

58. Recent attitude surveys suggest 'shades of grey now merge with the exclusive black and white nation-state relations in Northern Ireland'; N. Douglas, 'The Politics of Accommodation, Social Change and Conflict Resolution in Northern Ireland', *Political Geography*, 17/2 (1998), 226. Consider, for example, the Northern Ireland Life and Times Survey, available online at [www.qub.ac.uk/nilt](http://www.qub.ac.uk/nilt)
59. This is shown in McGarry and O'Leary, *Explaining Northern Ireland*, 195, table 5.5.
60. See J. Anderson and J. Goodman (eds.), *Dis/Agreeing Ireland: Contexts, Obstacles, Hopes* (London: Pluto Press, 1998).
61. Consider L. M. Salamon and H. K. Anheier, 'The Civil Society Sector', *Transaction: Social Science and Modern Society*, 34/2 (1997), 60–5.
62. J. Ruane and J. Todd, *The Dynamics of Conflict in Northern Ireland: Power, Conflict and Emancipation* (Cambridge: Cambridge University Press, 1996), 313.
63. J. Anderson and D. Hamilton, 'Transnational Democracy versus National Conflict: Resolving Conflict in Ireland', Centre for Transnational Studies paper (1998), University of Newcastle.
64. McGarry and O'Leary, *Explaining Northern Ireland*, 192. Also see J. Hume, *A New Ireland: Politics, Peace and Reconciliation* (Boulder, Colo.: Roberts Rinehart, 1996).
65. Northern Ireland Act 1998, sect. 56. Similarly, cross-border dimensions are recognized in the Belfast Agreement (notably the North–South Ministerial Council), but they are under-developed and hostage to the internal consociational aspects of the Agreement.
66. Editorial, 'Out of Step', *Fortnight*, 372 (July–Aug. 1998), 5.

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## Comparative Political Science and the British–Irish Agreement

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The British–Irish Agreement of 1998 was an exemplary constitutional design for an ethno-nationally divided territory over which there were rival claims to its sovereignty, ethnically polarized party and paramilitary blocs, and no reasonable prospects of peaceful integration within one civic nationalist identity.<sup>1</sup> Internally it was a consociational settlement. Externally it established confederal relationships, and prefigured imaginative federalist relationships and a novel model of double protection: of a minority that might become a majority, and a majority that might become a minority.<sup>2</sup> If this Agreement is not implemented in full, and the past tense in the first two sentences indicates my current expectations, a debate will arise over whether flaws in its design were the principal factors explaining its partial failure. This chapter is partly written in anticipation of that debate. By contrast, if the Agreement is fully implemented, albeit outside its scheduled timetable and its own agreed procedures, it will become an export model for conflict regulators—indeed it is already acquiring this status even for unpromising places, such as Kashmir.<sup>3</sup> If such full implementation materializes I will be extremely pleased, but this chapter may nevertheless serve the function of appraising the Agreement's novelties, possible design flaws, and possible pertinence for political scientists.

This chapter's reflections, driven by the Agreement, are threefold. First, political scientists have been too prone to recommend solely internal regulatory systems for managing ethno-national conflicts, and have thereby failed to recognize that successful ethno-national engineering not only can, but also should, address controversial sovereignty and self-determination disputes. But sovereignty disputes can have overlooked dimensions. Territory is not the be-all and end-all. States with parliamentary sovereignty, such as the United Kingdom, make it extremely difficult to entrench

autonomy, i.e. to create constitutional predictability for 'federacies', and that makes such states unreliable partners in international treaties. The peculiarity of the United Kingdom's doctrine of parliamentary sovereignty is that it renders the constitutionalization of an ethno-national agreement uncertain because it remains revisable in the same manner as normal legislation.<sup>4</sup> Secondly, the prescriptions about electoral systems of the most able, high-minded, and comparatively informed political scientists in the field of conflict regulation have been overly committed either to one system of proportional representation—as in the case of Arend Lijphart—or to (sometimes wholly inappropriate) integrationist devices of a majoritarian kind—as in the case of Donald Horowitz. Thirdly, the novel dual premiership, designed by the major moderate parties, the Social Democratic and Labour Party (SDLP) and the Ulster Unionist Party (UUP), in the heat of the negotiations, has arguably proved to be its major institutional weakness.

#### A Distinctive Consociation and its External Features

The Agreement fulfilled and superseded its predecessor, the Anglo-Irish Agreement of 1985.<sup>5</sup> It was internally consociational, meeting all four of the criteria laid down by Arend Lijphart:<sup>6</sup>

*Cross-community executive power-sharing.* This was manifest in:

- the quasi-presidential dual premiership, elected by a concurrent majority of unionists and nationalists in the Assembly, and expected to preside over
- the inclusive grand coalition ten-member executive council of ministers—whose portfolios were allocated according to the d'Hondt procedure.

*Proportionality norms.* These were evident in:

- the d'Hondt procedure used to determine the composition of the Cabinet—which resulted in five unionists (three UUP, two Democratic Unionist Party (DUP)) and five nationalists (three SDLP and two Sinn Féin) holding ministries between November 1999 and February 2000;
- the electoral system (the single transferable vote in six-member districts) used to elect the Assembly;
- the d'Hondt procedure used to allocate assembly members to Committees with powers of oversight and legislative initiative; and

- existing and additional legislative provisions to ensure fair and representative employment, especially throughout the public sector, and the promise of a representative police service.<sup>7</sup>

*Community autonomy and equality.* This was evident in:

- the official recognition of the political identities of unionists, nationalists, and others, notably in the Assembly's cross-community consent procedures;
- the decision to leave alone the existing separate but recently equally funded forms of Catholic, Protestant, and integrated schooling;
- the official outlawing of discrimination on grounds of political or religious belief;
- the replacement of an oath of loyalty to the Crown with a pledge of office for ministers;
- the establishment of a Human Rights Commission tasked with protecting individual equality and liberty, and—I believe—reasonable groups rights;
- the entrenchment of vigorous equality provisions in Section 75 of the Northern Ireland Act (1998);<sup>8</sup>
- the promise of better legislative and institutional treatment of the Irish language and Ulster Scots—both of which became languages of record in the Assembly; and
- the promise of a Civic Forum, and participatory norms of governance, to facilitate the representation of voices that might not be heard purely through electoral or party mechanisms.<sup>9</sup>

*Veto rights for minorities and mutual veto rights.* These were evident in:

- the legislative procedures in the Assembly which required 'key decisions' to be passed either with a concurrent majority (under the 'parallel consent' procedure) or with a weighted majority (a 60 per cent majority including the support of at least 40 per cent of registered nationalists and registered unionists);
- the mutual interdependency of the first minister and deputy first minister; and of the Northern Ireland Assembly and the North–South Ministerial Council; and
- the legal incorporation of the European Convention on Human Rights and Freedoms and (the promise of) other legal enactments to give Northern Ireland a tailor-made bill of rights.

This was therefore a consociational settlement, perhaps unparalleled in its liberal democratic and institutional detail. But the Agreement was not just consociational, and departed from Lijphart's prescriptions in some

respects. It had critical external institutional dimensions. It was made with the leaders of national, and not just ethnic or religious, communities (unlike most previously existing consociations), and was prompted by the cooperation of two governments of sovereign states over a disputed territory. It was endorsed by (most of) the leaders of most of the political parties in both parts of Ireland and (most of) the led in two jointly conducted referendums across a sovereign border. It was the first consociational settlement endorsed by a referendum that required concurrent majorities in jurisdictions in different states.

The Agreement established a devolved government. Non-devolved powers remained with the Westminster Parliament and the secretary of state for Northern Ireland, who continues to be appointed by the UK premier. The devolved government—executive and legislature—had full competence for economic development, education, health and social services, agriculture, environment, and finance (including the local Civil Service), though plainly it was constrained by both UK and European Union (EU) budgetary and other policies in these domains. The form of devolved government envisaged few limits on Northern Ireland's capacity to expand its autonomy. Through 'cross-community agreement' the Assembly was entitled to agree to expand its competencies; and, again through such agreement, and with the consent of the UK Secretary of State and the Westminster Parliament, the Assembly was empowered to legislate for any currently non-devolved function. The security functions of the state, policing and the courts, were not devolved, but they could be in principle. Maximum feasible autonomy<sup>10</sup> was therefore within the scope of the local decision-makers. A convention may have arisen in which the secretary of state and Westminster 'rubber-stamped' the legislative measures of the Assembly.<sup>11</sup> Indeed public policy in Ireland, North and South, might eventually have been made without direct British ministerial involvement.

For these and other reasons I maintain that, had the Agreement been fully implemented and developed, Northern Ireland would have become a clear specimen of what Daniel Elazar has called a 'federacy'.<sup>12</sup> A federal relationship exists where 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. Such a relationship is a necessary element of a federal system, but whether it is sufficient is controversial. Normally a federation has sub-central units that are co-sovereign with the centre throughout most of the territory and population of the state in question. Plainly it would be premature and controversial to call the new United Kingdom a federation. But any system of constitutionally entrenched

autonomy for one region makes the relationship between that region and the centre functionally equivalent to a federal relationship, and so, following Elazar, I call such a region—and its relationships with the centre and the centre's relationships with it—a federacy.

