembly was entitled to legislate for any non-devolved reserved function. Maximum feasible devolved self-government was therefore within the scope of the local decision-makers and a convention might have developed in which the Secretary of State and Westminster 'rubber stamped' any measures of the Assembly. Indeed it was conceivable that much public policy in Ireland, North and South, would eventually be made without direct British ministerial involvement—though the British budgetary allocation would be pivotal as long as Northern Ireland remained in the UK.

Elected Assembly members were obliged to designate themselves as 'nationalists', 'unionists' or 'other'—in this respect Lajperg's injunctions in favour of full self-determination rather than pre-determination were violated. After the Assembly was elected in June 1998, this requirement posed difficult questions for the Alliance and other 'cross-community' parties, such as the Women's Coalition. Though standard majority rules the Assembly was entitled to pass 'normal laws' within its competencies, though there was provision for a minority of 30 of the 108 Assembly members, to trigger special procedures that required special majorities—see Wildfoot, in Chapter 6 of this volume. Key decisions, the passage of controversial legislation, including the budget, automatically have these special procedures that require 'cross-community' support. Two rules were designed for this purpose. The first was 'parallel consent', a majority that encompasses a strict concurrent majority of the nationalists and unionists. It required that a two-thirds majority of those present and voting, both by an overall majority of Assembly members, and by a majority of both the unionist and nationalist members respectively. Table 4.1, which records the numbers in each bloc returned in the June 1998 election, shows that parallel consent with all members present, required the support of 22 nationalists, and 30 unionists, as well as an overall majority in the Assembly. With all present, the Assembly is 55 members which means that measures may pass under parallel consent procedures that are dependent upon the support of the 'others'. 22 nationalists, 30 unionists and 3 others enable the passage of a key decision so this rule did not automatically render the 'others' unimportant.

The second rule was that of 'weighted majority'. This required, amongst those present and voting, that a measure have the support of 60 per cent of members.
Executive Power-Sharing

The Agreement established two quasi-presidential figures, a novel dyarchy, a First Minister and a deputy First Minister, elected together by the parallel consent procedure. This procedure was intended to supply very strong incentives to unionists and nationalists to nominate a candidate for one of these positions that was acceptable to a majority of the other bloc’s Assembly members. In the first elections for these posts, in design form, pro-agreement unionists in the UUP and the Progressive Unionist Party, who then had a majority of registered unionists, voted solidly for the combination of David Trimble of the UUP and Seamus Mallon of the SDLP. Naturally so did the SDLP, which enjoyed a majority among registered nationalists. The ‘No unionists’ voted against this combination, while Sinn Féin abstained.

The rule ensured that a unionist and a nationalist shared the top two posts. The Agreement and its U.K. legislative enactment, the Northern Ireland Act (1998) made clear that both posts had identical symbolic and external representation functions. Indeed both had identical powers. The sole difference was in their titles: both were to preside over the ‘Executive Committee’ of Ministers, and have a role in co-ordinating its work. This dual premiership critically depended upon the personal co-operation of the two holders of these posts, and upon the co-operation of their respective dominions—or pluralities. The Northern Ireland Act (1998) reinforced their interdependence by requiring that ‘if either the First Minister or the deputy First Minister ceases to hold office, whether by resignation or otherwise, the other shall also cease to hold office’ (Article 14 (6)). This latter rule underscored the delicacy of the dual premiership. Indeed the proximate cause of the suspension of the Agreement in February 2000 was the fear that the threatened resignation of the First Minister, David Trimble, would have produced an unworkable Assembly. Given that there were now twenty-nine ‘No Unionists’ with a blocking veto, the UK
1. No party was entitled to veto another party's membership of the Executive—though the Assembly as a whole, through cross-community consent, was free to deem a party unfit for office.

2. The Agreement did not require decommissioning before executive formation on the part of any paramilitaries or of any parties connected to them—though it did require parties to use their best endeavours to achieve the completion of decommissioning within two years, that is, by 22 May 2000. Indeed it was precisely this fact that prompted Jeffrey Donaldson to leave the UUP's negociating team the day the Agreement was made.

3. Any 'natural' reading of the Agreement mandated executive formation as the first step necessary to bring all of the Agreement's institutions 'on line'.

Trimble rested his (flimsy) case on a communication he had received from the UK premier on the morning of the Agreement, indicating that it was Tony Blair's view that decommissioning 'should begin straight away'. Communications from UK premiers do not, of course, have the force of law—outside the ranks of New Labour! Trimble's concern was to appease critics of the Agreement within his own party, and among his voters. His negotiating team split in the making of the Agreement, a majority of his party's Westminster members opposed the Agreement, and his new Assembly party contained critics of aspects of the Agreement. So he felt obliged to play for time before implementing the Agreement.

Trimble was initially facilitated in exercising his veto by UK and Irish Governments sympathetic to his exposed position. He also took advantage of the fact that the SDLP did not make the formation of the rest of the executive a precondition of its own support for the Trimble/Mallon ticket for First and Deputy First Minister. The SDLP wished to shore up Trimble's political position. One flexible provision in the Agreement gave Trimble further room for manoeuvre. The Agreement stated that there must be at least six 'Other Ministers', but that there could be 'up to ten'. The number of ministries was to be decided by cross-community consent, and that gave an opportunity to delay on executive formation. It would be December 1998 before the parties reached agreement on ten ministries after the UUP abandoned its demand for a seven-seat Executive in which unionists would have had a 4:3 majority.

The protracted crisis over executive formation was, in principle, resolved in mid-November 1999. Unionists accepted that executive formation would occur—with the IRA appointing an interlocutor to negotiate with the International Commission on Decommissioning (ICD)—while actual decommissioning, consistent with the text of the Agreement, would not be required until after executive formation. Senator George Mitchell in concluding his eleven-week review of the Agreement, and with the consent of the pro-Agreement parties, stated that Decommissioning should take effect, then the executive should meet, and then the paramilitary groups should appoint their authorised repres-
Ministers might precipitate a protracted crisis of Executive-formation. Amendments to the *Northern Ireland Act* (1998) could be adapted to the UK Parliament, or by the Assembly, that would be consistent with the Agreement, to prevent any recurrence of this type of crisis. In future, candidates for First and Deputy First Minister could be obliged to state the number of executive portfolios that will be available, and the formation of the executive should be required immediately after their election. Otherwise the election of the First Minister and Deputy First Minister should be rendered null and void. That would plug this particular constitutional hole. It may, however, be unnecessary because it is not likely that future candidates for First and Deputy First Ministers will agree to be nominated without a firm agreement from their opposite number on the number of portfolios and the date of cabinet formation.

**Forms of Proportionality**

Constitutional arrangements are built on principles of proportionality. The Agreement met this test in four ways: in the *d'Hondt* procedure for executive formation discussed above; in the Assembly’s committees—see *Wilford*, in Chapter 6 of this volume; in the electoral system for the Assembly; and in recruitment and promotion policies within the public sector.

