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ARCHITECTURE
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**Constitutional Design, Conflict
Management, and Democracy**

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OXFORD STUDIES IN DEMOCRATIZATION

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Edited by
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Photograph by Tom Weis

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 Preface

This book was born out of an enjoyable gathering of over 100 academics and practitioners in the electoral and constitutional field at the University of Notre Dame in December 1999. That conference was in turn the spin-off of a personal wish I had had a few years earlier. Since 1991 I had spent most of my professional life immersed in the study of elections and constitutions in emerging democracies. After the dramatic growth of that field, which came along with the third wave of democratization, I wanted to set up a group photograph of the most influential and articulate protagonists in the discipline: my own mentors, and the scholars who had actually penned the books which I had spent so much time poring over. I also wanted to gather together the new wave of scholars in the field who were doing both cutting-edge quantitative work and sophisticated social science studies of the relationships between institutional design and democratic endurance. The photograph, which appears on page vi and is the real reason for this book, doesn't include everyone I had hoped for. Robert Dahl and Matthew Shugart were unavoidably occupied, Larry Diamond was—unusually—travelling, and Notre Dame's own Guillermo O'Donnell was being honoured at the inauguration of the new Argentinian president: a more than reasonable excuse. But what is remarkable about the photograph—and the conference itself—is how many of the icons of the field were on the stage. Arend Lijphart and Donald Horowitz were mischievously set up as the two opposing team captains and played their roles with grace and aplomb. Alongside them Giovanni Sartori, Juan Linz, Al Stepan, Dieter Nohlen, Bernie Grofman, Rein Taagepera, and Scott Mainwaring brought a huge weight of innovative inquiry and practical experience to the proceedings. Brendan O'Leary, Pippa Norris, Brij Lal, Cheryl Saunders, Nigel Roberts, René Antonio Mayorga, Vincent Maphai, Bereket Selassie, Jørgen Elklit, Bill Liddle, and Ruth Lapidoth came from far and wide, representing the collected wisdom of five continents. Then there were the Young Turks: the East European troika of Shvetsova, Solnick, and Frye; the Latin American foursome of Carey, Coppedge, Chieub, and Levitsky; and the 'rest of the world' team of Varshney, Suberu, and Stuligross. Finally, we were joined by representatives of the practitioners who

work with elections and the design of institutions on a day-to-day basis in the reality of emerging democracies: Carina Perelli, head of the United Nations' Electoral Assistance Division; Richard Soudriette, director of the International Foundation for Election Systems; John Packer, legal adviser to the OSCE's High Commissioner on Minorities; and Peter Manikas, senior executive at the National Democratic Institute.

The weekend was a great success, and I believe the chapters presented in this book capture not only the spirit of enthusiasm for new avenues of investigation prevalent at the conference but the feeling that constitutional design can, if appropriately considered, be a lever of great good for very troubled societies. It may also be worth noting an interesting anthropological phenomenon from the conference. Participants were compelled to endure a 'Reynolds Quiz Night' which covered subjects both trivial and obscure. It was fascinating to see how academics turn into very different animals when a competitive test of their breadth is on the table and how alliances forged in battle cross traditional boundaries. Lijphart, Sartori, and Stepan were as one gathering together a huge team around them—Norris, O'Leary, Solnick among them—attempting, without shame, to crush all comers. This they did, but not without the serendipity of Lijphart's mother being born in Paramaribo—thus giving them the capital of Suriname. Grofman and Elklit took a bolder path leading a team of only three. Their honour only managed to achieve the position of dead last in the final rankings which didn't stop them spending a fair part of the rest of the conference trying to prove with mathematical voting models that technically they had actually won the quiz.

However, I digress. The Constitutional Design 2000 conference and this resulting book would not have become a reality without the support of Julius Ihonvbere of the Ford Foundation and grant makers at the United States Institute of Peace; along with Notre Dame supporters, Seamus Deane of the Keough Institute for Irish Studies, Bob Wegs of the Nanovic Institute for European Studies, the Henkles fund for visiting scholars, and the Institute for Scholarship in the Liberal Arts. But perhaps the greatest debt goes to Scott Mainwaring, director of the Kellogg Institute at the University of Notre Dame, who believed in this project from the beginning and made that belief manifest through consistent support, advice, and backing. There are few institutes which could have pulled off such an exercise so successfully and it is testament to Scott Mainwaring that Kellogg continues to develop as one of the pre-eminent centres of international studies in the world today. If

this work does little else, it will at least allow the undergraduate and graduate students of the future to actually put faces to the names of writers they are assigned: indeed, some of them look less intimidating when you see them in person.

Andrew Reynolds
March 2001

in force, and the elected government was still the legitimate government.² In his judgement delivered on 15 November, Justice Anthony Gates upheld the continuing validity of Fiji's 1997 Constitution. The interim administration challenged the ruling before the Fiji Court of Appeal, now the highest court after the Chief Justice advised the interim administration to abolish the Supreme Court. Chaired by Sir Maurice Casey (New Zealand) Sir Ian Baker (NZ) Mari Kapi (Papua New Guinea), Gordon Ward (Tonga) and Kenneth Handley (Australia), the Court ruled that the 1997 Constitution had not been abrogated and that the Parliament had not been dissolved.

The Court went further, comprehensively addressing the objections raised by the interim administration. The 1997 Constitution was the product not of hurried but of extensive consultation. 'The Commission report and the constitution that resulted from it received almost universal acclaim', the Court ruled.³ The Court found 'erroneous' the claim that the electoral system was 'extraordinarily complex, the results remarkably ambiguous and its merit as a tool for promoting ethnic cooperation were highly questionable'. The final result, the victory of the People's Coalition, would not have differed materially even under the first-past-the-post system. It rejected the claim that the percentage of invalid votes principally affected the indigenous Fijian votes. And finally, the Court did not accept the interim administration's claim that the 1997 Constitution had diluted protection given to Fijian interests and institutions under previous constitutions. 'Any perceived attempt by the Government to change the law in relation to land or to indigenous rights by stealth was impossible under the 1997 constitution and any suggestion that it needed to be replaced on that ground cannot be substantiated.'

The Court of Appeal's landmark decision was accepted, albeit without much enthusiasm, by the interim administration, the military forces, and the Great Council of Chiefs. That paved the way for a new general election, under the electoral provisions of the 1997 Constitution, due in August 2001. The 1997 Constitution, the result of the effort of so many over so many years, survived George Speight's assault. But it will remain a piece of paper unless there is a united will in the citizenry to make it work for the common good. In Rousseau's words, the most important laws are those which are 'not graven on tablets of marble or brass, but on the hearts of its citizens'.

² *Chandrika Prasad vs the Republic of the Fiji*. The judgement was published on the Internet in several places. My copy is from http://www.pegov.org.fj/does_o/chandrikaprasad_ruling_gates.htm

³ Judgement of the Fiji Court of Appeal, Civil Appeal No. ABU0078/2000S, P.9.

The Belfast Agreement and the British-Irish Agreement: Consociation, Confederal Institutions, a Federacy, and a Peace Process

Brendan O'Leary

The multi-party and intergovernmental agreement reached in Belfast on 10 April 1998 and the subsequent treaty between the Irish and the UK governments, the British-Irish Agreement of 1999, jointly comprise an exemplary collective constitutional design for an ethno-nationally divided territory with rival claims to its sovereignty. The word 'design' is appropriate because the Belfast Agreement's makers knew they were effectively engaged in constitutional crafting, even if they disagreed over whether they were making a transitional, durable, or permanent settlement. Whether it will be fully implemented and institutionalized still remains uncertain. If it is, it will become an export model for conflict regulators, and is already acquiring this status even for unpromising places such as Kashmir (Bose 1999). If this continues it will make a nice counterpoint to the export of the Westminster constitutional model that served Northern Ireland ill (Madden 1980; O'Leary and McGarry 1996: Chs 3–5). If it is not implemented, partially implemented, or 'malimplemented', as at the time of writing, debates will

This chapter is an updated version of the paper presented at the 'Constitutional Design 2000' conference at Notre Dame. I must thank Bernard Grofman, Jorgen Elklit, Donald Horowitz, Arend Lijphart, Andrew Reynolds, Ben Reilly, Fred Riggs, Cheryl Saunders, Giovanni Sartori, and Al Stepan for very helpful comments. The paper draws freely upon prior and subsequently published work (O'Leary 1999a, d, e; 2001a, b, c) and the thanks given therein still stands, especially to John McGarry, Christopher McCrudden and Paul Mitchell. The Notre Dame conference itself prompted a joint paper with Bernard Grofman and Jorgen Elklit on the design of the executive that will be published elsewhere (O'Leary, Grofman, and Elklit 2001).

arise over whether there were critical design flaws. But notwithstanding serious difficulties in implementation, it represents the most comprehensive, ambitious, and successful attempt at constitutional conflict regulation of the last three decades.