Through standard legislative majority rules the Assembly was empowered to pass 'normal laws' within its devolved competencies, though there was provision for a minority, of thirty of the 108 Assembly members, to trigger procedures that required special majorities. The passage of controversial legislation, i.e. 'key decisions', including the budget, automatically required these special procedures demonstrating cross-community support. Two rules were designed for this purpose: *parallel consent*, a majority that encompasses a strict concurrent majority of nationalists and unionists; and *weighted majority*, a majority among those present and voting that has the support of 60 per cent of members including the support of 40 per cent of nationalist members and 40 per cent of unionist members. There was also one super-majority rule, which was not explicitly concurrent, cross-community, or consociational. The Assembly was entitled by a two-thirds resolution of its membership, to call an extraordinary general election before its statutory four-year term expired. This was agreed by the parties, after the Agreement, in preference to a proposal that the secretary of state should have the power to dissolve the Assembly—a sign of the local parties' commitment to increasing their self-government rather than accept continuing arbitration from Westminster.

This distinctive devolved consociation—or consociational federacy as it would and should have become—was not a solely internal settlement, and that was multiply important. A strong conventional wisdom characterized the post-1945 political science of ethno-national questions. Taking its cue from public international law and realist international relations, it opposed changing the political borders of sovereign states; and on prudential or 'stabilitarian' grounds it feared irredentism and was sceptical of secessionist national self-determination.<sup>13</sup> For a long time 'external' self-determination, in law and political science, was accepted solely as a once-only right of colonial territories<sup>14</sup>; and this cautious reluctance to embrace national self-determination was reinforced by the received history of international relations, which was astringently critical of externally driven minority group rights regimes of the kind promoted by the League of Nations.<sup>15</sup>

The Agreement was, in part, a striking qualification of this wisdom. It contained agreed procedures on how a border might be changed, or rather abolished. The border in question, across the island, of Ireland is over 80 years old, the result of the Westminster Parliament's decision to partition

Ireland in 1920. The Agreement accepted the legitimacy of an irredentist aspiration: the desire of the Irish nation in both parts of Ireland to unify in one state, though the realization of that aspiration was made conditional upon the consent of majorities in both current jurisdictions in Ireland, and the recognition of the aspiration was accompanied by the removal of an irredentist territorial claim-of-right that had previously been embedded in the Irish Constitution. The Agreement, like the negotiations which preceded it, contained a recognition by the United Kingdom of the right of the people of Ireland, North and South, to exercise their self-determination to create a united Ireland if that was their wish.<sup>16</sup> The United Kingdom has never officially recognized Northern Ireland as a colonial territory, but its willingness to employ the language of self-determination in the making of the Agreement was an interesting departure. In addition, the Agreement promised to establish elaborate cross-border institutional arrangements explicitly seen by several nationalist parties as mechanisms to facilitate national reunification. Lastly, the Agreement contained features of an externally protected minority rights regime. The subtlest part of the Agreement was its tacit 'double protection model'—laced with elements of co-sovereignty, it was designed to withstand major demographic and electoral change. Under the Agreement the UK and Irish governments promised to develop functionally equivalent legal protections of rights, collective and individual, on both sides of the present border. In effect the Agreement promised protection to Northern Irish nationalists now on the same terms that would be given to Ulster unionists should they ever become a minority in a unified Ireland. National communities, British or Irish, were to be protected whether they were majorities or minorities, and whether sovereignty over the territory rested with the United Kingdom or the Republic—whence my expression 'double protection'. In the Agreement the two governments affirmed that

whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities.

If the conventional wisdom of post-war political science was correct, all these linkages, between an internal consociational settlement and a raft of measures that envisaged the possibility of a transformation in borders and

of sovereignty regimes, should have been the key sources of instability in the Agreement, raising expectations among a national minority and arousing deep fears among the local national majority. The collapse in 1974 of the Sunningdale settlement, which had linked another internal consociational settlement to all-Ireland institutions, seemed amply to confirm the wisdom of post-war political science. For nearly ten years after the collapse of the Sunningdale settlement it was an axiom of faith among UK policy-makers that an internal consociational agreement—power-sharing—should be reached without an external agreement—an Irish dimension. Alternatively, it was held that an internal agreement should precede an external agreement.<sup>17</sup> This thinking was, however, reversed in the making of the Anglo-Irish Agreement.<sup>18</sup> Recognizing that the absence of an Irish dimension facilitated republican militancy, the UK and Irish governments established an intergovernmental conference, giving the Irish government unlimited rights of consultation on the making of UK public policy on Northern Ireland, while encouraging the Northern Irish parties to come to agree internal power-sharing. This combination of external and internal arrangements and incentives, 'coercive consociation', was, predictably, unacceptable to unionists, in the short term. But since they could not destroy the Anglo-Irish Agreement, through strikes, paramilitarism, civil disobedience, or conventional parliamentary tactics, unionists eventually came to negotiate an internal settlement in return for the modification of what they regarded as deeply unsatisfactory external arrangements. The fact that unionists were formally free to negotiate away the Anglo-Irish Agreement, replacing it with a successor Agreement with most of the same provisions, was an essential element in the making of the Agreement.

Northern nationalists certainly had their expectations raised by the making of the Agreement, and unionists certainly had, and still have, anxieties about the Agreement's external dimensions, but both the making of the 1998 Agreement and its stalling in 2000 suggest that the post-war wisdom of political science needs some revision. Consociational arrangements can be effectively combined with cross-border regimes, which enable a change in sovereignty, without engendering massive instability. True, the 'no unionists', who rejected the Agreement, did not like its external features, but they focused their rhetorical fire on the prospects of gunmen getting into (the internal) government, terrorists being released early from gaol, the failure to secure the decommissioning of (republican) paramilitaries' weapons, and on those parts of the Agreement which implied the full equality of nationalists with unionists within Northern Ireland. By contrast the 'yes unionists' trumpeted some of the external aspects of the

Agreement—pointing out, correctly, that the Agreement had led to changes in the Irish Republic's Constitution, which now required the active consent of majorities in both parts of Ireland before Irish unification could materialize, and claiming that they had 'negotiated away' the Anglo-Irish Agreement of 1985. 'Yes unionists' defended the cross-border institutions as minimal rational functional cooperation between neighbouring states, and observed, correctly, that the North–South Ministerial Council, unlike the Council of Ireland of 1974, contained no all-Ireland parliamentary body; and that they had succeeded in trimming down the ambitious cross-border institutions advocated by the Irish government, the SDLP, and Sinn Féin—the number of functional jurisdictions and the powers of (some) cross-border bodies were curtailed by the unionist negotiators. In short, and unlike 1974, the primary unionist concerns with the Agreement, which materially contributed to its suspension, cannot reasonably be said to have been with its external dimensions.

#### *Consociation with Matching Confederations*

The Agreement's meshing of internal and external institutions marked it out as novel in comparative politics, and some of its subtle external balancing elements explain why unionists were less concerned by the Agreement's external features than they were with the Sunningdale Agreement. The argument which follows assumes that confederations exist when political units voluntarily delegate powers and functions to bodies that can exercise power across their jurisdictions. Two such confederal relationships were established under the Agreement: the North–South Ministerial Council and the British–Irish Council.

The first confederation was all-Ireland in nature: the North–South Ministerial Council (NSMC). It was intended to bring together those with executive responsibilities in Northern Ireland and in the Republic. What was intended was clear. Nationalists were concerned that if the Assembly could outlast the NSMC, it would provide incentives for unionists to undermine the latter. Unionists, by contrast, were worried that if the NSMC could survive the destruction of the Assembly, nationalists would seek to bring this about. The Agreement was a tightly written contract with penalty clauses. Internal consociation and all-Ireland external confederalism went together: the Assembly and the NSMC were made 'mutually interdependent'; one could not function without the other. Unionists were unable to destroy the NSMC while retaining the Assembly, and nationalists were not able to destroy the Assembly while keeping the NSMC.<sup>19</sup>

The NSMC satisfactorily linked northern nationalists to their preferred nation-state, and was one means through which nationalists hoped to persuade unionists of the attractions of Irish unification. Consistently with the Agreement the Irish government agreed to change its Constitution to ensure that the NSMC, and its delegated implementation bodies, would be able to exercise island-wide jurisdiction in those functional activities where unionists were willing to cooperate. The NSMC was intended to function much like the Council of Ministers in the European Union, with ministers having considerable discretion to reach decisions, but remaining ultimately accountable to their respective legislatures. The NSMC was to meet in plenary format twice a year, and in smaller groups to discuss specific sectors (say, agriculture or education) on a 'regular and frequent basis'. Provision was made for the Council to meet to discuss matters that cut across sectors, and to resolve disagreements. In addition, the Agreement provided for cross-border or all-island 'implementation' bodies.