The Assembly’s Committees

The Assembly was to have committees scrutinising each of the departments headed by ministers. Committee chairs and deputy chairs were allocated according to the *d'Hondt* rule. Committee composition was in proportion to the composition of the Assembly. Each committee had to approve any proposed new law within its jurisdiction tabled by ministers, and indeed committees could initiate legislation. In consequence, a committee dominated by other parties could block the legislative initiatives of a dynamic minister; and it could initiate legislation not to that minister’s liking—though the success of such proposals would be subject to cross-community special procedures. Thus, the committee system effectively combines the constitutional principles of proportionality and veto-rights. The principles were reinforced by the stipulation in the *Northern Ireland Act* (1998) that the committees could not be chaired or deputy chaired by ministers or junior ministers, and the further requirement that they be organised in such a way that the chair and deputy chair were drawn from different parties from the relevant minister.

The Assembly’s Election System: Corrections for *Lijphart and Honinger*: Elections to the 108 member Assembly used a proportional representation system, the single transferable vote, STV, in eighteen six-member constituencies—though the Assembly could choose, by cross-community consent procedures, to deviate from this system. The Droop quota in each constituency was therefore 14.3 per cent of the vote, which squeezed the very small parties, or, alternatively, encouraged them to form electoral alliances.7 Thus, the smaller of the two loyalist parties, the Ulster Democratic Party (UDP), won no seats in the first assembly election. However, minor parties which can gather lower order preferences from across the unionist and nationalist blocs, such as the Women’s Coalition, have shown that the system need not preclude representation for small parties amongst the ‘others’. This voting system is not what Lijphart recommends: he is an advocate of party-list PR systems, principally because he believes they help make party leaders more powerful, and better able to sustain inter-ethnic constitutional deals.50 Those who would like to see David Trimble in greater control of his party might have heeded after Lijphart’s preferred form of proportional representation. The Northern Ireland case, however, suggests that a modification of the constitutional prescriptive canon is in order. Had a region-wide list-system been in operation in June 1998 the UDP would have ended up with fewer seats—fewer even than the BDP—rendering the implementation of the Agreement even more problematic. There is a further and less contingent argument against party-list systems, especially important where the relevant ethnic communities are internally democratic rather than sociologically and politically monolithic. A region-wide party-list election gives incentives for the formation of a wide variety of micro-parties. In Northern Ireland it would have fragmented and shredded the votes of the major parties which made the Agreement. Hard-liners under party-list systems have every reason to form fresh parties knowing that their disloyalty will penalise more moderate parties, but without necessarily reducing the total vote and seat share of the relevant ethno-national bloc. This objection to Lijphart’s favoured prescription is not merely speculative. The 1996 elections to the Northern Ireland Peace Forum used a mixture of a party-list system and ‘reserved seats’. Party-proliferation and the erosion of the UDP first preference vote47 were some of the more obvious consequences.47 STV, of course, does not guarantee party discipline as multiple candidates for the same party in a given constituency may present different emphases on party commitments. Yet, combined with higher effective thresholds than under most forms of party-list PR, the system makes it more likely that parties will remain formally united, and therefore able to make and maintain constitutional deals. At the very least the prescriptive superiority of the party-list system for those purposes is unproven, and Lijphart’s consistent counsel in this regard should be heeded.51 As well as achieving proportionality STV has the great merit of encouraging inter-ethnic ‘vote-pooling’.48 In principle, voters could have used their lower-order preferences (transfers) to reward pro-Agreement candidates at the expense of uncooperative opponents.
of anti-Agreement candidates. In this respect STV looks tailor-made to achieve the ‘inter-ethnic’ and ‘cross-ethnic’ voting favoured by Doug Horowitz, a critic of consociational thinking but a strong advocate of institu-
tional and policy devices to facilitate conflict-reduction. Consistent, however, with his general premises, Horowitz believes that the STV system damages the prospects for inter-ethnic co-operation because the relatively low quota required to win a seat in single-member constituencies (1.3 per cent) makes it too easy for hard-line parties and their candidates to be successful. He also thinks that the Agreement’s other institutions, biased towards the key consociationalist—nationalist and unionist—compounds this effect by weakening the prospects of cross-ethnic parties, such as Alliance, which he believed impairs conflict-
reduction.

The Northern Ireland case suggests that normative and empirical challenges to Horowitz’s reasoning are in order. Horowitz would generally prefer the use of the Alternative Vote (AV) in single-member constituencies in Northern Ireland, as elsewhere, because its quota—30 per cent plus one—would demand strong support to moderate ethno-national and cross-ethnic candidates. The problem with this prescription is straightforward. The outcomes it would deliver would be majoritarian, disproportional, and unpredictably so, and they would be disproportional both within and across blocs. They would, additionally, have much more indirect ‘inclusive’ effects than STV. In some of Northern Ireland’s constituencies there would be unambiguous unionist and nationalist majorities and AV would lead to the under-representation of minority voters even in these constituencies, and to local fields. Secondly, while candidates would have to seek support for lower-order preferences under AV, it would not be obvious that their best strategy would be to seek lower-order preferences across the ethno-national divide because the imperative of staying in the count would dictate building as big an initial first and second preference vote tally as possible. Lastly, AV would never be agreed by hard-line parties enter-
ing a consociational settlement if they believed that it would be likely to undermines their electoral support. Since the Agreement was made possible by encouraging inclusivity, by facilitating negotiations which included Sinn Fein the party that had supported the IRA and the PUP and the LDP—the parties that had supported the UVF and the UDA, it would have been per-
verse for their leaders to have agreed an electoral system that minimised their prospects.

Indeed STV arguably worked both before and after the Agreement to consolidate the Agreement’s prospects. It had helped to moderate the policy stance of Sinn Fein. After its first phase of electoral participation in elections in Northern Ireland in the 1980s, and in the Republic in the latter half of the 1980s, the party discovered that it was in a ghetto. Its candidates in some local government con-
stituencies accumulated large numbers of first-preference ballot papers, only to remain unelected as a range of other parties’ candidates overtook them to achieve

quotas on the basis of lower-order preferences. They received very few lower order preferences from SDLP voters. But once the party moderated its stance, once it promoted the IRA’s cease-fire, and became the champion of a peace process and a negotiated settlement, it found that its first-preference vote, its transfer vote, and its seats-won all increased.

The constitutional design argument that can be extracted from this story is that once there has been party fragmentation within ethno-national blocs then STV can assist accommodating postures and initiatives by parties and candid-
ates, both intra- and inter-bloc. Horowitz’s electoral integrationist prescriptions are most pertinent at the formation of a competitive party system. However, once party formation and pluralism have occurred there will be few 
agents with the incentives to implement Horowitz’s preferences, and if a third-
party or outside power did so it would be a provocative to the less moderate parties, and would therefore most likely reignite ethno-national tensions. This argument is, of course, a very qualified one: STV is certainly not enough, and it may not be appropriate everywhere. But it can help both to promote accom-
modative moves and consolidate consociational deals in ways that region-wide party-list systems and the AV system in single member districts cannot.