The Name of the Agreement

Names matter in ethno-national conflicts and there is no unanimity on the title of this agreement. Under the description *The Agreement: Agreement Reached in the Multi-party Negotiations*¹ it was published, unaltered, as a dense 30-page text and distributed to all households before the referendum to endorse it in Northern Ireland in May 1998. Since then the UK government has officially styled it the 'Belfast Agreement' in its primary legislation, the Northern Ireland Act 1998, and in its parliamentary references. Its republican dissident critics call it the 'Stormont Agreement', advertizing their continuing rejection of the partition of Ireland executed by the Westminster Parliament in the Government of Ireland Act 1920, and their dislike of the final negotiating venue that once housed the hated Northern Ireland Parliament. But the text was negotiated in many other places: in Dublin, London, and Washington; in smaller cities, towns, and villages; and in airports, aeroplanes, and unofficial 'communications'. It was not signed by all of its makers in the final negotiations in Belfast; some had to await their parties' endorsements. Some know it just by its date: the 'April 10 1998 Agreement'. Its most popular name is the 'Good Friday Agreement' because the 'miracle' of its finalization occurred on the anniversary of Christ's crucifixion; but this name gives too much credit to Christianity, both as the key source of conflict and as a source of resolution.² It is perhaps most suitably called the 'British-Irish Agreement' (O'Leary 1999e), a designation that reflects an important fact, namely that it fulfils and, if implemented, supersedes its predecessor, the Anglo-Irish Agreement of 1985 (O'Leary and McGarry 1996: Ch. 6). But that name is now taken by the 1999 treaty which incorporates the Belfast text as an appendix. So I shall refer simply to 'the Agreement', where necessary distinguishing the Belfast text from the treaty.

¹ 'Government of the United Kingdom' is given as the author, but neither publisher nor place of publication is supplied.

² For the argument that the conflict in Northern Ireland is primarily ethno-national rather than religious see, *inter alia*, McGarry and O'Leary (1995a: Chs 5, 6; 1995b).

The Institutional Nature of the Agreement

The Agreement is internally consociational, a political arrangement that meets *all* of the criteria laid down by Lijphart:

- (1) cross-community executive power-sharing;
- (2) proportionality rules throughout the governmental and public sectors;
- (3) community self-government—or autonomy—and equality in cultural life; and
- (4) veto rights for minorities (Lijphart 1977).

A consociation is an association of communities: in this case British unionist, Irish nationalist, and 'others'. A consociation can be built without explicit theoretical guidance.³ Most often consociations are the outcomes of bargains between the political leaders of ethnic or religious groups. This Agreement was the product of tacit and explicit consociational thought⁴ and of 'pacting' by most of the leaders of the key ethno-national groups and their respective patron states.

But the Agreement is not just consociational, and departs from Lijphart's detailed prescriptions. It has important external dimensions; it was made with the leaders of national, and not just ethnic or religious, communities—unlike most previous consociations; and it is the first consociational settlement endorsed by a referendum that required concurrent majorities in jurisdictions in different states. To be formulaic: *the Agreement foresaw an internal consociation within overarching confederal and federalizing institutions; it has elements of co-sovereignty agreed between its patron states; it promises a novel model of 'double protection'; and it rests on a*

³ Lijphart claims that consociational rules were invented by Dutch politicians in 1917, and by their Lebanese (1943), Austrian (1945), Malaysian (1955), Colombian (1958), Indian (in the 1960s), and South African (1993–4) counterparts later in the century. One does not have to agree with the citation of any of these cases to accept that politicians are capable of doing theory without theorists, see Lijphart (1990c: viii; 1996).

⁴ Dr Mowlam, the UK Secretary of State for Northern Ireland in 1997–9, had an academic consociational heritage. Consociational thinking had an impact on the drafting of the Framework Documents of 1995 that prefigured the Agreement (O'Leary 1995), and the 'novel' executive formation in the Agreement, based on the d'Hondt rule, adapted coalition principles used elsewhere in Europe and in the European Parliament (O'Leary, Grofman, and Elklit 2001). Consociational thinking had had local resonance since the Sunningdale Agreement of 1973; the nationalist SDLP had been especially interested in power-sharing devices, and was the prime initiator of proposals in the internal negotiation (Strand One) of the Agreement.

bargain derived from diametrically conflicting hopes about its likely long-run outcome, but that may not destabilize it.

The Internal Settlement: A Distinctive Consociation

The Agreement proposed and the 1998 Northern Ireland Act established a single-chamber Assembly and an Executive. The Assembly and Executive have full legislative and executive competence for economic development, education, health and social services, agriculture, environment, and finance, including the local civil service. Through 'cross-community agreement'—defined below—the Assembly may expand these competencies; and, again through such agreement and with the consent of the UK Secretary of State for Northern Ireland and the Westminster Parliament, it may legislate for any currently non-devolved reserved function.⁵ Within a traditional UK constitutional perspective, maximum feasible devolved self-government⁶ is therefore within the scope of the local decision-makers: a convention may arise in which the Secretary of State and Westminster 'rubber stamp' the legislative measures of the Assembly.⁷ Indeed, it is conceivable that most public policy in Ireland, north and south, may eventually be made without direct British ministerial involvement, though the British budgetary allocation will be pivotal as long as Northern Ireland remains in the UK.

Elected Assembly members (MLAs) must designate themselves as 'nationalist', 'unionist', or 'other'. In this respect Lijphart's injunctions in favour of 'self-determination rather than pre-determination' are violated (Lijphart 1985; 1990b; 1993). After the first Assembly was elected in June 1998 this requirement posed difficult questions for the Alliance Party of Northern Ireland (APNI) and other 'cross-community' parties, such as the Northern Ireland

⁵ The internal security functions of the state—policing and the courts—have not been devolved, but they could be devolved in principle. I address the meaning of 'devolution' below.

⁶ The Assembly may not legislate in contravention of the European Convention on Human Rights or European Union law, modify a specific entrenched enactment, discriminate on grounds of religious belief or political opinion, or 'deal with' an excepted power except in an 'ancillary way'—which roughly means it may not enact laws which modify UK statutes on excepted matters, such as the Crown.

⁷ According to the UK's legislative enactment in the Northern Ireland Act 1998, the Assembly can expand its autonomy only with regard to *reserved*, not *excepted*, matters. Reserved matters, most importantly, include the criminal law, criminal justice, and policing. Excepted matters include the Crown and the currency.

Women's Coalition (NIWC), who have both cultural Catholic and cultural Protestant leaders and voters. They determined that they were 'others', though they are free to change their classifications once in this Assembly, and, of course, in future Assemblies.

Through standard legislative majority rule the Assembly may pass 'normal laws' within its devolved competencies, though there is provision—the petition procedure—for 30 of the 108 Assembly members to trigger special procedures that require special majorities. But 'key decisions'—that is, the passage of controversial legislation, including the budget—automatically have these special procedures that require 'cross-community' support. Two rules have been designed for this purpose. The first is 'parallel consent', a majority that encompasses a strict concurrent majority of registered nationalists and unionists. It requires that a law be endorsed, among those present and voting, both by an overall majority of MLAs and by majorities of both its unionist and its nationalist members respectively. Table 11.1, which records the numbers in each bloc returned in the June 1998 election, shows that parallel consent with all members present currently requires the support of 22 nationalists and 30 unionists, as well as an overall majority in the Assembly. With all members present a majority of the Assembly is 55 members, so under parallel consent procedures laws may pass that are dependent upon the support of the 'others'—22 nationalists, 30 unionists, and 3 others enable the passage of a key decision. The rule does not automatically render the others unimportant.

The second rule is that of 'weighted majority'. It requires, among those present and voting, that to become law a measure must have the support of 60 per cent of members, currently 65 members when

TABLE 11.1: *The shares of blocs in the June 1998 elections to the Northern Ireland Assembly*

Bloc	First preference vote	Seats	
	%	No.	%
All nationalists	39.8	42	38.9
All others	9.4	8	7.3
All 'Yes' unionists	25.0	30	27.7
All 'No' unionists	25.5	28	25.9

Percentage figures for votes and seat shares rounded to one decimal place. 'Yes' unionists support the Agreement; 'No' unionists do not. The electoral system is the single transferable vote in six-member constituencies.

Source: O'Leary (1999e).

all members vote or 64 excluding the Presiding Officer, that is, the Speaker. But it also requires the support of 40 per cent of registered nationalist members and 40 per cent of unionist members: that is, in the current Assembly at least 17 nationalists and at least 24 unionists must consent. Presently all nationalists (42) and the minimum necessary number of unionists (24) have the combined support for any measure to pass in this way—without support from the 'others'. A combination of all the others (8) and the minimum number of nationalists (17) and the minimum number of unionists (24) cannot, by contrast, deliver a majority, let alone a weighted majority.