The scope of these North–South institutions was somewhat open-ended. The Agreement, however, required a meaningful Council. It stated that the NSMC 'will' (not 'may') identify at least six matters, where 'existing bodies' will be the appropriate mechanisms for cooperation within each separate jurisdiction, and at least six matters where cooperation will take place through cross-border or all-island implementation bodies. The latter were subsequently agreed to be inland waterways, food safety, trade and business development, special EU programmes, the Irish and Ulster Scots languages, and aquaculture and marine matters. The parties further agreed on six functional areas of cooperation—including some aspects of transport, agriculture, education, health, the environment, and tourism—where a joint North–South public company was established.<sup>20</sup>

The NSMC differed from the Council of Ireland of 1974, and not just in name. The name change was significant: a concession to unionist sensibilities even though the reference to the 'North' is more nationalist than unionist. There was no provision for a North–South joint parliamentary forum but the Northern Assembly and the Irish Oireachtas<sup>21</sup> were asked 'to consider' developing such a forum. Nationalists wanted the NSMC established by legislation from Westminster and the Oireachtas—to emphasize its autonomy from the Northern Assembly. Unionists wanted the NSMC 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, but during the transitional period it was for the Northern executive and the Republic's government to decide, by

agreement, how cooperation should take place, and in what areas the North–South institutions should cooperate. Once agreed, the Northern Ireland Assembly was unable to change these agreements—except by cross-community consent.

The Agreement linked Ireland, North and South, to another confederation, the European Union. It required the NSMC to consider the implementation of EU policies and programmes as well as proposals under way at the European Union, and made provisions for the NSMC 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, however, sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement occurring over the NSMC—but this was evidently a by-product of the crisis over executive formation and decommissioning. 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 over functions where there is a 'mutual cross-border and all-island benefit'.<sup>22</sup>

If the Agreement is fully implemented, the new constitutional confederalism may be underpinned by economic rationality. As the Republic's Celtic Tiger continues to expand, Northern Ireland's ministers and citizens, of whatever background, might see increasing benefits from North–South cooperation. And as the European Union continues to integrate, there will be pressure for both parts of Ireland to enhance their cooperation, given their shared peripheral geographical position, and similar interests in agriculture and tourism, and in having regions defined in ways that attract funds.<sup>23</sup>

A second weaker confederal relationship was established by the Agreement, affecting all the islands of Britain and Ireland. Under the new British–Irish Council the two governments of the sovereign states, all the devolved governments of the United Kingdom, and all the neighbouring insular dependent territories of the United Kingdom, can meet, agree to delegate functions, and may agree common policies. This proposal met unionists' concerns for reciprocity in linkages—and provided a mechanism through which they might in future be linked to the United Kingdom even if Northern Ireland becomes part of the Republic.

Unionists originally wanted any North–South Ministerial Council to be subordinate to a British–Irish, or East–West, Council. This did not happen. There was no hierarchical relationship between the two councils. Two textual warrants suggest that the NSMC was more important and far-

reaching than its British–Irish counterpart. The Agreement required the establishment of North–South implementation bodies, leaving the formation of east–west bodies a voluntary matter; and stated explicitly that the Assembly and the NSMC were interdependent, making no equivalent status for the British–Irish Council.

The development of this confederal relationship would be stunted if the Irish government was reluctant to engage in a forum where it may be outnumbered by seven other governments—of Westminster, Scotland, Wales, Northern Ireland, Jersey, Guernsey, and the Isle of Man—but rules would presumably develop to ensure the joint dominance of the governments of the sovereign states. The British–Irish Council may yet flourish as a policy formulation forum, if the UK's devolved governments choose to exploit it as an opportunity for intergovernmental lobbying and alliance-building, or to build alliances with the Irish government on European public policy—which would give impetus to federalist processes.

#### *Consociation with Matching Federalist Possibilities*

The Agreement opened other external constitutional linkages for Northern Ireland, one within the United Kingdom, and another possibility with the Republic, which held federalist promise.

Within the United Kingdom the Agreement seemed the penultimate blow to centralist unionism already dented by the 1997–8 referendums and legislative Acts establishing a Scottish Parliament and Welsh National Assembly.<sup>24</sup> But did the Agreement simply fall within the rubric of 'devolution within a decentralized unitary state'? Arguably not. The United Kingdom is composed of two unions: that of Great Britain and that of Great Britain and Northern Ireland. The constitutional basis of the latter is distinct.

The nature of devolution in Northern Ireland was not closed by the 1998 Northern Ireland Act; an open-ended mechanism to expand autonomy existed—albeit with the consent of the secretary of state and the approval of Westminster. No such open-ended provision was granted to the Scottish Parliament or the Welsh Assembly. Maximum feasible autonomy while remaining within the Union was feasible, provided there was agreement to that within the Northern Assembly.

The Agreement, unlike Scottish and Welsh devolution, was embedded in a treaty between two states, based on the United Kingdom's recognition of Irish national self-determination. The United Kingdom officially acknowledged that Northern Ireland has the right to join the Republic, on the basis

of a local referendum, and it recognized, in a treaty, the authority of Irish national self-determination throughout the island of Ireland. The Agreement's institutions were brought into being by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland (recall the interdependence of the NSMC and the Assembly). In consequence, under the Agreement, the United Kingdom's relationship to Northern Ireland, at least in international law, in my view, had an explicitly federal character: Northern Ireland had become a federacy. The Westminster Parliament and executive could not, except through breaking its treaty obligations, and except through denying Irish national self-determination, exercise power in any manner in Northern Ireland that was inconsistent with the Agreement. This interpretation was made by the author and others immediately after the Agreement was made. Plainly the suspension of the Assembly in February 2000 showed that the United Kingdom's authorities did not feel constrained by its reasoning, a point to which I shall return.

The Agreement also opened federalist avenues in the Republic—one of the most centralized states in Europe. The NSMC was seen by nationalists as the embryonic institution of a federal Ireland. This stepping stone theory was most loudly articulated by 'no unionists', but they were not wrong to surmise that many nationalists saw the NSMC as 'transitional'. Sinn Féin said so; so did Fianna Fáil.

The Irish government and its people did not abandon Irish unification when they endorsed the Agreement. Instead 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 is compatible with either 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.<sup>25</sup> The unification envisaged in the redrafted Irish Constitution is, however, now different. It no longer has anything resembling a programme of assimilation. Respect for 'the diversity of . . . identities and traditions' connects with both consociational and con/federal logic. The Republic is bound to structure its laws to

prepare for the possibility of a con/federal as well as a unitary Ireland. Northern Ireland is a fully recognized legal entity within the Irish Constitution, and its elimination as a political unit is no longer a programmatic feature of *Bunreacht na hÉireann*.<sup>26</sup>

#### *Externally Protecting the Agreement*

The two states not only promised reciprocity for the protection of present and future minorities, but also created two intergovernmental devices to protect those communities. The most important was the successor to the Anglo-Irish Agreement, namely the new British–Irish intergovernmental conference, which guarantees the Republic's government access to policy formulation on all matters not (yet) devolved to the Northern Assembly or the NSMC.<sup>27</sup> Unionists claimed that they had removed the 1985 Anglo-Irish Agreement in return for conceding a North–South Ministerial Council. This claim was exaggerated. Under the new Agreement the Irish government retains a say in those Northern Irish matters that have not been devolved to the Northern Assembly, as was the case under Article 4 of the Anglo-Irish Agreement, and, as with that agreement, there will continue to be an intergovernmental conference, chaired by the minister for foreign affairs and the Northern Ireland secretary of state, to deal with non-devolved matters, and it will continue to be serviced by a standing secretariat. The new Agreement, moreover, promises to 'intensify co-operation' between the two governments on all-island or cross-border aspects of rights, justice, prisons, and policing (unless and until these matters are devolved). There is provision for representatives of the Northern Assembly to be involved in the intergovernmental conference—a welcome parliamentarization—but they will not have the same status as the representatives of the governments of the sovereign states. The Anglo-Irish Agreement fully anticipated these arrangements.<sup>28</sup> Therefore, it is more accurate to claim that the Anglo-Irish Agreement was fulfilled rather than deleted.

Formal joint sovereignty of the two states over Northern Ireland was not established, but the governments guaranteed the Agreement, and embedded it in an international treaty. Irish officials had been wary since the early 1990s of trading likely irreversible constitutional changes—transformations of Articles 2 and 3 of the Constitution—in exchange for institutions that might share the same fate as the Sunningdale settlement. That is why they argued that the Agreement as a whole should be embedded in a treaty. Together with the fact that the Agreement had been endorsed in double

referendums, the official Irish belief, and the Irish nationalist belief, was that the Agreement, like Northern Ireland's constitutional choice between membership of the United Kingdom and of the Republic, rested on the consent of the Irish people, through the joint act of self-determination of the North and South. The UK government would not have power to do anything that was not legitimate under the Agreement's procedures.

It has become apparent that the UK government, eventually, did not share this understanding. The New Labour government acted in classic Diceyan fashion in suspending the Northern Assembly and the UK side of the NSMC, using the doctrine of parliamentary sovereignty to arrogate to itself the power of suspension—which had not been granted to it in the making of the Agreement, nor in its (UK) legislative enactment in the 1998 Northern Ireland Act.