There has been some empirical confirmation of the merits of STV since the Agreement was made. See Mitchell, in Chapter 3 of this volume, ‘Vote-
pooling’ occurred within the first Assembly elections—as we can surmise, to an extent, from actual counts—and, as Geoffrey Evans and I can confirm from a survey we helped design, in our survey, approximately 10 per cent of each bloc’s first-preference supporters gave lower-order preference support to pro-
Agreement candidates in the other bloc. Within-bloc rewards for moderation also occurred: Sinn Fein won lower order preferences from SDLP voters, and the PUP had candidates elected on the basis of transfers from other candidates.

The Northern Ireland Act 1998 and the Northern Ireland (Elections) Act 1998 opened one novelty in the practice of STV in Ireland. Both Acts left it open to the Secretary of State to determine the method of filling vacancies: through by-elec-
tions, substitutes, or through whatever method the Secretary of State deems fit. By-elections are anomalous in a PR system. A candidate who wins the last seat in a six-member constituency and who subsequently resists or dies is unlikely to be replaced by a candidate of the same party or persuasion in a by-election which becomes the equivalent of the alternative vote in a single-
member constituency. The Northern Ireland Assembly (Elections) Order 1998 provided for a system of alternates, or personally nominated substitutes with a provision for by-elections if the alternates system fails to provide a substitute.

The disproportionality possible implied by by-elections—with consequent unpredictable ramifications for the numbers of registered nationalists and unionists and the cross-community rules—needed to be engineered out of the settle-
ment, and it was encouraging that the parties co-operated with this concern in mind.
Recruitment and Representativeness in the Public Sector

Proportionality rules combined with accommodative incentives did not stop with the Executive, the committees system, or with the electoral system. The Agreement was consistent with past and future measures taken to promote fair employment and (modest) affirmative action in the public sector that will, one hopes, eventually ensure a representative and non-discriminatory civil service and judiciary.

Most significantly, the Agreement envisaged a representative police force—see Walker, C. in Chapter 8 of this volume. The Patten Report published in September 1999 was an able expression of democratic thought on policing and fulfilled the mandate of the Agreement.24 Given that the parties could not agree on police reform, the Commission had to propose policing arrangements consistent with the internal and external spirit of the Agreement. Patten delivered, including on recommendations for better-structured cross-border co-operation with the Garda Síochána in the Republic. Significantly, the Report’s recommendations mostly do not depend upon the Agreement’s institutions for their implementation. The commissioners explicitly recommended most of their changes come what may.25 Policing is thus in principle scheduled for full-scale transformation.

In short, in the entirety of the important posts in the public sector the principles of representativeness and proportionality are to be applied, either in the form of party representativeness, or in the form of representative bureaucracies and public services. There is one exception left: the judiciary, and here the proposal to have a judicial appointments commission may eventually perform the same task.

Community Autonomy and Equality

Conventional settlements avoid the compulsory integration of peoples. Instead they seek, through bargaining, to manage differences equally and justly. They do not present voluntary integration or assimilation, and to be liberal, such settlements must protect those who wish to keep their identities intact.

The Agreement left in place the recently established arrangements for primary and secondary schooling in Northern Ireland in which Catholic, Protestant, and integrated schools are equally funded. In this respect Northern Ireland is fully consociational but liberal—one can avoid Catholic and Protestant schools.

The Agreement also makes new provisions for the educational use, protection, and public use of the Irish language—along the lines used for Welsh within the principality—thereby adding linguistic to educational protections of Irish nationalist culture.

Most importantly, the Agreement completes the equalization of both major communities as national communities, that is, as British and Irish communities not just, as is so misleadingly emphasized, as Protestants and Catholics. The

European Convention on Human Rights—which is weak on the protection of collective rights and equality rights—will be supplemented by measures that will give Northern Ireland its own tailor-made Bill of Rights, to protect both national groupings as well as individuals. The worst illusion of parties to the conflict and some of its successive managers, based in London, Belfast, or Dublin, held that Northern Ireland could be stable and democratic while being either British or Irish. The Agreement promises to make Northern Ireland binational—and opens up the prospect of a fascinating jurisprudence, not least in the regulation of parades and marches.

The Agreement did not neglect the non-national dimensions of local politics, nor did it exclude the ‘Others’. All aspects of unjustified social equalities, as well as inequalities between the national communities, were recognized in the text of the Agreement, and given some means of institutional redress and monitoring. The Agreement addresses national equality, the allegiances to the Irish and British nations, and social equality, that is, other dimensions that differentiate groups and individuals in Northern Ireland: religion, race, ethnic affiliation, sex, and sexuality. And equality issues, be they national or social, were not left exclusively to the local parties to manage and negotiate, which might be a recipe for stagnation. Instead, under the Agreement, the UK Government has created a new statutory obligation on public authorities. They will be required to carry out all their functions with due regard to the need to promote equality of opportunity in relation to people’s religious background and political opinions; and with respect to their gender, race, disabilities, age, marital status, and sexual orientation. This commitment entails what McCrudden labels ‘mainstreaming equality’.26 The UK Government has also established a Human Rights Commission under the Agreement, tasked with an extended and enhanced role compared with its predecessor, including monitoring, the power to instigate litigation, and drafting a tailor-made local Bill of Rights.

Minority Veto Rights

The final dimension of an internal consociational settlement is the protection of minorities through tacit or explicit veto rights. The Agreement fulfilled this criterion in the Assembly, in the courts, and through enabling political appeals to both the UK and Irish Governments.

The Assembly has procedures—parallel consent, weighted majority, and the petition of concern—that protect nationalists from unionist dominance. Indeed they did so in such a comprehensive manner that the rates designed to protect the nationalist minority were deployed by hard-line unionist opponents of the Agreement to wreck its initiation and development. Indeed, their threatened use by ‘No’ unionists was the immediate excuse employed by the Secretary of State to suspend the Assembly. The ‘Others’ were less well protected in the Assembly—they could be outvoted by a simple majority, and any nationalis-
unionist super-majority, and their numbers left them well short of being able to trigger a petition on their own. However, the ‘Others’ were not at the heart of the conflict so it is not surprising that they were not at the heart of its pacification. It is not accurate to claim that they were excluded.

In the courts, the ‘Others’, as well as discredited nationalists and unionists, have come to redress breaches of their human and collective rights. The content of the European Convention on Human Rights is well known. What is less clear is what package of collective rights the new independent Northern Ireland Human Rights Commission will recommend. But the new policing arrangements, if they follow the Purcell Report, will be infused with a human rights culture see Walker, C. in Chapter 4 of this volume. The incorporation of the European Convention into public law and Northern Ireland’s forthcoming provisions to strengthen the rights of national, religious, and cultural minorities, will ensure that policing arrangements have to perform to higher standards.