The outcome of the elections presented in Table 11.1 suggested that pro-Agreement unionist Assembly members (30) would be vulnerable to pressure from anti-Agreement unionists (28). Indeed, a member of the internally divided but formally pro-Agreement Ulster Unionist Party (UUP), Peter Weir, subsequently resigned his party's whip and must be counted as a 'No' unionist. This MLA has refused to be part of the unionist majority necessary to work the parallel consent rule. But this rebellion still left room for the Agreement to function. The UUP could deliver a workable portion of a cross-community majority under the weighted majority rule, even with six dissidents, providing David Trimble, its leader, could rely on the two pro-Agreement Progressive Unionist Party (PUP) Assembly members, and providing that he can live with support from Sinn Féin—a more uncomfortable prospect.⁸

The cross-community consent rules are central to the design of the internal consociation but are not entirely predictable. The UK legislation implies that the parallel consent procedure must be attempted first, followed by the weighted majority procedure, though the election of the premiers may only be effected by the parallel consent rule (see below). The operation of the rules depends not just on how parties register but also on their discipline within the Assembly. The lack of discipline of the UUP during 1998–2001 confirms this critical fact.

There is one 'supermajority' rule. The Assembly may, by a two-thirds resolution of its membership, call an extraordinary general election before its statutory four-year term expires. This was agreed by the parties, after the Agreement, in preference to a proposal that the UK Secretary of State should have the power to dissolve or

⁸ There is one important exception to this possibility: the death or the resignation of either premier requires that both be replaced under the parallel consent rule, see below.

suspend the Assembly—a sign of the local parties' commitment to their self-government rather than accepting continuing arbitration from Westminster. Subsequently, to suspend the Assembly in February 2000, the Secretary of State for Northern Ireland, Peter Mandelson, had to pass new primary UK legislation through the Westminster parliament outside the remit of the Agreement—which is why Irish nationalists regarded the power of suspension as a breach of the Agreement, and indeed of the 1999 inter-governmental treaty (see below).

Executive power-sharing

The Agreement established an entirely novel Executive Committee, and at its head two quasi-presidential figures, a diarchy: a First Minister (FM) and a Deputy First Minister (DFM). Once elected the latter have presidential characteristics because it is almost impossible to depose them, provided they remain united as a team, until the next general election: the essence of presidentialism is an executive that cannot be destroyed by an assembly except through impeachment. The FM and DFM are elected together by the *parallel consent* procedure. This rule gives very strong incentives to unionists and nationalists to nominate a candidate for one of these positions that is acceptable to a majority of the other bloc's Assembly members. In the first elections for these posts, in *designate* form, pro-Agreement unionists in the UUP and the PUP voted solidly for the combination of David Trimble of the UUP and Seamus Mallon of the Social Democratic and Labour Party (SDLP). Naturally, so did the SDLP, which enjoyed a majority among registered nationalists. The 'No' unionists voted against this combination, while Sinn Féin abstained.

The rule ensures, though it does not officially require, that a unionist and a nationalist share the top two posts: it does not specify which must be First Minister. The Agreement and the Northern Ireland Act 1998 make clear that the two posts have identical symbolic and external representation functions. In the negotiations the SDLP conceded the difference in dignity in title between the positions but no differences in powers.⁹ The sole difference is their titles: both preside over the Executive Committee of Ministers and have a role in coordinating its work.¹⁰ This dual premiership critically

⁹ Private information.

¹⁰ Clause 15 (10) of the Northern Ireland Act 1998 enables the top two ministers to hold functional portfolios.

depends upon the cooperation of the two office-holders and upon the cooperation of their respective majorities—or pluralities under the weighted majority rule. In Art. 14(6) the Northern Ireland Act 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'.

The formation of the rest of the Executive Committee, according to the procedure described below, did not proceed smoothly. Indeed, in the summer of 1999 Seamus Mallon resigned as Deputy First Minister (designate), complaining that the UUP was 'dishonouring' the Agreement and 'insulting its principles' by insisting upon decommissioning of paramilitaries' weapons before executive formation.¹¹ He did so to speed an intergovernmental review of the implementation of the Agreement. The 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.¹² This answer was accepted. It implied, however, that if the review of the Agreement succeeded and the Agreement's institutions came into force, either that there would have to be fresh elections of the FM and DFM under the parallel consent rule or that Mallon's resignation would have to be rescinded. When the review succeeded and the Agreement came on line, the Assembly voted to nullify Mallon's resignation, thereby preventing a vote under the parallel consent rule that might have prevented Trimble's and Mallon's (re)installation in office—because the resignation of the UUP whip by Peter Weir would have left the pair one short of the required unionist majority.

This prime ministerial diarchy, forged in the heat of inter-party negotiations, is properly considered quasi-presidential because,

¹¹ See statement by the Deputy First Minister (Designate), Northern Ireland Assembly (1999: 325, 15 July).

¹² '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' (Northern Ireland Assembly 1999: 326–7, 15 July).

unlike executive presidencies—and unlike most prime ministers—neither the FM nor the DFM formally appoints the other ministers to the Executive Committee. Instead, posts in the Executive Committee, or cabinet, are allocated to parties in proportion to their strength in the Assembly, according to the d'Hondt rule (O'Leary, Grofman and Elklit 2001; see the Annex below). The premiers do have implicit and explicit coordinating executive functions, as approved by the Shadow Assembly in February 1999 (Wilford 2001). To fulfil them, the Department of the First and Deputy First Ministers was created. It has an Economic Policy Unit and an Equality Unit, and is tasked with liaising with the other institutions of the Agreement, namely, the North-South Ministerial Council, the British-Irish Council, the Secretary of State on reserved and excepted UK powers, and EU/ international matters, and, of course, with cross-departmental coordination.

Posts in the rest of the Executive Committee are allocated to parties in proportion to their strength in the Assembly, according to the d'Hondt rule. The rule's consequences are fairly clear: any party that wins a significant share of seats and is willing to abide by the new institutional rules has a reasonable chance of access to the executive, a subtly inclusive form of Lijphart's 'grand coalition government'. It is a voluntary arrangement because parties are free to exclude themselves from the Executive Committee. No programme of government has to be negotiated in advance between the parties entitled to portfolios. The design in principle creates strong incentives for parties to take up their entitlements to ministries, because if they do not then the portfolios go either to their ethno-national rivals or to their rivals in their own bloc.¹³ The d'Hondt allocation

¹³ The rules of executive formation did not formally require any specific proportion of nationalists and unionists in either the dual premierships or the Executive Committee. But in the course of the crisis over executive formation in the summer of 1999, the UK Secretary of State, Dr Mowlam, 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 hand-written note to the Initial Presiding Officer, she introduced an additional Standing Order to the running of d'Hondt: '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 3 designated Nationalists and 3 designated Unionists. This order, authorized under the Northern Ireland (Elections) Act 1998, in my view was the first breach of the letter of the Agreement by the UK government. Given that the parties had previously agreed that the executive should consist of ten ministers, in addition to the First and Deputy First Ministers, the standing order, in effect, gave a veto power to both the UUP and the SDLP over executive formation, because each party was entitled to three seats on the basis of its strength in seats. The standing order was introduced in a hurry to

procedure means that democratic parties get the absolute right to nominate ministers according to their respective strength in seats;¹⁴ that is, no vote of confidence is required by the Assembly either for individual ministers or for the Executive Committee as a whole. Parties choose, in order of their strength, their preferred ministries—which leads to fascinating strategic decision-making (see Annex; O'Leary, Grofman, and Elklit 2001). An individual minister may be deposed from office by the Assembly under the cross-community rules, but the party that held the relevant ministry is entitled to appoint his or her successor from amongst its ranks.¹⁵

Crises over executive formation and maintenance have been the major signals that the Agreement might falter. Crisis over formation arose for political and constitutional reasons—politically because David Trimble insisted that the Irish Republican Army (IRA) deliver some decommissioning of its weapons before Sinn Féin members could take their seats in the Executive Committee: 'no government before guns' became his slogan. Otherwise, he would refuse to cooperate in the running of the d'Hondt procedure. Constitutionally—that is, under the text of the Agreement—Trimble had no warrant to exercise this veto.

1. No party was formally entitled to 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.

stop a running of the procedure for 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 was triggered and the decision of the 'No' unionists not to take their ministerial entitlements—*or* to an executive in which there would have been no pro-Agreement unionists (Northern Ireland Assembly 1999: 317, 15 July). 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. It was consociational in spirit, 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 in power-sharing systems. My perspective here is at odds with that of Donald Horowitz (personal conversations). The Standing Order no longer has force.