The constitutional meanings of the suspension—not evident in most of the contributions to the debates over the power of suspension that occurred in the House of Commons and the House of Lords—are highly significant. The UK government's officials knew that suspension would breach the formal Agreement, because in the summer of 1999, when both governments contemplated a suspension mechanism, the United Kingdom proposed to the Irish side that the treaty that was about to be signed by the two governments should be amended to make it compatible with suspension. No such amendment was made. The United Kingdom's justification of the suspension was that it was necessary to save the first minister, David Trimble. His threat to resign because the Irish Republican Army (IRA) had not delivered on decommissioning would become operative in an environment in which 'yes unionists' no longer commanded an absolute majority of the registered unionists in the Assembly—and therefore, it was feared, he could not in future have been resurrected as first minister. This reasoning was false: the Assembly, by weighted majority, was entitled to pass any measure to amend its current rules for electing the dual premiers, and to send this measure to Westminster for statutory ratification. So, in short, there were mechanisms within the Agreement under which Trimble could have regained the position of first minister. But even if the UK's reasoning had been correct, the suspension was both an unconstitutional and a partisan act. It was unconstitutional in Irish eyes because the suspensory power had not been endorsed with cross-community consent through the negotiation of the Agreement, or in the referendums, or in the United Kingdom's legislative enactment of the Agreement. It was also partisan because neither the Agreement, nor the Mitchell Review of the Agreement, required Sinn Féin to deliver material decommissioning by the IRA on the

basis of a deadline set by the leader of the UUP. The sole agreed deadline for decommissioning required all political parties to use their best endeavours to achieve full decommissioning by 22 May 2000, two years after the endorsement of the Agreement in the referendums.

One of the relevant passages of the Agreement referred to procedures for review if difficulties arose across the range of institutions established on the entering into force of the international treaty between the two governments: 'If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British–Irish Agreement or relevant legislation, *the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction*' (my italics). The italicized passages, read in conjunction with the Agreement as a whole, suggest that the UK government was obligated formally to consult the parties in the Assembly and the Irish government over obtaining any power of suspension, and that any remedial action required the joint support of the two governments, especially as regards their treaty. That each government would be 'responsible for action in its own jurisdiction' was not taken by the Irish side to mean that the Westminster Parliament had unilateral discretion to alter, amend, suspend, or abolish the institutions of the Agreement. It merely meant that for agreed remedial action there would not be joint sovereignty but rather parallel legislative procedures to be followed in each state.

The central purpose of the United Kingdom's agreement to delete Section 75 of the Government of Ireland Act of 1920, and of the Irish state's agreement to modify Articles 2 and 3 of the Irish Constitution, had been to show that both states were engaged in 'balanced' constitutional change, confirming that Northern Ireland's status as part of the United Kingdom or the Republic rested with its people alone, and to facilitate the establishment of institutions in Northern Ireland that were rooted in local popular consent. The United Kingdom's Diceyans have obviously interpreted the United Kingdom's deletion of Section 75 of the Government of Ireland Act as meaningless because in their eyes Parliament's sovereignty remains intact even when it removes a statutory statement which says it remains intact. Irish negotiators obviously should have been more careful: the United Kingdom's 'constitution' is Ireland's British problem. Had the Agreement fully bedded down, perhaps Northern Ireland's status as a federation would have developed the status of a constitutional convention—the United Kingdom's mysterious functional poor relation of constitutionality. But it was not to be.

The act of suspension has four constitutional messages. First, it has made it plain that every aspect of the Agreement is vulnerable to Westminster's doctrine of parliamentary sovereignty. Everything in the Agreement—its institutions, its confidence-building measures, the promise that Irish unification will take place if there is majority consent for it in both parts of Ireland—is revisable by the current Westminster Parliament, and any future Parliament, irrespective of international law, or the solemn promises made by UK negotiators in the run-up to, and in the making of, the Agreement. No UK parliamentarian can look an Irish nationalist or republican in the eye and say that Northern Ireland's status as part of the United Kingdom, and its institutional arrangements, ultimately rest upon the consent of its people. By its actions the Westminster Parliament has affirmed that it regards its sovereignty as unconstrained by the Agreement. Had it sought and obtained the assent of the Northern Assembly—by cross-community consent—to its possession of the power of suspension that would have been a different matter. It did not. Even if the secretary of state's motives were entirely benign—and that has been questioned—his decision to obtain the power of suspension destroyed the assumptions of nearly a decade of negotiation.

Secondly, the suspension will spell out to official Irish negotiators, and Northern nationalists, the necessity, in any new round of negotiations, of entrenching Northern Ireland's status as a federacy, perhaps in the same manner as the United Kingdom's courts are instructed to make European law supreme over law(s) made by the Westminster Parliament, through full domestic incorporation and entrenchment of the relevant treaty. Without such protection the Agreement cannot be constitutionalized consistently with both the Agreement and the exercise of Irish national self-determination, North and South. This will require Ireland's negotiators to require Westminster to repeal the suspension Act and to declare that its sovereignty is circumscribed by the Agreement.

Thirdly, unionists themselves must consider the constitutional consequences of suspension. If the 'yes unionists' embrace the Diceyan reading of the doctrine of parliamentary sovereignty, as some plainly do, then they may one day suffer the consequences of the sword they urged Westminster to deploy. What Westminster does on unionists' behalf today it can take from them tomorrow—on exactly the same basis. Under the doctrine of parliamentary sovereignty the Union rests not on the consent of its component parts, but rather on Westminster's say-so: Westminster is free to modify the Union in any way it likes, for example, through full-scale joint sovereignty over Northern Ireland with the Republic, or through expelling Northern Ireland from its jurisdiction.

Lastly, the suspension spells a very blunt warning to the Scottish Parliament and the Welsh Assembly and supporters of these devolved institutions—bodies that were created with smaller proportions of popular support and lower electoral turnouts than their Northern Irish counterpart. Sovereignty, in Westminster's eyes, remains indivisibly in its possession: even under 'modernizing' New Labour, Westminster remains the site of the supreme sovereign, the unconstitutionalized Crown-in-Parliament.

### Electoral Systems and Consociational Design

Elections to the 108-member Assembly used a proportional representation (PR) system, the single transferable vote (STV) in six-member constituencies—though the Assembly was entitled, by cross-community consent procedures, to advocate change 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.<sup>29</sup> Thus the smaller of the two loyalist parties, the Ulster Democratic Party (UDP), led by Gary McMichael, won no seats in the first Assembly election. Very small parties, which can gather lower-order preferences from across the unionist and nationalist blocs, such as the Women's Coalition, showed that this system need not preclude representation for small parties among the 'others'.

This system of voting is not what Arend Lijphart recommends for consociational systems: he is an advocate of party-list PR systems, principally because he believes that they help make party leaders more powerful, and better able to sustain inter-ethnic consociational deals.<sup>30</sup> Lijphart also argues for party-list PR, 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—arguments to be addressed shortly.

Those who would like to see David Trimble in greater control of the UUP, a pro-Agreement party with a strong anti-Agreement minority in its ranks, may have hankered after Lijphart's preferred form of PR. But whether party-list PR in itself would have helped Trimble overcome resistance to the Agreement within his party ranks may legitimately be doubted. The Northern Ireland case suggests that modification of the consociational prescriptive canon is in order. Had a regionwide party-list system been in operation in June 1998, the UUP would have ended up with fewer seats, and with fewer seats than the SDLP, and, in consequence, the implementation of

the Agreement would have been even more problematic. This is because under party-list PR the UUP's seat share would have been much closer to its vote share, whereas under STV the party benefited from transfers which took its seat share significantly beyond its first-preference vote share (see Table 3.1). There is a further and less contingent counsel against party-list systems in consociational systems where the relevant ethnic communities are internally democratic, rather than sociologically monolithic. A region-wide party-list election gives incentives to dissidents to form their own parties, or micro parties. In 1998 a party-list system would have fragmented and shredded the UUP's support more than actually transpired. Hardliners under party-list systems have every reason to form new parties knowing that their disloyalty will penalize the more moderate parties they leave behind, but will not necessarily reduce the total vote and seat share of their ethno-national bloc. Hardline conduct will cost little to their 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 UUP first-preference vote were some of the more obvious consequences.<sup>31</sup>

The single transferable vote, of course, does not guarantee party discipline, as multiple candidates for the same party in a given constituency may present, tacitly or otherwise, slightly different emphases on party commitments. I suggest, however, that the STV system, combined with higher effective thresholds than under most forms of party-list PR, makes it more likely that parties will remain formally unified, and therefore better able to make and maintain consociational deals. In any case, neither party-list PR nor STV has automatic consequences for central party leadership control over their candidates. At the very least the prescriptive superiority of the party-list system for enhancing the capacity for party leaders to make and sustain consociations is unproven, and Lijphart's consistent counsel in this respect should be modified.<sup>32</sup>

Let me briefly address Lijphart's second-order arguments for party-list PR instead of STV. I have already argued implicitly in favour of the higher thresholds that exist in STV with six-member districts than in region-wide list PR (where the district magnitude might be as high as 108). That is because, other things being equal, I favour restraining party fragmentation in preference to achieving allegedly 'better' proportionality, and I favour reducing the number of players necessary to sustain a consociational coalition. Secondly, and contra Lijphart, I maintain that STV, legislatively enacted with uniform district magnitudes, and implemented by an inde-

pendent electoral commission tasked to create uniform electorates, is no more vulnerable to gerrymandering than regional party-list PR. I concede that STV is only suitable for numerate electorates, but otherwise its complexities are not especially mysterious—no more so than the formulae used for achieving proportionality in party-list systems. Try discussing d'Hondt, Hare, and Sainte-Laguë in public bars!