The Agreement provided for a review of the criminal justice system that would include ‘arrangements for making appointments to the judiciary’. It was \( e v i d e n t l y d e t a i l e d t h a t h e n t h e j u d i c i a l i t y r e f l e c t e d, m e r i t o r i o u s l y, t h e d i f f e r e n t c o m m u n i t i e s i n t h e N o r t h , a n d b e c o m i n g t o t h e h u m a n a n d m i n o r i t i e s ’ r i g h t s p r o v i s i o n s t h a t i t w i l l i n c r e a s i n g l y i n t e r p r e t’. The Criminal Justice Review which made these recommendations was published late, after the suspension of the Assembly, its latency apparently the product of resistance to possible ‘real across’ effects in Scotland and Wales.

Non-national minorities were not forgotten. A civil society forum was to be created in the North, with a Southern counterpart, and through the Inter-governmental Conference of the British and Irish Governments, mechanisms have been established to ensure that ‘Others’ will be able to express their views and ensure that the new ‘rights culture’ does not exclude them.

The External Settlement: Confederal and Federal Elements

The Agreement was not, however, only internally consensual: it was also externally confederalizing and federalizing, though my emphasis is on the latter. The argument rests on these stipulative definitions: confederations exist when political units voluntarily delegate powers and functions to bodies that can exercise power across their jurisdictions; and a federal relationship exists when there are at least two separate tiers of government over the same territory, and when neither tier can unilaterally alter the constitutional capacities of the other.\(^25\)
areas of co-operation, including some aspects of transport, agriculture, education, health, the environment, and tourism—where a joint North-South public company was established. These zones and modes of co-operation were to be decided during a transitional period between Assembly elections and October 31, 1998. The Agreement provided an Annex listing twelve possible areas for implementation but left it open for others to be considered.

The NSMC differed from the Council of Ireland of 1974, and not just in name. There was no provision for a North-South joint parliamentary forum, as there was in the Sunningdale Agreement of 1973, but the Northern Assembly and the Irish Dail Eireann were asked to consider developing such a forum. Nationalists wanted the NSMC to be established by legislation from Westminster and the Dail Eireann to emphasize its autonomy from the Northern Assembly. Unionists preferred that the NSMC be established by the Northern Ireland Assembly and its counterpart in Dublin. The Agreement split the differences between the two positions. The NSMC and the implementation bodies were brought into existence by British-Irish legislation. During the transition it was for the Northern executive and the Republic’s government to decide, by agreement, how co-operation should take place, and in what areas the North-South institutions should co-operate. The Northern Ireland Assembly could not alter this body of work, except by cross-community consent.

The Agreement also linked Ireland, North and South, to another confederation, the European Union. It required the Council to consider the implementation of EU policies and programmes as well as proposals under way at the EU, and made proposals for the Council’s views to be ‘taken into account’ at relevant EU meetings.

The signatories to the Agreement promised to work ‘in good faith’ to bring the NSMC into being. There was not sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement, but the signatories were required to use ‘best endeavours’ to reach agreement and to make ‘determined efforts’—language that echoed that used in the Anglo-Irish Agreement of 1985—to overcome disagreements in functions where there is ‘a mutual cross-border and all-island benefit’.29

Several economic and sociological developments might underpin the new confederation. As the Republic’s ‘Celtic Tiger’ continues to expand, Northern Ireland’s ministers and citizens, of whatever background, should see increasing benefits from North-South co-operation. And if the European Union continues to integrate, there will be pressure for both parts of Ireland to enhance their co-operation, given their shared peripheral geographical position, and similar interests in functional activities such as agriculture and tourism, and in having regions defined in ways that attract funds.30 Northern Ireland may even come to think that it would benefit from membership of EMU.
not, except through breaking its treaty obligations, and except through denying Irish national self-determination, exercise power in any manner in Northern Ireland that is inconsistent with the Agreement.

That is why, in Irish nationalist eyes, the unilateral suspension of the Assembly and the NSMC by the UK in February 2000 was regarded as a breach of the new constitutional arrangements. This step violated the will of the people of Ireland, North and South, expressed in two referendums: neither the Agreement, nor the people(s), had mandated the suspensive power. The Secretary of State and the UK Parliament may have believed they were acting from the best of motives—though that can certainly be debated—but they acted without any serious scrutiny of the constitutional consequences. Their action ripped apart the negotiating work of the last ten years—breaking the UK's commitment to the principles of consent, and the recognition of the Irish people's right to national self-determination, North and South. No UK parliamentarian can now look an Irish republican in the face and say that a united Ireland will occur if there is local majority consent, because any such promise, like every other element of the Agreement, is now vulnerable to the infinitely revisable dogma of parliamentary sovereignty. A state which lets its Parliament break international law, override a referendum, and suspend—without its consent—an Assembly built upon unprecedented levels of local consent in a referendum, is one which nationalists complain is incapable of being constitutionalized.

The federalizing possibility, or federation, that has now been put into deep storage, might have been enhanced if the UK and Northern Irish courts had come to treat Northern Ireland’s relationships to Westminster as akin to those of the former Dominions—which had a federal character—as they did in the period of the Stormont Parliament (1921–72). Maximum feasible autonomy for Northern Ireland while remaining within the Union was achievable, provided there was agreement to that within the Northern Assembly. Legislator Dissention and unionists revised that Westminster sovereignty in Northern Ireland remained unattainable, led ultimately to disastrous effect in February 2000. Nationalists, by contrast, believed that the repeal of section 75 of the Government of Ireland Act of 1920 was intended to place the status of Northern Ireland and its institutions in the hands of its people, and not of Westminster’s absolute determination. If the Agreement breaks down, the political development of a federation might be assured, but the prospect remains uncertain.

Irish Federalizing Processes

The Agreement opened federalist avenues in the Republic of Ireland—inhito one of the most centralized states in Europe. Nationalists saw the NSMC, North and South, as the embryonic institution of a federal Ireland: first confederation, then federation after trust had been built. This stepping-stone theory was most loudly articulated by ‘No Unionists’, but they are not wrong in their calculation that many nationalists see the North-South Council as ‘transitional’. Sinn Féin says so, Fianna Fáil says so.

The so-called Agreement and its people did not abandon Irish unification when they endorsed the Agreement. Upon the change of the Irish Constitution, it became the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognizing that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people expressed, in both jurisdictions in the island—from the new Article 3.

The amended Irish Constitution therefore officially recognizes two jurisdictions that jointly enjoy the right to participate in the Irish nation’s exercise of self-determination. Unification is no longer linked to ‘unitarism’, and therefore is entirely compatible with either full confederation or federation.