¹⁴ A party as a whole may be excluded from a right to nominate if it is deemed by the Assembly, through cross-community consent procedures, to be in breach of the requirements of the Pledge of Office (see below). Efforts by unionist MLAs to have Sinn Féin so deemed have foundered because the moderate nationalists in the SDLP have not supported them.

¹⁵ In the course of 2000 the anti-Agreement DUP decided to take advantage of this provision to rotate its MLAs through its two ministerial portfolios. Its critics observed that they did not, however, resign their entitlements to the two ministries.

2. The Agreement did not specify a starting date for decommissioning though it did require parties to use their best endeavours to achieve its completion within two years of the referendum, that is, by 22 May 2000.
3. Any 'natural' reading mandated executive formation as a necessary step in bringing all the Agreement's institutions 'on line'.

Trimble rested his flimsy case on a communication he had received from the UK prime minister on the morning the Agreement was made, 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—and the 'should' in Blair's text was in the subtle subjunctive mood rather than a mandatory reading of the text of the Agreement that had just been negotiated. Trimble's concern was to appease critics of the Agreement within his own party. His negotiating team had split, with one of his Westminster MPs walking out; a majority of his party's Westminster MPs opposed the Agreement; and his new Assembly party contained critics of aspects of the Agreement.

Trimble was initially facilitated in exercising his veto by the UK and Irish governments, which were sympathetic to his exposed position; and he 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 Trimble-Mallon ticket for FM and DFM. The SDLP wished to shore up Trimble's position. One provision in the Agreement gave Trimble further room for manoeuvre. The Agreement implied that there would be at least six other Ministers apart from the premiers, but that there could be 'up to' ten (Government of the United Kingdom (n.d. 1998: Strand One, paras 14 (explicitly) and 3 (implicitly)). The number of ministries was to be decided by MLAs through cross-community consent, and that gave Trimble the opportunity to delay executive formation. It would be December 1998 before the parties reached agreement on ten ministries, when the UUP finally abandoned its demand for seven rather than ten departmental ministries—with seven, unionists would have had an overall majority in the Executive Committee.¹⁶

Thereafter the bulk of 1999 saw protracted bargaining, including a failed running of the d'Hondt procedure to fill the executive in July, but no consensus on proceeding to formation. Seamus Mallon's resignation triggered a review of the Agreement, as permitted by its terms, under US Senator George Mitchell. In mid-November the

¹⁶ For details of the ministries, see Table 11.4.

crisis looked as if, in principle, it would be resolved. The UUP accepted that executive formation would occur—with the IRA appointing an interlocutor to negotiate with the International Commission on Decommissioning—while actual arms decommissioning, consistent with the text of the Agreement, would not be required until after executive formation. In concluding his 'Review of the Agreement', and with the consent of the pro-Agreement parties, Senator Mitchell 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 appeared an honourable resolution to what appeared a fundamental impasse. The d'Hondt procedure was followed, and Northern Ireland at last had its novel power-sharing Executive Committee—though the Ulster Unionist Council would later fatefully render problematic this settlement within the settlement.

The moment of suspension

To get the support of his party's more or less permanent electoral college, the Ulster Unionist Council, Trimble offered his party chairman a post-dated resignation letter, leaving his position as First Minister, to become operative if the IRA did not start decommissioning within a specified period: not one formally negotiated under the Mitchell Review. The IRA did not deliver on decommissioning, at least not in the way that Secretary of State Mandelson believed was required to stop Trimble making effective his resignation threat, though the IRA did appear to others to clarify that decommissioning would occur. In February 2000 Mandelson obtained from the UK Parliament emergency statutory powers to suspend the Assembly and Executive and did so at 5.00 p.m. on 11 February 2000. In doing so, he acted in classic Diceyan fashion, using the doctrine of parliamentary sovereignty to arrogate to himself the power of suspension—which had not been negotiated in the making of the Agreement or granted in its legislative enactment in the UK. The UK government's officials knew that suspension would breach the formal treaty incorporating the Agreement, because in the summer of 1999, when both governments contemplated a suspension mechanism, they proposed that the treaty that was about to be signed by the two governments, which incorporated the Belfast Agreement, should be amended to make it compatible with suspension. No such amendment was made.

The Secretary of State's justification for suspension was that it was necessary to save Trimble. His threat to resign would have

become operative in an environment in which 'Yes' unionists no longer commanded an absolute majority of the registered unionists in the Assembly. Therefore, it was feared, Trimble could not have been resurrected as First Minister if he did resign. This reasoning was partial. 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. It could, for instance, propose that when deadlocked under the parallel consent procedure the Assembly adopt the weighted majority procedure for electing the premiers. So there was a mechanism, within the terms and institutions of the Agreement, under which Trimble could have regained the position of First Minister. But, even if Mandelson's justification was utterly sincere,¹⁷ the suspension was 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 UK's legislative enactment of the Agreement. It was partisan because neither the Agreement nor the Mitchell Review of the Agreement that took place in late 1999 required Sinn Féin to deliver decommissioning by the IRA because of a deadline set by the leader of the UUP. The then formally agreed deadline for decommissioning required all political parties to use their best endeavours to achieve full decommissioning by 22 May 2000.

One passage 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, the British-Irish Agreement: '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*' (Government of the United Kingdom n.d., 1998; emphasis added). The italicized passages, read in conjunction with the whole Agreement, suggest that the UK government was obliged 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

¹⁷ For a critical dissection see 'The Blame Game', Spotlight BBC Northern Ireland, produced by Justin O'Brien, reporter Andy Davies, 22 February 2000.

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.

The central purpose of the UK's assent, during the negotiation of the Agreement, to delete section 75 of the Government of Ireland Act 1920, and of the Irish state's assent to propose modifying Arts 2 and 3 of the Irish Constitution after a referendum, had been to show that both states were engaged in 'balanced' constitutional change, confirming that Northern Ireland's status as part of the UK or the Republic rested with its people alone, and that an exercise of Irish national self-determination had been organized. The UK's Diceyans, including Ulster Unionists, interpreted the UK's deletion of section 75 of the Government of Ireland Act as meaningless. In their eyes the UK Parliament's sovereignty remains intact in a given domain, even when it removes a statutory statement which says it remains intact! Irish negotiators regretted that they were not more careful: not for the first time the UK's 'constitution' has proved Ireland's British problem.

The suspension had at least three messages. First, it made plain that every aspect of the Agreement was vulnerable to Westminster's sovereignty. Its institutions, its confidence-building measures, its commissions, the promise that Irish unification will take place if there is majority consent for it in both parts of Ireland, are all revisable by the current UK Parliament, and any future Parliament, and Parliament's Secretaries of State, irrespective of international law or the solemn promises made by UK negotiators. 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 the 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.

Second, the suspension spelled out to some official Irish negotiators, and northern nationalists, the necessity in future negotiations of entrenching Northern Ireland's status as a 'federacy', perhaps in the same manner as the UK'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. A federacy, as Daniel Elazar (1987) clarified

the concept, is an autonomous unit of government whose relationship with its host state is federal, even if the rest of the state is organized in a unitary fashion. A federal relationship exists when there are at least two units of government over the same territory and when neither can unilaterally alter the constitutional capacities of the other. It is my contention, supported by many in Irish officialdom, that the Agreement was intended to make Northern Ireland such a federacy, though not by that name, as long as it remained within the UK (see below). Northern Ireland's membership of the union was to be subject to the Agreement, not to the untrammelled sovereignty of Westminster; and change in the exercise or division of competencies would require due legal process in both the Assembly and Westminster. If Northern Ireland's status as such a federacy is not affirmed through a subsequent repeal of the Suspension Act 2000 then the Agreement cannot be constitutionalized consistently with Irish national self-determination. If Ireland's negotiators do not, in future, require the Westminster Parliament to repeal the Suspension Act and to declare that its sovereignty is circumscribed by the Agreement, then Northern Ireland's status merely as a devolved UK authority may be affirmed by the practice of the Irish state.

Third, unionists may one day rue the constitutional consequences of the suspension and the Suspension Act. What Westminster did on unionists' behalf it may take from them tomorrow—including membership of the Union. The Suspension Act means that in UK public law the Union does not rest on the consent of its component parts but rather upon Westminster's say so. Westminster, despite the referendums, is free, according to its constitutional norms, to modify the union in any way it likes: for example, through full-scale joint sovereignty over Northern Ireland with the Irish government or through expelling Northern Ireland from its jurisdiction.