The operation of STV in Northern Ireland suggests a corrective not only to Lijphart's prescriptions, but also to Donald Horowitz's favoured remedies for moderating ethnic conflict. STV has the great merit of encouraging 'vote-pooling':<sup>33</sup> in principle, voters were able to use their lower-order preferences (transfers) to reward pro-Agreement candidates at the expense of anti-Agreement candidates.<sup>34</sup> In this respect STV looks tailor-made to achieve the 'inter-ethnic' and 'cross-ethnic' voting favoured by Horowitz, a strong advocate of institutional and policy devices to facilitate conflict reduction.<sup>35</sup>

Consistent, however, with his general anti-consociational premises, Horowitz believes that the STV system damages the prospects for inter-ethnic cooperation because the relatively low quota required to win a seat in six-member constituencies (14.3 per cent) makes it too easy for hardline parties and their candidates to be successful.<sup>36</sup> He also thinks that the Agreement's other institutions, biased towards the key consociational partners (nationalists and unionists), compound this effect by weakening the prospects of cross-ethnic parties, such as the Alliance, which he believes impairs the long-run chances of conflict reduction.

The Northern Ireland case, and the limited working of the Agreement so far, in my view suggests some normative and empirical challenges to Horowitz's reasoning—even if he may be right to be sceptical about the general stability of consociational systems. Horowitz would generally prefer the use of the alternative vote (AV) in single-member constituencies in Northern Ireland, as elsewhere, because its quota (50 per cent plus one) would deliver strong support to moderate ethno-national and cross-ethnic candidates. His reasoning is that the high threshold requires parties (and candidates) to moderate their appeals in search of lower-order preferences. The problem with this prescription is straightforward. The outcomes it would deliver would be majoritarian, disproportional, both within blocs and across blocs, and unpredictably so.<sup>37</sup> The outcomes would, additionally, have much more indirectly 'inclusive' effects than STV.

Let me justify this argument specifically. In some of Northern Ireland's existing constituencies, none of which is gerrymandered, there would be unambiguous unionist and nationalist majorities. In these constituencies

the use of the AV would lead to the under-representation of local minority voters, and to local fiefdoms. Preference transfers in such constituencies would be more likely to occur within blocs rather than across blocs. Secondly, while candidates who could not expect to win a majority of first-preference votes 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.<sup>38</sup> Lastly, and most significantly, it is reasonable to believe that AV would never be agreed by hardline parties tempted to enter a consociational settlement because they would sensibly believe it would be likely to undermine their legislative success. Since the 1998 Agreement was made possible by encouraging 'inclusivity', by facilitating negotiations which included Sinn Féin (the party that had supported the IRA) and the Progressive Unionist Party (PUP) and the UDP (the parties that had supported the Ulster Defence Association and the Ulster Volunteer Force), it would have been perverse for their leaders to have agreed an electoral system which would have minimized the seat-winning prospects of their newly moderated hardline parties.

Indeed STV arguably worked both *before and after* the Agreement to consolidate the Agreement's prospects. To begin with it helped to moderate the policy stance of Sinn Féin. 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 constituencies<sup>39</sup> would pile up large numbers of first-preference ballot papers, and then sit unelected as a range of other parties' candidates would go past them to achieve quotas on the basis of lower-order preferences. They received very few lower-order preferences from SDLP voters. However, once the party moderated its stance, once it promoted the IRA's ceasefire(s), and became the champion of a peace process and a negotiated settlement, it found that both its first-preference vote and its transfer vote (and seats won) increased. These rewards would not have been delivered by any other widely used voting system that I know of.

The constitutional design argument that can be extracted from this story is this: once there has been party fragmentation within ethno-national blocs, STV in multi-member districts ( $M \geq 4$ ) can assist accommodating postures and initiatives by parties and candidates, both intra-bloc and inter-bloc. The corollary is that STV's positive effects apply best to already

polarized and pluralized party systems in ethno-nationally divided territories. If there has been no prior history of ethnicized party polarization within a state, or no deep pluralization of parties within ethno-national blocs, then the merits of STV's implementation may be doubted on Horowitzian grounds. This reflection raises what may be the key problem with Horowitz's electoral integrationist prescriptions: they apply best to forestalling or inhibiting ethnic conflict; they seem much less effective remedies for cases of developed, protracted, and intense ethnic and ethno-national conflict. Horowitz's integrationist prescriptions may be most pertinent at the moment of formation of a competitive party system—but once party formation and pluralism have occurred, there will be few agents with the incentives to implement Horowitz's prescriptions, and if a third party or outside power did so, it would be a provocation to the less moderate parties and would therefore most likely reignite ethno-national tensions. The normative objection that can be levelled against Horowitz's position is that, in the run-up to a power-sharing bargain, proportionality norms better match parties' respective bargaining strengths and their conceptions of justice than do majoritarian systems, even majoritarian systems with artificial distributive requirements. Once party pluralism has already occurred, some form of proportionality is more likely to be legitimate than a shift to strongly majoritarian systems (such as AV), which will be seen, correctly, as deliberate electoral gerrymandering. Likewise, systems with ad hoc distributive requirements will always be (correctly) represented as gerrymanders—albeit well-intentioned.

Perhaps it is necessary to add that these arguments are narrow and qualified. STV is no panacea; it is not enough on its own to facilitate ethno-national conflict regulation; and it may not be appropriate everywhere. But I maintain that it can help to promote accommodative moves, and to consolidate consociational deals in ways that regionwide party-list systems and the AV system in single-member constituencies cannot.

There has been some empirical confirmation of the merits of STV since the Agreement was made. Vote-pooling occurred within the first Assembly elections—as we can surmise, to an extent, from actual counts,<sup>40</sup> as Geoffrey Evans and I can confirm from a survey we helped design,<sup>41</sup> and as unpublished work on actual counts by Paul Mitchell of Queen's University, Belfast, also suggests. In short, *some* of the SDLP's and Sinn Féin's voters found it rational to reward David Trimble's UUP for making the Agreement by giving its candidates their lower-order preferences, and so helped them against Ian Paisley's DUP and Robert McCartney's United Kingdom Unionist Party (UKUP). Likewise, *some* of the UUP's and the

PUP's voters transferred their lower-order preferences to pro-Agreement candidates within their own bloc, among the others, and among nationalists. (Of course, transfers also took place amongst the 'no unionists'—and between 'yes' and 'no unionists'.) 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 Féin won lower-order preferences from SDLP voters, and the PUP had candidates elected on the basis of transfers from other candidates.

Table 3.1 reports the outcome of the June 1998 elections to the Assembly. The proportionality of the results was evident, both with respect to blocs and with respect to parties. But the deviations in seats won compared to the first-preference vote primarily benefited the pro-Agreement parties. The UUP was the principal beneficiary of the transfer of lower-order preferences, taking its seat share (25.9 per cent) significantly above its first-preference vote share (21.3 per cent)—though these lower-order preferences came from voters who voted 'no' as well as those who voted 'yes' to the Agreement, as was evident in ballot papers and in our survey.<sup>42</sup> The Women's Coalition was the most widespread beneficiary of lower-order preferences, winning two seats despite a very low first-preference vote share. Its inclusive orientation towards both republicans and loyalists meant that the transfer process assisted it more than the Alliance, as its successful candidates won transfers from every party, whereas the Alliance's appeal for lower-order preferences was more confined to middle-class SDLP and UUP voters. The net transfers by voters to the pro-Agreement candidates, though not as significant as had been hoped, performed one very important task. They converted a bare 'anti-Agreement' majority of the first-preference vote (25.5 per cent) within the unionist bloc of voters into a bare 'pro-Agreement' majority (27.7 per cent) among seats won by unionists, a result that was essential for the (possible) stabilization of the Agreement. The data are suggestive: STV may be helpful both in achieving vote-pooling and in providing moderating incentives within a consociational system.

The Northern Ireland Act 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: this may be done through by-elections or substitutes, or through whichever method the secretary of state deems fit. By-elections, used in the Republic of Ireland and hitherto in Northern Ireland, are anomalous in a PR system.<sup>43</sup> A candidate who wins the last seat in a six-member constituency and who subsequently resigns or dies is unlikely to be replaced by a candi-

date of the same party or persuasion in a by-election—which would then become the equivalent of AV in a single-member constituency. The Northern Ireland Assembly (Elections) Order of 1998 has provided for a system of alternatives, or personally nominated substitutes, with a provision for by-elections if the alternatives system fails to provide a substitute. The disproportionality possibly induced by by-elections—and with consequent unpredictable ramifications for the numbers of registered nationalists and unionists and the operation of the cross-community rules—needed to be engineered out of the settlement, and it was a good sign that the parties cooperated with this concern in mind.