Irish unification cannot be precluded because of present demographic and electoral trends, which have led to a steady rise in the nationalist share of the vote across different electoral systems. The nature of any eventual unification envisaged in the redrafted Irish Constitution is, however, now very different. It no longer has anything resembling a programme of assimilation. Respect for the diversity of identities and traditions connects with both convivial and com/federal logic. The Republic is bound by the Agreement to structure its laws, and its protection of rights, to prepare for the possibility of a com/federal as well as a unitary Ireland. The Agreement recognizes Northern Ireland as a legal entity within the Irish Constitution. So its eventual elimination as a political unit is no longer a programmatic feature of Bonneracht na Mírinne.

The Agreement also envisages the subjection of both jurisdictions in Ireland to the same regime for the protection of individual and group rights—a situation entirely compatible with a subsequent formal confederation or federation.

What might happen if no majority emerges for Irish unification within Northern Ireland—a possibility that is not, of course, guaranteed? If nationalists acquired local majority support it would not necessarily be in their considered interests to promote the region’s immediate administrative and legal assimilation into the Republic. They would then have a new interest in preserving Northern Ireland as a political entity within a federated Ireland—after all they would be a ‘local’ majority. So would the governing coalition in the Republic whose calculations might be disturbed by the entry of Northern participants. Conversely, some unionists faced with this prospect might prefer a unitary Ireland as the lesser evil, calculating that their chances of being key players in government formation in a bigger arena might protect them better than being a minority in Northern Ireland. But that is simply one possible future.

The com/federal dimensions of the Agreement were not merely pan-Irish or pan-British. They could have evolved within a European Union which has its own strong confederal relationships, and many ambitious federalists.
would have been no obvious organizational or policy-making contradictions, though multiple networking clashes, that would have arisen from this extra line of confederalizing, and they might have helped to transfer some of the problems of binary considerations of whether a given issue is controlled by London or Dublin.

Double Protection and Co-Sovereignty

The subtler and so far least implemented part of the Agreement was well beyond standard constitutional thinking. This is its tacit 'double protection model' based on elements of co-sovereignty. The Agreement was designed to withstand major demographic and electoral change and promised to ensure the protection of rights, collective and individual, on both sides of the present border in functionally-equivalent ways. In effect, it promises protection to Northern nationalists now on the same terms that will be given to Ulster unionists should they ever become a minority in a unified Ireland. Communities are to be protected whether they are majorities or minorities, and whether sovereignty lies with the U.K. or the Republic — whichever the expression 'double protection'.

The two states not only promise reciprocity for the local protection of present and future minorities, but they have created two intergovernmental devices to protect those communities. One is the successor to the Anglo-Irish Agreement, the British-Irish intergovernmental conference that guarantees the Republic's protection to its government's access to policy formulation on all matters not (yet) devolved to the Northern Assembly or the North-South Ministerial Council — and which can be expected to develop a greater role in what were devolved matters in the event of continuing suspension of the Agreement. The other is the British-Irish Council — see Walker, p. in Chapter 7 of this volume. It has no impact or function, but both, as representatives of the two governments, will have the same status as the representatives of the governments of the sovereign states. The Anglo-Irish Agreement fully anticipated this arrangement. Therefore it is more accurate to claim that the Anglo-Irish Agreement has been fulfilled than that it has been removed.

The Military and Political Nature of the Agreement

The institutional nature of the Agreement is complex, but matches the conceptual categories I have deployed. There is no need to write new terms for what has been agreed, except, perhaps, for what I have called the 'double protection' model. The Agreement was wide-ranging, multilateral and had something in it for everyone who signed it. It addressed the 'Irish' of relationships between nationalist and unionist parties in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain. It was neither a victory for nationalists, nor for unionists. Both could maintain their central aspirations, their core identities, and present or express better their interests. But describing constitutional architecture is one thing; informal political reality is often different.

The Agreement in its totality was an immensely subtle institutional construction and vulnerable to the play of events, especially Orange or Green cards by hard-line nationalists or republicans, and to miscalculations by softer-line politicians. Its successful implementation has proved more difficult than its formulation. The fracas at 'Drumcree' in July 1998, the massacre at Omagh in August 1998, and the continuing crisis over executive formation and decommissioning joint committees revealed these difficulties. There were, however, reasons to be cheerful about the robustness of these institutions if we analyse the military and political nature of the settlement, though there were also reasons to be cautious.

The Agreement on Ending the Armed Conflict

The Agreement promised a path to end armed conflict, though formally speaking, no military or paramilitary organizations negotiated the Agreement. The Agreement encompassed decommissioning, demilitarization, police reform, and even power-sharing. It addressed these issues in this textual order, and though
all these issues are interlinked they were not explicitly tied to the construction or timing of the new political institutions—with one exception.

Decommissioning. The Agreement is clear on decommissioning, despite the difficulty to engage in formal surrender to those they opposed in war. The RUC, charging ‘the total disarmament of all paramilitary organizations’. The parties that required to ‘use any advantage they may have to achieve the decommissioning’ of all paramilitary arms within two years following endorsement of the referendum on overall settlement’ (The Agreement, page 20; para. 3, emphasizes mine).

The italicized passages clarify the termination point for decommissioning, not linked to the implementation of the overall settlement—including the established police and judicial reform. That is why, David Trimble’s demand that Sinn Fein North, was regarded as a breach of any reasonable interpretation of the text of the instructions of the Agreement that required the co-operation of the local parties could Commission, issued a statement to the effect that they were not, and for the whose members carried out the Omagh bombing. But until November 1999, the activity in sufficient evidence of good intentions. Each move on Sinn Fein’s part caused the impasse, recommended an agreed way forward. Deconscription, executive agreements on decommissioning without any timeline to occur, in that order. The scenario duly materialized. However, to win support from his party, for reversing his position, David Trimble were decommissioned. Sinn Fein’s refusal to order, and Sinn Fein could not or would not deliver the IRA in the so at that time, though their political obligations were clear. This led to a showdown with Padraig悍 of Sinn Fein unilaterally deciding to suspend the Assembly to save David Trimble from his own threat of recognition.

Decentralization, Police Reform, and Prisoner Release. The Agreement promises, and the UK Government has begun, a series of phased developments to "demilitarization, police reform, and prisoner release." The Agreement promises, and the UK Government has begun, a series of phased developments to "demilitarization, police reform, and prisoner release."
severally. It has confirmed that Northern Ireland has the right to secede, by majority consent, to unify with the Republic of Ireland. The Republic of Ireland has recognized nationalists as British political identity. The United Kingdom has recognized Northern nationalists as a national minority, not simply as a cultural or religious minority, and as part of a possible future Irish national majority. The two states have, in effect, recognized the paramilitaries that have organized cease-fires as political agencies. They have not required them to surrender to their respective authorities and have accepted the release of their prisoners on the assurances of their organizations’ cease-fires. The paramilitaries on cease-fires have, with some minor exceptions, recognized one another. Unionists have recognized nationalists as nationalists, not simply as Catholics or as the minority. Nationalists have recognized Unionists as unionists, and not just as Protestants. Nationalists and unionists have recognized ‘others’ who are neither nationalists nor unionists. There was no just shortage of recognition: the Agreement would warm the cockles of Hegel’s heart.52

Balance of Power. The Agreement also rested on a recognition of a balance of power. The Anglo-Irish Agreement of 1985 led to a new but ultimately productive stalemate. Republicans were left with no immediate prospect of significant electoral growth and their military capacity, ‘to sicken the Brits’ proved limited. Loyalists reorganized in the late 1980s and by the early 1990s were able to raise the costs of sustaining violence within the republican constituency. Nationalists discovered the limits of just saying ‘No!’ as British or bipartite governmental initiatives occurred over their heads. There was a military stalemate and a political stalemate.