Suspension did not completely save Trimble from the wrath of his party activists, 43 per cent of whom voted for a stalking horse to replace him, the Reverend Martin Smyth MP, a hardliner and former Grand Master of the Orange Lodge. Trimble remained leader but bound by a mandate for reformation of the Executive that neither the UK government nor republicans seemed likely to deliver. But in May 2000 negotiations between the pro-Agreement parties and the two governments produced a formula that appeared to break the deadlock. Republicans promised to deliver a 'confidence-building measure', which involved supervising international inspections of the IRA's arms dumps, the UK government promising to deliver fully on police reform (see below) and demilitarization,

and the UUP and the UK government agreeing respectively to withdraw Trimble's resignation and to end the suspension. As we shall see, the salience of the suspensory power would recur.

Further consociational traits of the executive

The consociational criterion of cross-community executive power-sharing was clearly met in the Agreement, but there are special features of the new arrangements that differ from consociational experiments in Northern Ireland and elsewhere. Ministers take a 'Pledge of Office', not an 'Oath of Allegiance'. This cements what nationalists see as the binationalism at the heart of the Agreement: nationalist ministers do not have to swear an Oath of Allegiance to the Crown or the Union. The Pledge requires ministers to:

- discharge their duties in good faith;
- follow exclusively peaceful and democratic politics;
- participate in preparing a programme of government, and
- support and follow the decisions of the Executive Committee and the Assembly.

The duties of office include a requirement to serve all the people equally, to promote equality, and to prevent discrimination—which means, according to the UK's doctrine of ministerial responsibility, that civil servants will be bound to run their departments consistent with these obligations (McCrudden 1999a, b 2001). They include a requirement that the 'relevant Ministers' serve in the North-South Ministerial Council, a duty that, in conjunction with other clauses, was intended to prevent parties opposed to this aspect of the Agreement, such as the Democratic Unionist Party (DUP), from abusing their offices or taking offices in bad faith.

The UUP and the SDLP, in the negotiations over the Northern Ireland Act, agreed that junior ministers could be created. They are currently in place only in the Office of the FM and DFM, one from the UUP and one from the SDLP; more could be allocated places under the d'Hondt process, though they are not obliged to be appointed in this way.¹⁸ Most of the leading members of the major parties, in consequence, 'win prizes' of one sort or another—something intended to assist the cementing of the Agreement and to provide incentives for a shift of posture on the part of ambitious anti-Agreement Assembly members. These incentives worked: the

¹⁸ Section 19 of the Northern Ireland Act 1998 permits the First and Deputy First Ministers to determine, subject to Assembly approval, the number of junior ministers and the procedure for their appointment.

anti-Agreement DUP took its seats in the Executive and in the Assembly's Committees, and fought the 2001 Westminster general election not on a pledge to scrap the Agreement but to renegotiate it. It did, however, engage in ritualized protest. Taking advantage of the d'Hondt procedure, it decided to rotate its ministerial positions—which led its critics to accuse it of accumulating and distributing pension rights among its members while depriving its constituents of effective ministers.

This inclusive executive design, of course, means that the new Assembly has a rather small part of its membership free as an opposition for standard adversarial parliamentary debating in the classic Westminster mould, though the inter-party rhetorical engagement in the Assembly is sometimes difficult to reconcile with the fact that the four largest parties—the UUP, the SDLP, the DUP, and Sinn Féin—share the cabinet positions. The standard complaint of critics of consociation—that it weakens the effectiveness of parliamentary opposition—must surely be tempered in this case by the fact that the backbenchers from other parties in the government are likely to hold the relevant minister vigorously to account.

Evaluation of the Executive

How should we appraise the executive design that is at the heart of the Agreement? The special skill of the designers and 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 were designed to tie moderate representatives of each bloc together and to give some drive towards overall policy coherence. It was intended to strengthen moderates and to give them significant steering powers over the rest of the executive. The d'Hondt mechanism, by contrast, ensures inclusivity and was carefully explained to the public as achieving precisely that;¹⁹ it also saves on the transaction costs of bargaining over portfolios (see Annex). Distinctive coalitions can form around different issues within the Executive, permitting flexibility but inhibiting chaos—given the requirement that the budget be agreed by cross-community

¹⁹ '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*, 319 (18 November 1998), col. 1023.

consent. The Executive successfully agreed a budget and a programme of government through inter-ministerial bargaining during 2000–01: the DUP ministers agreed it though they then supported their colleagues in voting against in the Assembly! These creative incentives to keep parties in the executive despite strong disagreements means the Agreement differs positively from the Sunningdale power-sharing experiment of 1973 which sought to maintain traditional UK notions of collective cabinet responsibility.

What was not foreseen was that failure to timetable the formation of the rest of the Executive immediately after the election of the FM and DFM could precipitate a protracted crisis. Trimble availed himself of this loophole to prevent executive formation until November 1999. If the Agreement survives, 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 FM and DFM 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 not likely that future candidates for FM and DFM will agree to be nominated without a firm agreement on the number of portfolios and the date of cabinet formation.

What was also not foreseen was that the dual premiership might prove the most brittle institution of all. Recall that it was separately negotiated by the two moderate parties as a carve-up in which they had very direct stakes. Other possibilities were excluded, such as filling the top positions by the d'Hondt rule or another allocation rule. And the posts were made tightly interdependent: the resignation or death of one triggers the other's formal departure from office, and requires fresh elections within six weeks. One consequence has been that all inter-communal tension has been transmitted through these posts. Mallon, as we have seen, deployed his resignation power before the executive was fully formed for the first time, and Trimble, as we have seen, deployed the resignation threat to precipitate suspension of the Agreement's institutions. As we shall see, he was to do so again in 2001, just before the Westminster general elections: a resignation that became operative on 1 July 2001 and that has opened a crisis yet to be resolved.

So the dual premiership has been a lightning rod for deep tensions at least as much as it has been a mechanism for joint coordination and creation of calm by moderate leaders. The relationship between the premiers progressively worsened after a promising

beginning, and has recently culminated in Trimble giving Mallon two minutes notice of his intention to repeat his use of a post-dated resignation letter.²⁰

Forms of proportionality

Consociational arrangements are built on principles of proportionality. The Agreement meets this test in four ways: in the d'Hondt procedure for executive formation discussed above; in the Assembly's committees; in the electoral system for the Assembly; and in recruitment and promotion policies within the public sector.

The Assembly's committees The Assembly has committees scrutinizing each of the departments headed by ministers. Committee Chairs and Deputy Chairs are allocated according to the d'Hondt rule. Committee composition is in proportion to the composition of the Assembly. Each committee must approve any proposed new law within its jurisdiction tabled by ministers, and indeed the committee can itself initiate legislative proposals. In consequence, a committee dominated by other parties may block the legislative initiatives of a dynamic minister, and it may initiate legislation not to that minister's liking—though the success of such proposals is subject to cross-community special procedures. So the committee system combines the two consociational principles of proportionality and veto rights. In the passage of the Northern Ireland Act 1998 the committees were explicitly prevented, by law, from being chaired or deputy-chaired by ministers or junior ministers, and are required, where feasible, to be organized in such a way that the Chair and Deputy Chair be from parties other than that of the relevant minister. This ensures the accountability of ministers at least to MLAs from other parties and inhibits full-scale party fiefdoms in any functional sector.

The Assembly's election system: corrections for Lijphart and Horowitz? Elections to the 108-member Assembly are required to be conducted under a proportional representation (PR) system, the single transferable vote (STV), in six-member constituencies—though the Assembly may choose, by cross-community consent procedures, to advocate change from this system that would be ratified

²⁰ One sage reporter describes the Mallon-Trimble relationship as 'poisonous', compounded by Trimble's character traits, 'unpredictable and mercurial, often bewildering, sometimes impossible', and by the nature of his career, 'a mixture of dashes and longeurs, alternatively crisis-ridden and becalmed, of tacks towards moderation interspersed with lurches to the confrontational' (McKittrick 2001: 27).

by Westminster. The Droop quota in each constituency is therefore 14.3 per cent of the vote, which squeezes the very small parties, or, alternatively, encourages them to form electoral alliances.²¹ Thus the smaller of the two loyalist parties, the Ulster Democratic Party (UDP), won no seats in the first Assembly election. Conceivably, the two rival loyalist parties, the PUP and the UDP, may in the future see the need to coalesce to achieve better representation. Very small parties which can gather lower-order preferences from across the unionist and nationalist blocs, such as the Women's Coalition, have shown that the system need not preclude representation for small parties.

This system, STV-PR, is not what Lijphart recommends for consociational systems. He is an advocate of party-list PR systems, principally because he believes they help make party leaders more powerful and better able to sustain inter-ethnic consociational deals.²² Those who would like to see David Trimble in greater control of the UUP might hanker after Lijphart's preferred form of PR. The Northern Ireland case, however, suggests that a modification of the consociational prescriptive canon is in order. Had a region-wide list system had 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.