TABLE 3.1. *Party performances in 1998 Assembly election*

Political parties	Seats	First preference vote (%)	Percentage of seats
SDLP	24	22.0	22.2
Sinn Féin	18	17.7	16.6
Other nationalists	—	0.1	—
Total nationalists	42	39.8	38.8
UUP	28	21.0	25.9
PUP	2	2.5	1.8
UDP	—	1.2	—
Other 'yes unionists'	—	0.3	—
Total 'yes unionists'	30	25.0	27.7
DUP	20	18.0	18.5
UKUP	5	4.5	4.6
Other 'no unionists'	3	3.0	2.8
Total 'no unionists'	28	22.8	25.9
Alliance	6	6.4	5.5
Women's Coalition	2	1.7	1.9
Others	—	1.3	—
Total others	8	9.4	7.4

### The Dual Premiership

Among its institutional novelties the Agreement established two quasi-presidential figures, a dyarchy.<sup>44</sup> The first minister and deputy first

minister were to be elected jointly under the parallel consent rule. Presidentialism in essence is an executive that cannot be destroyed by an assembly except through impeachment. The dual premierships has presidential characteristics because it should be almost impossible to depose the two office-holders, provided they remain united as a team, until the next general election.

The first and the deputy first minister were to be elected together by the *parallel consent procedure*, an idea that flowed out of the making of the Agreement which required propositions to have the support of a majority of parties, including parties representing a majority of nationalists and of unionists. The rule gave 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 members in the Assembly. In the first elections for these posts in *designate* or *shadow* form, pro-Agreement unionists in the UUP and the PUP, who between them had a majority of registered unionists (thirty out of fifty-eight), 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 (twenty-four out of forty-two). (The 'no unionists' voted against this combination, while Sinn Féin abstained.)

The rule practically ensures that a unionist and a nationalist share the top two posts, and that the post-holders be acceptable to a majority of both blocs—pure concurrent majoritarianism. The Agreement and its UK legislative enactment, the Northern Ireland Act (1998), made clear that the two posts had identical symbolic and external representation functions;<sup>45</sup> indeed they have identical powers. Both were to preside over the Executive Committee of Ministers, and have a role in coordinating its work: the sole difference is in their titles.<sup>46</sup> Their implicit and explicit coordinating functions, as approved by the Shadow Assembly, were elaborated in February 1999. There was to be an Office of the First and Deputy First Ministers. It was to have an Economic Policy Unit, and an Equality Unit, and was tasked with liaising with the North–South Ministerial Council, the British–Irish Council, the secretary of state on reserved and excepted UK powers, EU–international matters, cross-departmental coordination, and so on.

The prime-ministerial dyarchy was to be quasi-presidential, because, unlike executive presidents (and unlike most prime ministers), neither the first nor the deputy first minister formally appointed the other ministers to the Executive Committee—save where one of them is a party leader entitled to nominate the ministries to which his party is entitled. Posts in the Executive Committee were to be allocated to parties in proportion to their

strength in the Assembly, according to a mechanical rule, the d'Hondt rule.<sup>47</sup> The rule was simple in its consequences: any party that won a significant share of seats and was willing to abide by the new institutional rules established by the Agreement was to have a reasonable chance of access to the executive, a subtle form of Lijphart's 'grand coalition government'. It was a voluntary grand coalition because parties were free to exclude themselves from the Executive Committee, and because no programme of government had to be negotiated before executive formation. The design created strong incentives for parties to take their entitlement to seats in the executive because, if they did not, they would go either to their ethno-national rivals or to rivals in their own bloc. The rules did not, however, formally require any specific proportion of nationalists and unionists.<sup>48</sup>

This dual premierships critically depended upon the personal cooperation of the two holders of these posts, and upon the cooperation of their respective majorities (or pluralities—under the weighted majority rule). 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 power of resignation was in fact to be strategically deployed twice, by both elected office-holders.

In the summer of 1999 Seamus Mallon of the SDLP resigned as deputy first minister (designate), complaining that the UUP were 'dishonouring' the Agreement and 'insulting its principles' by insisting upon the prior decommissioning of paramilitaries' weapons before executive formation.<sup>49</sup> He did so to speed an intergovernmental review of the implementation of the Agreement. The constitutional question immediately arose: did Mallon's resignation automatically trigger Trimble's departure from office, and require fresh elections to these positions within six weeks? The initial presiding officer's answer to this question was that it did not, because the Assembly was not yet functioning under the Northern Ireland Act.<sup>50</sup> This answer was accepted, and in November 1999 Mallon's resignation was rescinded with the assent of the Assembly with no requirement that the two men would have to restand for office.

Shortly afterwards David Trimble was to use the threat of resignation—helping thereby to precipitate the suspension of the Assembly in February 2000. He wrote a post-dated letter of resignation to the chairman of his party, who was authorized to deliver it to the secretary of state if Sinn Féin failed to achieve IRA movement on the decommissioning of its weapons—in the form of 'product'—within a specified period after the UUP had

agreed to full-scale executive formation, and the initiation with full plenitude of all the Agreement's institutions. As we have seen, the fear that this resignation would become operative was the proximate cause of the UK secretary of state's decision to suspend the Assembly: Peter Mandelson believed that without a 'yes unionist' first minister capable of winning the support of a majority of registered unionists, and with all UUP ministers likely to resign their portfolios, no workable executive would be available.

How should we appraise the executive design in the Agreement? The special skill of the designers—negotiators was to create strong incentives for executive power-sharing and power division, but without requiring parties to have any prior formal coalition agreement—other than the institutional agreement—and without requiring any party to renounce its long-run aspirations. The dual premierships was designed to tie moderate representatives of each bloc together, and to give some drive towards overall policy coherence. The dual premierships was intended to strengthen moderates in both camps and to give them significant steering powers over the rest of the executive. The d'Hondt mechanism ensured inclusivity, and was carefully explained to the public as achieving precisely that.<sup>51</sup> Distinctive coalitions could form around different issues within the executive, permitting flexibility, but inhibiting chaos (given the requirement that the budget be agreed by cross-community consent). In these respects and others the Agreement differs positively from the Sunningdale experiment of 1973.

Yet the executive, and the dual premierships in particular, has proven unstable—and for reasons that go beyond the holders' personalities. Two reasons mattered: the precariousness of the 'yes unionist' majority bloc, and the potency of the resignation weapon available to each premier. Arguably this inter-moderate party deal was a weak spot in institutional design: had the first and deputy first premierships been allocated according to the d'Hondt procedure, and had parties which threatened not to take up their executive seats simply lost access to executive power, then there would have been very strong incentives for the executive to be sustained, especially if the UK secretary of state had decided to take a hands-off approach to any threats of non-participation in the executive. This procedure would also have meant that no suspension could have been justified on the grounds that it was necessary to 'save' David Trimble's chances of returning to the position of first minister—though that excuse was not valid, as I have already argued.

Using the d'Hondt rule to allocate the dual premierships, with the same Mitchell-inspired ministerial oath of office—perhaps modified by a rule that one premierships had to go to the unionist party with the highest num-

ber of seats and the other to the nationalist party with the highest number of seats— would, however, have had the consequence of making more likely the future passage of hardline party leaders, such as Paisley or Adams, to such positions. That, of course, was one motivation behind the construction of the dual premierships by the moderates. However, the prospect feared by the moderates may not have spelled disaster: the prospect of such high office might have further moderated the stances of the respective hardline parties. It is a heretical thought.

What was definitely not foreseen was that failure to timetable the formation of the rest of the executive immediately after the election of the premiers would precipitate a protracted crisis of executive formation. If the Agreement is rebuilt, amendments to the Northern Ireland Act (1998) could be adopted by 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. That would plug this particular constitutional hole. It may, however, be unnecessary. It is unlikely 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.

The crisis of executive formation which dogged the implementation of the Agreement between June 1998 and November 1999 arose for political and constitutional reasons. Politically it arose shortly after the Agreement was made because David Trimble insisted that Sinn Féin deliver some IRA decommissioning before its members would take their seats in the Executive Committee: 'no government before guns' became his party's slogan. Under the text of the Agreement Trimble had no warrant to exercise this veto:

- no one party (unless it enjoys a majority within one bloc) can veto another party's membership of the executive—though the Assembly as a whole, through cross-community consent, may deem a party unfit for office (it has not done so);
- 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;
- any natural reading of the Agreement mandated executive formation as the first step in bringing all the Agreement's institutions 'on line'.

Trimble rested his case on a letter he 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). But Trimble's real concern was to appease critics of the Agreement within his own party—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 the Agreement.

Trimble was initially facilitated in exercising a tacit veto by the UK and Irish governments who were sympathetic to his exposed position, and 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 support for the Mallon–Trimble ticket for deputy first minister and first minister. The SDLP did so because it wished to shore up Trimble's political position. One flexible provision in the Agreement gave Trimble time to stall. The Agreement stated that there must be at least six 'Other Ministers', but that there can 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 an overall majority.