But there were also structural changes beneath the ‘frozen surface’ that were noted by the late John White.53 These included greater equality of opportunity and self-confidence amongst nationalists and a shift in the demographic (and therefore) electoral balance of power between the communities—today these changes underlined the fact that any political settlement could not return nationalists to a subordinate status. The initiatives of John Hume and Gerry Adams responded constructively to this new stalemate. Much work had to be done before their initiative bore fruit.54

The Bargain. There was a bargain at the heart of the Agreement. Nationalists endorsed it because it promised them political, legal, and economic equality now, plus institutions in which they would have a strong stake, with the possibility of Irish unification later. They would get to co-govern Northern Ireland, rather than being simply governed by either unionists or the British Government. Moreover, they would get this share of government with promises of further reforms to redress past legacies of direct and indirect discrimination. Republicans in Sinn Fein and the IRA could trade a long war that they could not win, and could not lose, for a long march through institutions in which they could reasonably claim that only their means have changed, not their end: the termination of partition—see McTytpe, in Chapter 13 of this volume.

Nationalist support for the Agreement was not difficult to comprehend. For them it was a very good each-way bet. But why did the DUP and the loyalist parties make this concession-plus bargain? In my judgment the unionists who supported the Agreement were concerned not so much to end the IRA’s long war but rather to protect and safeguard the Union—see Aspey, in Chapter 10 of this volume. Their calculus suggested that only by being generous now could they reconcile nationalists to the Union, and protect themselves against possible seismic shifts in the balance of demographic power. Unionists would get a share in self-government now, avoid the prospect of a British Government making further deals over their heads with the Irish State, and have some prospect of persuading northern nationalists that a newly reconstructed Union offers a secure home for them. In short, they made the Agreement to stave off something worse. It is not surprising therefore that there has been greater REALISM within the unionist bloc. They are conceding more, and some maintain there is no need to concede anything, at least, not yet.55 Nevertheless, significant proportions of supporters of the ‘No!’ unionist parties, especially in the DUP, tell pollsters they would like the Agreement to work, which implied they were convertible to its merits.

Idea. Recognizing identities and interests are necessary but not sufficient conditions of a constitutional settlement. Ideas, however loosely understood or flexibly deployed, were also important in the making of the Agreement. Their development, dissemination, and impact is harder to trace, but that does not mean the task cannot be accomplished. Fresh language and policy learning were evident in the making of the Agreement—though so were policy obstinacy and recalcitrance within the highest echelons of the dying Majo government—see Patterson, in Chapter 9 of this volume—and of the spread-netted rainbow coalition in Dublin during 1995-7. The crafting of the ideas was many and varied. Refined and understanding the sources of the conflict in national terms—rather than as issuing from religious extremism or terrorism—was vital. Without this shift, the Anglo-Irish Agreement, the 1995 Framework Documents, and the Agreement itself would not have been possible. Intimations and imitations of changes elsewhere—the end of the Cold War and its repercussions, political change in South Africa and the Middle East—all had their local register—see Guelke, in Chapter 13 of this volume. The traditional explanations of the causes of the conflict had increasingly ceased to move the local participants, and many were open to compromises and political institutions that would mark a shift from the limitations of either London’s or Dublin’s conceptions of good governance.

The beauty of the Agreement as a bargain was that both nationalists and unionists had sound reasons for their respective assessments of its merits, that is, for believing that they were right about the long term. They could not be
certain that they were right, and so they were willing to make this elaborate
agreement. There were incentives for each bloc to accommodate the other precisely
in order to make its vision of the future more likely, that is, both had reasons
to act creatively on the basis of self-fulfilling prophecies. The treat of the dou-
bly protection model was to promise to ease the pain for whoever got it wrong
about the future. The confederalizing and federating possibilities in the
Agreement ensured that both national communities would remain linked, even
what may, to their preferred nation-states.

Prospectus

Northern Ireland between April 1998 and January 2000 looked like a success
story in the annals of ethno-national conflict-settlement. It had a new, if slightly
precocious and slightly unbalanced, binational super-majority. The Assembly and
its Executive Committee had demonstrated that they could work, and become
mechanisms for accommodating the diverse peoples of the North. There would
have been difficulties in agreeing a budget and a broad programme of govern-
ment, and die-hards or kill-hawks would have been hoping to capitalize on them.
Managing the twilight of the second Protestant ascendancy in Irish history, and
the re-justification of militant republicanism, would not have been easy tasks, but
they were not impossible. This optimistic picture was shattered in February
2000. It was broken on the stubborn refusal of the IRA to clarify unambiguously
its commitment to end its war and to deliver 'prisoners on decommissioning,' and
on the equally stubborn refusal of the UUP to settle for the informal decom-
missioning, the silence of the IRA's guns, and, lastly, on the constitutionally
untethered response of the Westminster Government. It will take skill and back
unwind consension and restore the Agreement, and in my view will require
the full repeal of the Suspension Act to restore the original Agreement.

The Agreement's political enthronement required that some short-term
advantage-maximizing and game-playing temptations be avoided, and that lead-
ers remained in control of their parties and movements. These temptations have
not been avoided. At the heart of this Agreement lay four internal political
forces: the SDLP and the UUP amongst the historically moderate nationalists
and unionists, and Sinn Fein and the PUP/UPD amongst the historically hard-
line republicans and loyalists. Maintaining the Agreement required these poli-
tical forces to evolve as internal coalition partners while preserving their bases.
Let me focus on just two of these constellations.

The UUP

The UUP was always the most likely short-term maximizer and game-player and
split more than any other party under the impact of the making of the

The Agreement: Results and Prospect

It made very significant concessions on internal power-sharing and on all-Ireland dimensions. It lost votes to the No Unionists, and subsequently
lost some further disconsolates that were elected on its platform to the Assembly.

The temptation of its leaders was to renegotiate the Agreement in the course of
its implementation. That way they could hope to re-form the party, and draw
delusion support from the 'soft No' camp amongst unionists.

The UUP would have preferred an Agreement which was largely internal to
Northern Ireland, and which involved them governing Northern Ireland with
the SDLP in a weaker Assembly, on the lines established in Wales, and without the
elemented dual premiership and inclusive executive. It would have strongly
preferred to govern without the formal participation of Sinn Fein in government.