There is a further and less contingent argument against party-list systems in consociational systems, especially important where the relevant ethnic communities are internally democratic rather than sociologically and politically monolithic. A region-wide party-list election gives incentives for the formation of a wide variety of micro-parties. It would have fragmented and shredded the votes of the major parties which made the Agreement. Hardliners under party-list systems have every reason to form fresh parties knowing

²¹ The Droop quota used in STV is $V/(N+1) + 1$, where V = total valid votes, and N = number of Assembly members to be elected.

²² Lijphart also argues for this system rather than STV because it (1) allows for a high district magnitude, making possible greater proportionality, (2) is less vulnerable to gerrymandering, and (3) is simpler for voters and organizers (Lijphart 1990b). In the text I argue implicitly for high thresholds to reduce fragmentation, as a trade-off against 'better' proportionality. Contra Lijphart, I maintain that STV, legislatively enacted with uniform district magnitudes and supervised by independent electoral commissions charged with creating uniform electorates, is not more vulnerable to gerrymandering than regional party-list PR. I concede that STV is suitable only for numerate electorates, but otherwise its complexities are not especially mysterious: no more so than the formulas used for achieving proportionality in party-list systems. Try discussing d'Hondt, Hare, and Sainte-Laguë in public bars!

that their disloyalty will penalize more moderate parties but without necessarily reducing the total vote and seat share of the relevant ethno-national bloc. This objection to Lijphart's favoured prescription is not merely speculative. The 1996 elections to the Northern Ireland Peace Forum used a mixture of a party-list system and 'reserved seats'. Party proliferation and the erosion of the UUP first-preference vote were among the more obvious consequences (Evans and O'Leary 1997a, b).²³

STV, 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, as indeed happened in Northern Ireland in 1998. But, I suggest, the 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 able to make and maintain consociational deals. At the very least the prescriptive superiority of the party-list system for these purposes is unproven, and Lijphart's consistent counsel in this respect should be modified.²⁴

As well as achieving proportionality, STV has the great merit of encouraging inter-ethnic 'vote-pooling' (Horowitz 1985: 628 ff): in principle, voters can use their lower-order preferences—'transfer papers'—to reward pro-Agreement candidates at the expense of anti-Agreement candidates.²⁵ In this respect, STV looks tailor-made to achieve the 'inter-ethnic' and 'cross-ethnic' voting favoured by Donald Horowitz, a critic of consociational thinking but a strong advocate of institutional and policy devices to facilitate conflict-reduction (Horowitz 1985; 1989c, d; 1991). Consistently, however, with his general premises Horowitz believes that STV 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.²⁶ He

²³ The nature of executive formation in the Agreement should act as one possible check on the possibilities of fragmentation under party-list PR, but that is true of any electoral system combined with this executive.

²⁴ My co-researcher John McGarry and I used to assume the prescriptive superiority of the party-list system (for example, McGarry and O'Leary 1990: 297). Facts and reflection have made me reconsider the merits of STV (O'Duffy and O'Leary 1995, O'Leary 1999c).

²⁵ This option is also open to anti-Agreement voters, but DUP and UKUP voters are unlikely to give their lower-order preferences to Republican Sinn Féin, an anti-Agreement nationalist party, should it ever to choose to stand for elections.

²⁶ Personal conversations with Donald Horowitz during his period as a Suntory-Toyota International Centre for Economics and Related Disciplines distinguished visiting professor at the London School of Economics, 1998–9.

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 is likely to impair conflict-reduction.

The Northern Ireland case, in my view, suggests that normative and empirical challenges to Horowitz's reasoning are in order. Horowitz would generally prefer the use of the Alternative Vote (AV) in single-member constituencies in Northern Ireland, as he does elsewhere, because its quota—50 per cent plus one—would deliver strong support to moderate ethno-national and cross-ethnic candidates. The problems with this prescription are straightforward. First, the outcomes it would deliver would be majoritarian, disproportional, and unpredictably so, and they would be disproportional both within blocs and across blocs. They would, additionally, have much more indirectly 'inclusive' effects than STV. In some constituencies there would be unambiguous unionist and nationalist majorities²⁷—and thus AV would lead to the under-representation of minority voters within these constituencies, and to local fiefdoms. Second, while candidates would often 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.²⁸ Third, AV would never be agreed to by hardline parties entering a consociational settlement if they believed it would be likely to undermine their electoral support. Since the Agreement was made possible by encouraging 'inclusivity', by facilitating negotiations which included Sinn Féin—the party that had supported the IRA—and the PUP and the UDP—the parties that had supported the loyalist Ulster Defence Association and Ulster Volunteer Force—it would have been perverse for their leaders to agree to an electoral system that minimized their future prospects.

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

²⁷ One recent analysis concludes that only three of Northern Ireland's current 18 constituencies are marginal between nationalists and unionists (Mitchell, O'Leary, and Evans 2001), so it would be a major re-districting exercise to generate a high number of ethnically heterogeneous constituencies out of 108 districts.

²⁸ It may be that AV's presumptively Horowitzian moderating effects materialize better in multi-ethnic political systems with no actual or potentially dominant group in given districts—a situation that does not obtain in Northern Ireland.

and in the Irish Republic in the latter half of the 1980s, the party discovered that it was in a ghetto. Its candidates in some local government constituencies²⁹ would pile up large numbers of first-preference ballot papers and then sit unelected as a range of other parties' candidates passed 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, promoted the IRA's ceasefire(s), and became the champion of a peace process and a negotiated settlement, it found that its first-preference vote, its transfer vote, and its seats won all increased.

The constitutional design argument that can be extracted from this story is this: once there has been party fragmentation within ethno-national blocs, then STV can assist accommodating postures and initiatives by parties and candidates, both intra-bloc and inter-bloc.³⁰ Horowitz's electoral integrationist prescriptions are most pertinent at the formation of a competitive party system. But once party formation and party pluralism within blocs have occurred, there will be few agents with the incentives to implement Horowitz's preferences; and if a third party or outside power did so it would be a provocation to the less moderate parties, and would therefore most likely re-ignite ethno-national tensions.³¹ This argument is, of course, a qualified one: STV is not enough, and it may not be appropriate everywhere. But it can help promote accommodative moves and consolidate consociational deals in ways that the region-wide party-list systems and the AV in single-member district cannot.

²⁹ STV has been used in local government elections and European parliamentary elections in Northern Ireland since 1973 and 1979 respectively. 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.

³⁰ The corollary is that STV's positive effects apply to already polarized and pluralized party systems in ethno-nationally divided societies. If there has been no prior history of ethnicized party polarization within a state, or of pluralization of parties within ethno-national blocs, the merits of its implementation may be reasonably doubted on Horowitzian grounds. This consideration raises what may be the key problem with Horowitz's electoral integrationist prescriptions: they apply best to forestalling or inhibiting ethnic conflict and are less effective remedies for cases of developed, protracted, and intense ethnic and ethno-national conflict.

³¹ The primary normative objection that can be levelled against Horowitz's position is that proportionality norms better match both parties' respective bargaining strengths and their conceptions of justice. Once party pluralism has already emerged some form of proportionality is more likely to be legitimate than a shift to strongly majoritarian systems, such as AV, or to systems with ad hoc distributive requirements that will always be—correctly—represented as gerrymanders, albeit well-intentioned.

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 (Sinnott 1998); and as Geoffrey Evans and I can confirm from a survey we helped design (Evans and O'Leary 2000). 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 among the 'No' unionists and between 'Yes' unionists 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.

Tables 11.1 and 11.2 report the outcome of the June 1998 elections to the first Assembly. The proportionality of the results is evident with respect both to blocs and to parties. The deviations in seats won compared with the first preference vote primarily benefited the pro-Agreement parties. The UUP was the principal beneficiary of the transfer of lower-order preferences, which took 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 (Evans and O'Leary 2000). The Women's Coalition was the most widespread beneficiary of lower-order preferences, winning two seats despite a very low first-preference vote. 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 confined more 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

TABLE 11.2: Party performances in the June 1998 elections to the Northern Ireland Assembly

Party	First preference vote (%)	Seats	
		No	%
SDLP Social Democratic and Labour Party of Northern Ireland	22.0	24	22.2
SF Sinn Féin	17.7	18	16.7
Other nationalists	0.1	—	—
UUP Ulster Unionist Party	21.0	28	25.9
PUP Progressive Unionist Party	2.5	2	1.8
UDP Ulster Democratic Party	1.2	—	—
Other 'Yes' unionists	0.3	—	—
DUP Democratic Unionist Party	18.0	20	18.5
UKUP United Kingdom Unionist Party	4.5	5	4.6
Other 'No' unionists	3.0	3	2.8
APNI Alliance Party of Northern Ireland	6.4	6	5.5
NIWC Northern Ireland Women's Coalition	1.7	2	1.8
Others	1.3	—	—

Percentage figures for votes and seat shares rounded to one decimal place.