In mid-November 1999 it looked as if the crisis over executive formation would finally be resolved. The UUP accepted that the running of the d'Hondt procedure to fill the Cabinet could occur after the *process* of decommissioning began—with the IRA appointing an interlocutor to negotiate with the International Commission on Decommissioning—while actual decommissioning, consistent with the text of the Agreement, would not be required until after executive formation. Senator George Mitchell, in concluding his Review of the Agreement and with the consent of the pro-Agreement parties, stated that 'Devolution should take effect, then the executive should meet, and then the paramilitary groups should appoint their authorised representatives, all on the same day, in that order.' This was an honourable resolution to what looked like becoming a fundamental impasse—though the Ulster Unionist Council fatefully rendered it problematic. To get its support its leader offered the previously cited post-dated resignation letter to become operative within a specified period that had not been negotiated under the Mitchell Review. As we all know, the IRA did not deliver, at least not in the way that Secretary of State

Mandelson believed was required; suspensory powers were obtained and used; and the Agreement remains only partially fulfilled at the time of composition. Had the Agreement been followed to the letter, the parties in the Assembly could have determined by cross-community consent that Sinn Féin and the PUP were not fit for office because they had not used their best endeavours to achieve comprehensive decommissioning. That avenue was not deployed, and the governments of the two sovereign states are presently doing their best to put Humpty-Dumpty together again. Suspension did not save David Trimble from the wrath of his party, 43 per cent of whom voted for a stalking-horse, the Reverend Martin Smyth. He remains leader of the UUP but bound by a party mandate for reformation of the executive that neither the UK government nor republicans seem likely to deliver. The 'yes unionists' have failed decisively to rout the 'no unionists', partly through mismanagement, and partly through lack of preparation of their base for the changes the Agreement required. But their failure was made even more likely by the republican position on decommissioning. Republicans seem locked in a ghetto of insecurity—determined that, at best, the decommissioning of their weapons be the last or joint last act of implementation—which merely compounds the insecurity of 'yes unionists'. The republican determination to avoid a major internal split—while accepting minor splinters in their movement—proved too much for the unionist moderates, who lived with a split in their ranks in making the Agreement but sought to repair it in its implementation. So near, and yet, right now, so far.

### Conclusion

The normative political science of this analysis is, I hope, clear. Consociational and confederal devices provide the best repertoires to address largely bicomunal ethno-national disputes where a sovereign border has separated a national minority living in its homeland from its kin state, and where the descendants of a historically privileged settler colonial portion of a *Staatsvolk* cannot, or are refused permission to, control the relevant disputed territory on their own. Such devices are capable of being constructed with and without guidance from constitutional designers—though plainly diffusion of institutional repertoires through political science and law is now part of global life. Comprehensive settlements, after inclusive negotiations, which incorporate hardliners looking to come in from war or political isolation, and that address the identities, interests,

and ideological agendas of all parties, are likely to produce complex, inter-linked institutional ensembles that look vulnerable. Referendums may, however, assist their legitimization and the consolidation of the pre-agreement pacts. Preferential voting in the STV mode both enables cross-ethnic vote-pooling and benefits hardliners willing to become less hardline. Double protection models offer imaginative ways to make possible changes in sovereignty less threatening, both now and later. But where any bloc is divided over the merits of such a settlement, and where its leaders respond more to the threat of being outflanked than they do to the imperative of making the new (tacit) cross-ethnic coalition work, it may prove impossible to implement the agreement. These agreements are precarious—but they are infinitely better than their alternatives—fighting to the finish, or the panaceas proposed by partisan or naive integrationists. And sometimes they work; this one is not yet definitively dead.

## NOTES

- \* I would like to thank Chris McCrudden and John McGarry for their critical comments on this chapter. They are not responsible for its final form. I would also like to thank Shelly Deane and Simone Lewis for their research assistance.
1. The Agreement has many names (Belfast, Stormont, Good Friday) and though my preference is to call it the British–Irish Agreement I will refer simply to the Agreement, shorthand for *Agreement Reached in the Multi-Party Negotiations*, 10 Apr. 1998 (n.p.), 30. My preferred description, the British–Irish Agreement, occasions difficulty because that is the technical title of the treaty that was intended to ratify and protect the Agreement.
  2. B. O'Leary, 'The Nature of the Agreement', *Fordham Journal of International Law*, 22 (1999), 1628–67; B. O'Leary, 'The Nature of the British–Irish Agreement', *New Left Review*, 233 (1999), 66–96.
  3. S. Bose, 'Kashmir: Sources of Conflict, Dimensions of Peace', *Survival* 41 (1991), 149–71. Also, this would make a nice counterpoint to the export experience of the 'Westminster model'. See A. F. Madden, "'Not for Export": The Westminster Model of Government and British Colonial Practice', in N. Hillmer and P. Wigley (eds.), *The First British Commonwealth: Essays in Honour of Nicolas Mansergh* (London: Cass, 1980).
  4. C. McCrudden, 'Northern Ireland and the British Constitution', in J. Jowell and D. Oliver (eds.), *The Changing Constitution* (Oxford: Clarendon Press, 1989).
  5. Details of the latter can be found in B. O'Leary and J. McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (London: Athlone Press, 1996), ch. 6.

6. A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977).
7. J. McGarry and B. O'Leary, *Policing Northern Ireland: Proposals for a New Start* (Belfast: Blackstaff Press, 1999).
8. C. McCrudden, 'Equality and the Good Friday Agreement', in J. Ruane and J. Todd (eds.), *After the Good Friday Agreement: Analysing Political Change in Northern Ireland* (Dublin: University College Dublin Press, 1999); C. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', *Fordham International Law Journal*, 22 (1999), 1696–1775; C. McCrudden, J. McGarry, and B. O'Leary, 'Equality and Social Justice: Explaining the Agreement, Part 4', *Sunday Business Post*, 10 May 1998.
9. McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland'.
10. The Assembly was prohibited from legislating in contravention of the European Convention on Human Rights, EU law, modifying a specific entrenched enactment, discriminating on grounds of religious belief or political opinion. It could not 'deal with' an excepted power except in an 'ancillary way'—which roughly meant that it might not enact laws which modify UK statutes on excepted matters (e.g. the Crown). These prohibitions reflected the Agreement's consociational character, its European context, and the fact that Northern Ireland was not becoming an independent sovereign state.
11. One material change flowed from the UK's legislative enactment of the Agreement. The Assembly was entitled to expand its autonomy but only with regard to *reserved* (not *excepted*) matters. Reserved matters, importantly, include the criminal law, criminal justice, and policing.
12. D. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama, 1987), 7. See also pp. 63–65.
13. See the discussion in M. Lind, 'In Defence of Liberal Nationalism', *Foreign Affairs*, 73 (1994), 87–99.
14. L. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), 16–19; A. Cassese, *The Self-Determination of Peoples: A Legal Reappraisal* (Oxford: Clarendon Press, 1995), 71 ff.
15. J. Mayall, *Nationalism and International Society* (Cambridge: Cambridge University Press, 1990), ch. 4.
16. In the Joint Declaration for Peace, a joint UK and Irish prime-ministerial statement made at Downing Street, the United Kingdom first publicly indicated its intention to make this recognition: 'They [the British government] accept that such agreement may, as of right, take the form of agreed structures for the island as a whole, including a united Ireland achieved by peaceful means on the following basis. The British Government agree that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united

- Ireland if that is their wish. They reaffirm as a binding obligation that they will, for their part, introduce the necessary legislation to give effect to this, or equally to any measure of agreement which the people living in Ireland may themselves freely so determine without external impediment'; 15 Dec. 1993. See J. McGarry and B. O'Leary, *Explaining Northern Ireland: Broken Images* (Oxford: Blackwell, 1995), app. A, 409.
17. The position of the United Kingdom's policy-makers was reinforced by the conviction that it would be very difficult to persuade the Republic to change Articles 2 and 3 of its Constitution, or that the price of doing so would be too high for the United Kingdom and unionists.
  18. B. O'Leary, 'The Anglo-Irish Agreement: Statecraft or Folly?', *West European Politics*, 10 (1987), 5–32.
  19. The Agreement did not mention what would happen if the United Kingdom suspended the Assembly—because the Agreement did not give this power to the Westminster Parliament.
  20. The Agreement provided an annex that listed twelve possible areas for implementation. These were: agriculture (animal and plant health); education (teacher qualifications and exchanges); transport (strategic planning); environment (protection, pollution, water quality, waste management); waterways; social security—social welfare (entitlements of cross-border workers and fraud control); tourism (promotion, marketing, research and product development); EU programmes (such as SPPR, INTERREG, Leader II, and their successors); inland fisheries; aquaculture and marine matters; health (accident and emergency measures and related cross-border issues); and urban and rural development.
  21. This is the collective name in Gaelic for the two chambers of the Irish Parliament, *Dáil Éireann* and *Seanad Éireann*.
  22. The possibility of a unionist minister refusing to serve on the Council appeared likely given that unionist parties which opposed the Agreement, especially the DUP, were eligible for ministerial portfolios, but participation in the NSMC was made an 'essential' responsibility attaching to 'relevant' posts in the two administrations ('relevant' meant, presumably, any portfolio a part of which is subject to North–South cooperation). This left open the possibility that a politician opposed to the North–South Council might take a seat on it with a view to wrecking it. *But* ministers were required to establish the North–South institutions in 'good faith' and to use 'best endeavours' to reach agreement. Since these requirements were presumably subject to judicial review, it was unlikely that overt wreckers would be able to take part in the North–South Council for long.
  23. E. Tannam, *Cross-Border Cooperation in the Republic of Ireland and Northern Ireland* (Basingstoke: Macmillan, 1999).
  24. R. Hazell and B. O'Leary, 'A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?', in R. Hazell (ed.), *Constitutional Futures: A*