In consequence, the UUP's most tempting game plan was to use the decommis-
ioning issue to split what its supporters saw as a pan-nationalist bloc. The
signs of this game were a phases' 'legalism,' adversarial and petty-minded inter-
pretation of the Agreement, postponement and procrastination, and brinkmanship.

Game-stage in this game was David Trimble, the UUP's leader.

His rise to prominence did not bode well for the peace process then under-
way, but, to his eternal credit, the victor of Drumcree modified his previous poli-
cy commitments, one by one; and went on to win a Nobel prize with John
Hume of the SDLP. Trimble won the prize, which he felt was 'premature,'
because of his decision to negotiate with two governments and eight other par-
ties, including Sinn Fein, his role in the production of the Agreement; and his
subsequent promise to build a pluralist parliament for a pluralist people.' He
would say, correctly, that he had done it all his way, in defence of the Union.

The UK government suspended the Assembly 'in order to save David
Trimble' as one Labour minister recently told me in justification. This breach
of the Agreement and international law did not save Trimble from the wrath
of his party's reactionaries who subsequently persuaded 43 per cent of fellow
members to demonstrate that they prefer the 69-year old Reverend Martin
Smith MP as their leader. Trimble's political future looks bleak. He has shown
more skill in winning power than in its exercise. He displays capacity to sur-
per, but rarely effective follow-through. He is still trying to conciliate his
party's intransigents and those who have personally betrayed him. His major
gamble and principled risk in making the Agreement required him to win his
battles with the 'No' unionists, inside and outside his party, and to build an
informal and sustainable coalition with Sinn Fein and the SDLP. It was an
extremely difficult task, not made easier by republican intrusiveness on decom-
missioning, but it is fair to say that Trimble, and his advisors, consistently mis-
judged their management of their party, their referendum campaign, and all
the ensuing elections. By failing to reform their party they kept its Orange Order
reactionaries armed with internal votes within their own camp. By appeasing
their reactionaries they helped them reorganize and recover. By seeking
in the implementation of the Agreement to recover what they had lost in
negotiation they crucially reduced republican and nationalist goodwill, and in 1995 further ammunition to their reactionaries when they finally decided to do what they had agreed to do. David Trimble in consequence is now a First Minister in deep freeze, a leader presiding over a party whose members seem unlikely to recover their senses unless and until two blows come their way—the Westminster general election and the 2001 census. Trimble is not politically dead, but he looks in mortal danger, with neither republicans nor hard-liners unionists willing to lift a finger to help him.

Republicans

The other constellation is republican. Republicans too have been tempted to engage in game-playing, of a different kind. They insisted on the full letter of the agreement from all other parties in order to sustain their constituencies and their long-term political strategy, even if this insistence created great difficulties for the UUP and the SDLP, their informal partners. Republicans thought they had an ace-in-the-hole if the UUP and the UK government delivered on the Agreement well and good, if the UUP did not then Sinn Fein would position itself to ensure that unionists got the blame for its non-implementation. As it happens a mixed scenario emerged. The UUP was late on its obligations to executive formation and agreeing North-South institutions, but it eventually delivered and then challenged Sinn Fein to get the IRA to deliver on decommissioning. That did not happen, although Sinn Fein did deliver two statements from the IRA in February, the second of which was as close as the organization had come to insinuating its willingness to decommission. Trimble’s and the UUP’s unilateral deadline to republicans to deliver on decommissioning by the end of January had not been an explicit part of the Mitchell Review so Sinn Fein was able to insist, correctly, that the UUP’s demands were outside the Agreement. The Secretary of State’s suspension of the devolved institutions to prevent Trimble’s resignation as First Minister meant that blame for the institutional freeze was distributed across three agents—the UUP, republicans, and the UK Government.

The hardest of IRA hard-liners appeared unwilling to deliver any decommissioning, because they consider it to be an act of surrender, unnecessary, and because they fear their arsenals might get into the hands of dissidents. For some hard-liners, non-implementation of parts of the Agreement within Westminster’s remit—police reform, judicial reform, equality measures, and demilitarization—may yet provide a pretext for a return to war, though most seem committed to a permanent cease-fire. Their view, roughly speaking, is that they wish to retain their weapons ‘just in case’. They expect others to trust them but are not willing to trust those others. By contrast, softer-liners appear willing to consider decommissioning but are having great difficulties taking their colleagues with them. Soft-liners would only sanction any return to violence if governmental or loyalist forces were responsible for the first military breach. Even then, fully policed republicans believe their movement has more to gain electorally both within Northern Ireland and the Republic through becoming a legally, constitutional opposition movement—even if that is to an Agreement without devolved institutions. Republicans, in short, were tempted by hard liners: extracting the full letter of the contract with the UUP, at the risk of damaging the informal political coalition that made the Agreement. It is ironic to see republicans demanding the restoration of devolved government, insisting, correctly, that the UK’s suspension is a breach of international law. The Irish Government has refused to recognize the suspension partly to prevent Sinn Fein initiating legal proceedings to the Republic.

To be fully resurrected this consociational and confederal agreement requires two things. First, immediate, daily, vigorous and continuing British and Irish co-operation to encourage the Agreement’s full implementation—both in institutions and confidence-building measures such as police reform and demilitarization. The governments must use all their available tools to this end. Secondly, it requires greater recognition among the voluntary coalition partners, especially within the UUP and Sinn Fein, that they may benefit more in the long run from not seeking maximum short-run advantage from one another’s difficulties, and from not over-hyping their own—and it requires some joint agreement on managing the matter of decommissioning.

Conclusion

The Mitchell Review of the Agreement temporarily renewed the inspiration that surrounded the making of the Agreement. But even if the full Agreement is not immediately resurrected it will continue to be partially implemented in its non-devolved dimensions. The UK government wants to avoid antagonizing any party or bloc too much. To maintain the major paramilitary organizations’ cease-fires, prisoner releases are likely to continue accompanied by warnings that punishment beatings will be treated as violations of cease-fires. To create the conditions for legitimate policing where paramilitaries are presently dominant, police reform as recommended by Paten will begin, though delays can be expected to mollify unionist sentiment. The reform of Northern Ireland, embodied in the human rights and mainstreaming equality provisions in the Agreement are likely to be followed through, albeit more slowly than might otherwise be the case. In short, the dimensions of the Agreement that do not require the local parties to cooperate in government may be delivered, slowly, by the two governments of the sovereign states. The British-Irish intergovernmental conference will, gradually, become an active site for policy formulation, and in time encourage sensible functional cross-border cooperation in the zones
marked out for the North-South Ministerial Council and the British-Irish Council. This is a feasible and less attractive scenario than the full Agreement. We may be moving into a world of a cold peace with traits of a local cold war, reform without significant devolution empowered by a strand of the Community, need IRA and the UVF, and their kindred spirits. Wrong moves by any parties might destabilize the cease-fires. Party politics might become more polarized. "Yes unifiers" may lose electoral ground to "no unifiers", while the SDLP may lose electoral ground to Sinn Fein within a territorially and electorally growing nationalist bloc, and Sinn Fein may obtain a kingmaker role in southern Irish coalition politics. The Alliance Party, the Women's Coalition, and the recon- structed loyalist parties are unlikely to flourish or make major breakthroughs. And the longer the devolved components of the Agreement persist in institutional limbo the more likely it will be that other options will be considered.