Source: O'Leary (1999e).

that may have been essential for the Agreement's (partial) stabilization.

The Northern Ireland Act 1998 and the Northern Ireland (Elections) Act 1998 opened one novelty in the practice of STV in Ireland. Both acts left it open to the Secretary of State to determine the method of filling vacancies: this may be done through by-elections, substitutes, or 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 (Gallagher 1987). 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 candidate of the same party or persuasion in a by-election, which becomes the equivalent of the alternative vote in a single-member constituency. The Northern Ireland Assembly (Elections) Order of 1998 has provided for a system of alternates or of personally nominated substitutes with a provision for by-elections if the alternates system fails to provide a substitute. The disproportionality possibly induced by by-elections, with its consequent unpredictable ramifications for the

numbers of registered nationalists and unionists and the cross-community rules, needed to be engineered out of the settlement, and it is a good sign that the parties cooperated with this concern in mind.

Recruitment and representativeness in the public sector Proportionality rules in the Agreement, combined with accommodative incentives, did not stop with the executive, the committee system in the Assembly, or the electoral system. The Agreement accepted past and future measures to promote fair employment and (weak) affirmative action in the public sector that will, one hopes, eventually ensure a representative and non-discriminatory civil service and judiciary. The civil service and the rest of the public sector have already been subjected to fair employment legislation, but in the entirety of important posts in the public sector the principles of representativeness or proportionality are to be applied, in the form either of party representatives holding others to account or of representative bureaucracies and public services. There is one exception: the judiciary.

Policing Most significantly, the Agreement envisaged a representative police force. Democratic consociation cannot exist where those of military age in one community are almost the sole recruitment pool for policing all of those in another community—a trait more characteristic of control systems (Lustick 1979). Policing had been so controversial that the parties to the Agreement could not concur on future arrangements, and it was not made a devolved function.³² They did agree the terms of reference of a Commission, eventually chaired by Christopher Patten, a former UK minister in the region and now a European Commissioner. The Report of the Independent Commission—the 'Patten Report'—published in September 1999 was both an able expression of democratic thought on policing and the fulfilment of the Commission's mandate under the Agreement (Patten 1999; O'Leary 1999b).

To have effective police rooted in, and legitimate with, both major communities was vital. Eight criteria for policing arrangements were mandated in the Commission's terms of reference. They were to be impartial; representative; free from partisan political control; efficient and effective; infused with a human rights culture; decentralized; democratically accountable 'at all levels'; and consistent with the letter and the spirit of the Agreement. The Commission

³² See McGarry and O'Leary (1999). A former Irish prime minister, Dr Garret FitzGerald, has described policing in Northern Ireland as having the status of Jerusalem in the Israeli-Palestinian peace process (FitzGerald 2000).

engaged in extensive research and interaction with the affected parties, interest groups, and citizens. It did not, and could not, meet the hopes or match the fears of all, but the Commissioners undoubtedly met their terms of reference.

The Patten Report was a thorough, careful, and imaginative compromise between unionists who maintained that the existing Royal Ulster Constabulary (RUC) already met the terms of reference of the Agreement and those nationalists, especially republicans, who maintained that the RUC's human rights record mandated its disbanding. However, the Police Bill presented to the Westminster Parliament in the spring of 2000 by Peter Mandelson was an evisceration of Patten, and condemned as such by the SDLP, Sinn Féin, the Women's Coalition, the Catholic Church, and non-governmental and human rights organizations such as the Committee on the Administration of Justice. It was also criticized by the Irish government, the US House of Representatives (H. Res 447, 106th Congress), and Irish Americans, including President Clinton.³³

The veracity of the critics' complaints can be demonstrated by comparing some of Patten's recommendations with the original bill.

1. Patten recommended a neutral name, the 'Northern Ireland Police Service'. The Royal Ulster Constabulary's name was not neutral, so it was recommended to go. Patten recommended that the display of the Union flag and the portrait of the Queen at police stations should go. Symbols should be 'free from association with the British or Irish states'. These recommendations were a consequence of Patten's terms of reference, the Agreement's commitment to establishing 'parity of esteem' between the national traditions, and the UK's commitment to 'rigorous impartiality' in its administration. The original bill, by contrast, proposed that the Secretary of State have the power to decide on the issues of names and emblems.
2. Patten recommended affirmative action. Even critics of affirmative action recognized the need to correct the existing imbalance in which over 90 per cent of the police are local cultural Protestants. But the original bill reduced the period in which the police would be recruited on a 50:50 ratio of cultural Catholics and cultural Protestants from ten years to three, requiring the Secretary of State to make any extension, and was silent on 'aggregation', the proposed policy for shortfalls in recruitment of suitably qualified cultural Catholics.

³³ I described it as betraying Patten's 'substantive intentions in most of its thinly disguised legislative window-dressing' (O'Leary 2000).

3. Patten proposed a Policing Board consisting of ten representatives from political parties in proportion to their shares of seats on the Executive, and nine members nominated by the FM and DFM. These recommendations guaranteed a politically representative board in which no bloc would have partisan control. The original bill introduced a requirement that the Board should operate according to a weighted majority when recommending an inquiry, tantamount to giving unionist or unionist-nominated members partisan political control.
4. Patten avoided false economies but recommended downsizing the service, advocated a strong Board empowered to set performance targets, and proposed enabling local District Policing Partnership Boards to market-test police effectiveness. The original bill empowered the Secretary of State, not the Board, to set performance targets, made no statutory provision for disbanding the police reserve, and deflated the proposed District Policing Partnership Boards because of assertions that they would lead to paramilitaries being subsidized by taxpayers.
5. Patten proposed that new and serving officers should have human rights training and re-training, and codes of practice. In addition to the European Convention on Human Rights, due to become part of UK domestic law, the Commission held out international norms as benchmarks (Patten 1999: para 5.17). Patten's proposals for normalization—through merging the special branch into criminal investigations—and demilitarization met the Agreement's human rights objectives. The original bill, by contrast, was a parody. The new oath was to be confined to new officers. No standards of rights higher than those in the European Convention were to be incorporated into training and practice. Responsibility for a Code of Ethics was left with the Chief Constable. Patten's proposed requirement that the oath of service 'respect the traditions and beliefs of people' was excluded. Normalization and demilitarization were left unclear in the bill and the implementation plan.
6. Patten envisaged enabling local governments to influence the Policing Board through their own District Policing Partnership Boards and giving the latter powers 'to purchase additional services from the police or statutory agencies, or from the private sector', and matching police internal management units to local government districts. The original bill, by contrast, maintained or strengthened centralization: the Secretary of State obtained powers that Patten proposed for the FM and DFM and the Board, and powers to issue instructions to District Policing

- Partnership Boards; and neither the bill nor the implementation plan implemented Patten's proposed experiment in community policing.
7. Patten envisaged a strong, independent and powerful Board to replace the discredited Police Authority (Patten 1999: para 6.23). The police would have 'operational responsibility' but be held to account and required to interact with the Human Rights Commission, the Ombudsman, and the Equality Commission. The Bill watered down Patten's proposals, empowering the Secretary of State to oversee and veto the Board, and the Chief Constable to refuse to respond to reasonable requests from the Board, and preventing the Board from making inquiries into past misconduct.
 8. Patten was consistent with the Agreement in letter and spirit. The original bill was not.

What explained the radical discrepancy between the Patten Report and the original bill? The short answer is that the Northern Ireland Office's officials under Mandelson's supervision drafted the Bill and took the views of the RUC and other security specialists more seriously than those of the Patten Commission. They treated the Patten Report as a nationalist report which they had to modify as benign mediators. They believed that they had the right to implement what they found acceptable, and to leave aside what they found unacceptable, premature, or likely to cause difficulties for pro-Agreement unionists or the RUC. The original bill suggested that the UK government was determined to avoid the police being subject to rigorous democratic accountability; deeply distrustful of the capacity of the local parties to manage policing at any level; and concerned to minimize the difficulties that the partial implementation of Patten would occasion for Trimble.

Under enraged nationalist pressure Mandelson beat a partial retreat, whether to a position prepared in advance only others can know. Some speculated that he designed an obviously defective bill so that nationalists would then be mollified by subsequent improvements, but all that the defective Bill achieved, according to Seamus Mallon, was to 'shatter already fragile faith in the Government's commitment to police reform'. Accusing his critics of 'hype', 'rhetoric', and 'hyperbole', Mandelson promised to 'listen'. He declared that he might have been too cautious in the powers granted to the Board. Indeed the Government was subsequently to accept over 60 SDLP-driven amendments to bring the bill more into line with Patten.