- History of the Next Ten Years* (Oxford: Oxford University Press, 1999). The formation of an English Parliament would be the last blow.
25. B. O'Leary, 'More Green, Fewer Orange', *Fortnight*, 12–15 and 16–17 (1990); McGarry and O'Leary, *Explaining Northern Ireland*, ch. 10; B. O'Leary and G. Evans, 'Northern Ireland: La Fin de Siècle, the Twilight of the Second Protestant Ascendancy and Sinn Féin's Second Coming', *Parliamentary Affairs*, 50 (1997), 672–80.
  26. *Constitution of Ireland* (Dublin: Government Stationery Office, 1937, as amended).
  27. The other, less immediately important protective body, was the British–Irish Council. If Irish unification ever occurred, the Republic's government would find it politically impossible not to offer the British government and unionists reciprocal access in the same forum.
  28. B. O'Leary and J. McGarry, *The Politics of Antagonism: Understanding Northern Ireland* (London: Athlone Press, 1996), chs. 6–7.
  29. The Droop quota used in STV is  $(\text{total vote}/N+1) + 1$ , where  $N$  = number of Assembly members to be elected.
  30. A. Lijphart, 'Electoral Systems, Party Systems and Conflict Management in Divided Societies', in R. Schrire (ed.), *Critical Choices for South Africa* (Cape Town: Oxford University Press, 1990).
  31. G. Evans and B. O'Leary, 'Frameworked Futures: Intransigence and Inflexibility in the Northern Ireland Elections of May 30 1996', *Irish Political Studies*, 12 (1997), 23–47; G. Evans and B. O'Leary, 'Intransigence and Flexibility on the Way to Two Forums: The Northern Ireland Elections of 30 May 1996 and Public Opinion', *Representation*, 34 (1997), 208–18.
  32. My co-researcher John McGarry and I used to assume the prescriptive superiority of the party-list system. See e.g. J. McGarry and B. O'Leary (eds.), *The Future of Northern Ireland* (Oxford: Oxford University Press, 1990), 297. Facts and reflection have made me reconsider the merits of STV. See e.g. B. O'Leary, 'The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament', *Representation*, 35 (1999), 106–13; and B. O'Duffy and B. O'Leary, 'Tales from Elsewhere and an Hibernian Sermon', in H. Margetts and G. Smyth (eds.), *Turning Japanese? Britain with a Permanent Party of Government* (London: Lawrence & Wishart, 1995).
  33. D. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985), 628 ff.
  34. This option was also open to anti-Agreement voters, but more unlikely for those with transitive preferences: DUP and United Kingdom Unionist Party (UKUP) voters are unlikely to give their lower-order preferences to republican Sinn Féin, should that party ever choose to stand for elections.
  35. Horowitz, *Ethnic Groups in Conflict*; D. Horowitz, 'Ethnic Conflict Management for Policymakers', in J. V. Montville (ed.), *Conflict and*

- Peacemaking in Multiethnic Societies* (Lexington, Mass.: Heath, 1989), 115; D. Horowitz, 'Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management', in Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies*; D. Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991).
36. Personal conversations with Donald Horowitz during his period as a STICERD distinguished visiting professor at the London School of Economics, 1998–9.
  37. No electoral system can guarantee certainty of outcomes, and in a sense it would be undemocratic if it could. The predictability of an electoral system's operation which I commend here is that which gives voters and party leaders reasonable cues as to how they should cast their ballots and conduct their campaigns in accordance with their preferences.
  38. It may be that AV's presumptively moderating effects would materialize better in multi-ethnic political systems with no actual or potentially dominant group and many heterogeneous and polyethnic constituencies—a situation that does not describe Northern Ireland.
  39. STV has been used in local government elections in Northern Ireland since 1973, and in the European parliamentary elections since 1979. Interestingly, the hardline unionist Ian Paisley has been most successful in the three-member district used to elect Northern Ireland's MEPs; in the more proportional five- or six-member local government constituencies the DUP has not fared as well.
  40. R. Sinnott, 'Centrist Politics Makes Modest but Significant Progress: Cross-Community Transfers were Low', *Irish Times*, 29 June 1998.
  41. G. Evans and B. O'Leary, 'Northern Irish Voters and the British–Irish Agreement: Foundations of a Stable Consociational Settlement?', *Political Quarterly*, 71 (2000), 78–101.
  42. *Ibid.*
  43. M. Gallagher, 'Does Ireland Need a New Electoral System?', *Irish Political Studies*, 2 (1987), 27–48.
  44. In current work with others I am examining the other novel dimension of the executive designed in the Agreement—the d'Hondt procedure for the allocation of ministerial portfolios.
  45. A Foreign Office official recounted to me how this fact had to be patiently explained to all British embassies and consulates who were inclined to take the titles of first and deputy more seriously than they should have: confidential discussion, London, Feb. 2000.
  46. The Northern Ireland Act (1998) enabled the top two ministers to hold functional portfolios, Clause 15(10).
  47. O'Leary, 'The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament'; O'Leary, 'The Nature of the Agreement'.

48. That was temporarily changed: in the course of the crisis over executive formation in the summer of 1999 the secretary of state introduced a new rule requiring that a well-formed executive consist of at least three designated nationalists and three designated unionists. On 15 July 1999, in a handwritten note to the initial presiding officer, the secretary of state introduced an additional standing order to the running of d'Hondt, namely 'On the completion of the procedure for the appointment of Ministers (designate) under this Standing Order, the persons appointed shall only continue to hold Ministerial office (designate) if they include at least three designated Nationalists and three designated Unionists.' This order, authorized under the Northern Ireland (Elections) Act 1998, in my view was a breach of the letter of the Agreement by the UK 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 power of veto to both the UUP and the SDLP over executive formation (because each party was entitled to three positions on the basis of its strength in seats). The standing order was introduced in a hurry to stop executive formation leading either to an all-nationalist executive as actually transpired—given the decision of the UUP to fail to turn up to the Assembly when the process of executive formation was triggered, and the decision of the 'no unionists' not to take their designated ministerial entitlements—or to an executive in which there would have been no pro-Agreement unionists (see the *Official Report of the New Northern Ireland Assembly*, Belfast, 15 July 1999, 317–37). This panic measure, introduced for high-minded motives, subtly changed the executive incentive structures agreed by the SDLP and the UUP in the negotiation of the Agreement. The standing order was rigidly consociational, but it was not negotiated by the parties, was not endorsed in the referendums, and encouraged moderates to over-bargain, knowing that they could veto executive formation. Insecure moderates as well as hardliners can be troublesome agents. My perspective here may be at odds with that of Donald Horowitz (personal conversations).
49. See statement by the Deputy First Minister (Designate), *Official Report of the Northern Ireland Assembly*, Belfast, 15 July 1999, 325.
50. 'Members will recall that the First Minister (Designate) and the Deputy First Minister (Designate) were elected, and I use the common parlance, "on a slate", when we were in a post-devolution situation. That means that under the Northern Ireland Act, both positions would fall when one resigned, but the remaining individual would remain in a caretaker capacity for up to six weeks. Before the end of that period the Presiding Officer would call for a further election. However, we are still functioning under the Northern Ireland (Elections) Act for these purposes and, therefore, the position of the First Minister (Designate), as I understand it—and you have simply asked me for an immediate view—is unchanged. It is possible that some Standing order, or other arrangement, may already be on the way, but I have no knowledge of it.'

*Official Report of the New Northern Ireland Assembly, Belfast, 15 July 1999, 326–7.*

51. 'The purpose is to ensure confidence across the community . . . so that people know that their parties will, if they receive a sufficient mandate in the election, have the opportunity for their Members to become Ministers and play their part in the Executive Committee'. House of Commons, Official Report, vol. 319, 18 Nov. 1998, col. 1023.

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## The Northern Ireland Agreement: Clear Consociational, and Risky

DONALD L. HOROWITZ\*

The Agreement consummated in Belfast on Good Friday of 1998 is extraordinary in three respects. It is mainly consociational, it is coherent, and it is maximal in its commitments. Few constitutional plans that emerge from a lengthy process of negotiation exhibit such clear and single-minded direction.

The Agreement is consociational, in that it contemplates a grand coalition, an executive constituted by proportional representation, government on the basis of inter-group consensus rather than majority rule, and a certain degree of group autonomy.<sup>1</sup> Consociational agreements are very rare in severely divided societies. They are preferred by minorities because they provide guarantees against majority rule, but opposed by majorities for the same reason. It requires some special conditions to overcome these typically divergent preferences. Even when these obstacles have been overcome, the divergent interests of majorities and minorities may reassert themselves later, thus rendering such agreements vulnerable to being undone, as the consociational Cyprus Constitution of 1960 was overthrown by the Greek side within a year. All the more reason to see the Belfast Agreement as exceptional.

The Agreement also has a large measure of coherence. With a couple of exceptions, it is not merely consociational but consistently so. The exceptions relate to the electoral system and the requirement of Stormont legislators to identify themselves as unionist, nationalist, or 'other'.<sup>2</sup>

To achieve proportional representation of groups in parliament, consociational theory generally advocates adoption of list system proportional representation.<sup>3</sup> The negotiators, however, chose the single transferable vote (STV),<sup>4</sup> a preferential system that can impair group proportionality by permitting the election of legislators on the basis of second or subsequent preferences.