A radical plan B might tempt some de facto co-sovereignty in and over Northern Ireland by the UK and Irish Governments. In the absence of agreed devolution the two governments might increase rather than reduce their cooperation. A formal declaration of shared sovereignty would not, and need not, be rushed. Its gradual emergence might act as a standing invitation to unionists to try some control over their own destinies through encroaching devolution, and it might persuade republicans that there is more to be gained through reforming intergovernmentalism than a return to war. Co-sovereignty has many merits, especially if considered from the perspective of justice. But, having just presided over a major institutional failure, the two governments are unlikely to move rapidly to a formal settlement of this kind, though coherent models of how it might operate have been sketched.67

The evolution of co-sovereignty could accompany two local government options. The unionist preference is for a "Northern Assembly" on the Welsh model, with Stormont stripped of legislative powers and of its strongly consessional rules. Nationalists are unlikely to cooperate with this option. Though they may become interested in reducing the veto-powers of "no unionists" they are not likely to want a form of majoritarianism from which they might suffer. A second local government strategy would be to abandon the project of one devolved government. Significant multi-functional competencies could be devolved to (reorganized) local governments willing to adopt institutions of the type made up in the Agreement. Local governments on the border, mostly dominated by nationalists, could be permitted to develop significant cross-border arrangements with their southern counterparts and the Dublin government.

This would isolate the heartlands of unformed majoritarian unionism while giving nationalists significant incentives to work within a reformed Northern Ireland. The principal danger of this option is that such cosanteriorization might encourage further ethno-national segregation and thereby promote revisionist thinking.
ENDNOTES


3. Lichy claims that Denmark politicians in 1917, and by their Labourites in 1948, Austrian (1945), Malayan (1959), Cubans in the 1960s, and South African 1991, did not violate or contemn the election rules in the constituencies. One does not have to agree with the citation of any of these cases to accept that politicians are more than capable of doing the same without the aid of theories - see also A. Lichy, A., Warsaw: One Dark Problem, Many Theoretical Options - A Practical Solution, in J. McGarry and B. O'Leary (eds.), The Fate of Northern Ireland (Oxford: Clarendon Press, 1999), 286-8 and A. Lichy, A. The Puzzle of Indian Democracy: A Conventional Interpretation, American Journal of Political Science, 39 (1995) 1-26 and 39 (1995) 254-79.

4. One of the makers of the Agreement, Dr. MacCann, the U.K. Secretary for State for Northern Ireland (1972-7), had an academic constitutional heritage, and at least one of his former academic assistants has had an abiding interest in the subject. Constitutional thinking had an impact on the drafting of the Framework Document of 1995. See O'Leary, B., Aftermath, 1995, 126-72.


6. The Assembly was not allowed to legislate in contravention of the European Convention on Human Rights or European Court law, modify a specifically entrenched enactment, discriminate on grounds of sex or age or physical or mental condition, or deal with an excepted power except in the normal way - which roughly means it may not enact laws which modify UK statutes on excepted matters such as the Crown.

7. According to the U.K.'s legislative consent, the 'Northern Ireland Act' (1998), the Assembly could expand its competence only with regard to social and cultural matters.


9. On 13 July 1999 in a handwritten note to the former Prime Minister, the Secretary of State introduced an additional Standing Order to the running of the Assembly, namely, 'On the composition of the procedure for the appointment of Ministers (designate) under this Standing Order, six person appointed shall continue to hold Ministerial office (designates) if the Chief Secretary has failed to designate at least 3 designated Ministers and 3 designated Unionists. This order, authorized by the Northern Ireland (Electoral) Order 1998, in its view, was the first breach of the letter of the Agreement by the U.K. Government. Given that the parties had agreed that the executive should consist of ten Ministers in addition to the First and Deputy First Ministers, the standing order, in effect, gave a floor to both the UUP and the SDLP whose executive formation because each party was entitled to three seats on the basis of no-stakeholding vote. The standing order was introduced in a hurry to stop executive formation leading to an all-rural executive as would have transpired given the decision of the UUP to fail to turn up to the Assembly when the process of executive formation was impeded, and the decision of the two minorities not to take their designated ministerial portfolios, or an executive in which there would have been no agreement (See New Northern Ireland Assembly, Thursday 13 July 1999, Belfast, 317, 57): This panic measure, introduced for high-minded motives, subtly charged the executive's ineptness-structures agreed by the MLP and the UUP in the negotiation of the Agreement, and was subsequently abandoned. It was constitutional, but it was not negotiated by the parties, was not endorsed in the referendum, and encouraged moderate amounts to stick with the status quo, knowing that they could veto executive formation. Incorrupt 'moderates' as well as hardliners can be multilateral in constitutional solutions.


11. The Group uses as STV is 1943-44, 1959-63, 1973, where: V = Total Valid Votes, and N = Number of Assembly members to be elected.

12. Lichy also argues for this system rather than STV because it allows for a high district magnitude enabling greater proportionality, is less vulnerable to gerrymandering, and is simpler for voters and organizers (see Lichy, A., Electoral Systems, Party Systems and Conflict Management in Divided Societies, in R. Schlesinger (ed.), Critical Choices for South Africa (Washington: Oxford University Press, 1990), 2-13). In the main text I argue implicitly for high thresholds to reduce fragmentation, so a trading-off between better proportionalism. Contra Lichy, I would maintain that STV, legislatively enacted with uniform district magnitudes, and supervised by independent electoral commissioners tasked to create uniform electorates, is not more vulnerable to gerrymandering than regional party-based PR. I conceive this STV is only suitable for nineties, but otherwise its complexities are not especially mysterious.

13. The nature of executive formation in the Agreement should have acted as a possible check on the possibilities of fragmentation under party-based PR, but that is true of any electoral system combined with thisexecutive.
The Agreement: Results and Promises

might take a seat on it with a view to revoking it. The Ministers were required to establish the North-South institutions 'in good faith' and to use 'best endeavours' to agree agreement. Since these requirements were presumably subject to judicial review it is unlikely that potential wrinkles would have been able to retain a negative role in the North-South Council for very long.


29. The formation of an English Parliament would be the last move.


31. Legal experts advise me that the UK's legislative statement of the Agreement may have made it for precedent precedents in this precise juridical context, thereby changing the nature of the law, so that the courts will now be ruled by jurisdictional decisions.


39. See O'Leary, B. 'Northern Ireland: The Irish-English Agreement'.