The bill was improved in the House of Commons and the House of Lords, but insufficiently. The quota for the recruitment of cultural Catholics became better protected. The Board was given power over the setting of short-run objectives, and final responsibility for the police's code of ethics. Consultation procedures involving the Ombudsman and the Equality Commission were strengthened, and the FM and DFM are to be consulted over the appointment of non-party members to the Board. The weighted majority provisions for an inquiry by the Board have gone.

Yet any honest appraisal of the act must report that it is still not the whole Patten; it rectifies some of the original bill's more overt deviations, but on the crucial issues of symbolic neutrality and police accountability, vital for a 'new beginning', it remains at odds with Patten's explicit recommendations.³⁴ Patten wanted a police rooted in both communities, not just one. That is why he recommended that the name of the service be *entirely* new: The Northern Ireland Police Service. The act, because of a government decision to accept an amendment tabled by the UUP, styles the service 'The Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary)', which must be one of the longest names of a police service in the English-speaking world. The Secretary of State promised an amendment to define it 'for operational purposes' and to ensure that the full title would rarely be used and the parenthetic past generally be excluded. He broke this commitment at Report Stage. Mandelson declared he was merely following Patten's wishes that the new service be connected to the old and avoid suggestions of disbanding, but this was not true: Patten proposed an entirely new and fresh name, and proposed linkages between the old and new services through police memorials, and *not* the renaming adopted by the government. Critics fear there might develop a police force with two names—the Police Service and the RUC—just as Northern Ireland's second city has two names, Derry and Londonderry.

Patten unambiguously recommended that the police's new badge and emblems be free of association with the British or Irish states, and that the Union flag should not fly from police buildings. The act postpones these matters. Avoiding responsibility, the government passed the parcel to the local parties to reach agreement while providing reassuring but vague words in Hansard. Since Mandelson had already ruled that only the Union Jack, albeit just on specified

³⁴ For the defects in the bill and the accompanying implementation plan with regard to community policing, see Hillyard (2000).

days, should fly over the buildings of the devolved administration, nationalists lacked faith that he would deliver on cultural neutrality and impartiality.

Why have these symbolic issues mattered? Because they do in ethno-national conflicts, and because the best way to win widespread acceptance for police reform was to confirm Patten's strategy of symbolic neutrality.³⁵ Full renaming and symbolic neutrality would spell a double message: that the new police are to be everyone's, and the new police are no longer to be, as they were, primarily the unionists' police. Not following Patten's recommendations has spelled a double message: that the new police is the old RUC re-touched, and linked more to British than Irish identity: a recipe for the *status quo ante*.

To achieve effective accountability and follow-through, Patten recommended an Oversight Commissioner to 'supervise the implementation of our recommendations'. The UK government—under pressure—put the commissioner's office on a statutory basis, which it did not intend to do originally, but confined his role to overseeing changes 'decided by the Government'. Had Mandelson and his colleagues been fully committed to Patten they would have charged the Commissioner with recommending, now or in the future, any legislative and management changes necessary for the full and effective implementation of the Patten Report.

Patten recommended a Board that could initiate inquiries into police conduct and practices. The Police Act 2000 prevents the Board from inquiring into any act or omission arising before the eventual act applies. This was tantamount to an undeclared amnesty for past police misconduct, not proposed by Patten. Many have no objections to an open amnesty, especially as paramilitaries have received *de facto* amnesties (see below), but this method was dishonest and appeared driven by concern to avoid state officials being held to account for their responsibilities for the last 30 years of conflict (see Ní Aoláin (2000)).³⁶ The Secretary of State additionally has the authority to approve or veto the person appointed to

³⁵ An alternative path, legitimate under the Agreement, would have been to pursue a fully bi-national symbolic strategy (McGarry and O'Leary 1999). However even if the police were to have both an English and Irish title in each case the name should be neutral: Northern Ireland Police Service or *Coras Síochana Thuaisceart Éireann*.

³⁶ Over 300 police have been killed in the current conflict, for whom there is widespread sympathy, but nationalists do not forget that the outbreak of armed conflict in 1969 was partly caused by an unreformed, half-legitimate police service, responsible for seven of the first eight deaths.

conduct any present or future inquiry (clause 58(9)). Whereas Patten recommended that the Ombudsman should have significant powers (Patten 1999: para. 6.42) and should 'exercise the right to investigate and comment on police policies and practices', in the act the Ombudsman may make reports but not investigate—so it is not a crime to obstruct her work. The Ombudsman is additionally restricted in her retrospective powers (clause 62), again circumscribing the police's accountability for past misconduct.

Mandelson suggested his critics were petty, pointing out just how much he had done to implement Patten and how radical Patten was by comparison with elsewhere. This 'spin' was unconvincing. The proposed arrangements sealed off past, present, and future avenues through which the police might be held to account for misconduct—for example, in colluding with loyalist paramilitaries or covering up assassinations—and were recipes for leaving the police outside the effective ambit of the law. And Patten was not radical by the standards of North America: it is radical by the past standards of Northern Ireland.

Failure to deliver fully on police reform in the judgement of many was likely to herald disaster. The SDLP, Sinn Féin, and the Catholic Church were unlikely to recommend that their constituents consider joining the police, and may well have boycotted the Policing Board and District Policing Partnership Boards. In its strongest form disaster would decouple nationalists and republicans from the Agreement. The mismanagement of the Patten Report meant that in the course of 2000 the pressure eased on Sinn Féin within its constituency to get the IRA to go further in decommissioning than arrangements for international inspections of its arms dumps. The argument was made that the UK government had reneged on a fundamental commitment under the Agreement, so the IRA was under no obligation to disarm. In turn this led to a renewal of unionist calls for the exclusion of Sinn Féin from ministerial office, leading to Trimble's second resignation threat in the Spring of 2001.

Generously disposed analysts believe that Mandelson's conduct was motivated by the need to help Trimble and the UUP, who were in a precarious position and fearful of the DUP. It was, in part. 'Saving Trimble' may account for the tampering with Patten's proposals on symbolic matters, but it hardly accounts for the blocking of the efforts to have a more accountable service. Whatever his motivation, he forgot that it was not his role unilaterally to abandon or renegotiate the Agreement or the work of Commissions sent up under the Agreement, whether on his own initiative or at the behest of any party.

Patten's imagination Patten's Report was a model of constitutional design for this aspect of the governance of a divided territory. It articulated a fresh vision: policing should not be exclusively the responsibility of the professionals, the police. Instead, responsibility for the security of persons and property should remain with citizens and their representatives. This logic was apparent in the title and composition of the recommended Policing Board—not 'Police Board'—bringing together ten elected politicians, drawn according to the d'Hondt rule from the parties that comprise the new Executive, with nine appointed members representative of civil society, 'business, trade unions, voluntary organisations, community groups and the legal profession'. The elected members must not be ministerial office-holders. The Board was to be representative but at one remove from direct executive power.

The Report intended to let police managers manage, but to hold them *ex post facto* accountable for their implementation of the Board's general policing policy, and to enhance the audit and investigative capacities of the Board. It recommended rolling back the centralization that had occurred in both the UK and Ireland through giving directly elected local governments opportunities to influence the policy formulation of the Board through their own District Policing Partnership Boards. Decentralization of political accountability was to be matched by the internal decentralization of the police.³⁷

The Report displayed philosophically coherent communitarian but democratic and pluralist ideas, informed by economically efficient and rigorous management practices. Segmental policing, in which each community would be policed by 'its own', was not considered and was not seriously proposed by any party. It would have produced intractable problems. Instead, a representative but integrated service was advocated, appropriate for a region with a high combination of both territorial segregation and mixing. Observing that peace and the Agreement's implementation would increase the likelihood of Catholics, nationalists, and republicans joining the police, the Commission proposed recruiting Catholics and non-Catholics in a 50:50 ratio from the pool of qualified candidates for the next decade. This matches the population ratios in the younger

³⁷ The Report exhibited Machiavellian skill in handing some responsibility for order to civil society organizations as well as to the police. It suggested that the (mainly Orange) Loyal Orders be obliged to have their own trained marshals, and their own policing plans, to accompany any requests to organize specific parades: a nice example of combining a right—freedom of assembly—with a duty—the obligation to preserve the peace, law, and order in a democratic society.

age cohorts. Given early and scheduled retirements of serving officers, this policy would ensure that 30 per cent of the service would be of Catholic origin after ten years and between 17 per cent and 19 per cent within four years—above the critical mass claimed essential to change the police's character. This is a slower pace of change than some of us advocated (McGarry and O'Leary 1999) but by making each successive cohort representative now, and by ensuring that the new service is impartial, the commissioners had an arguable case.^{38,39}

The Commission had to propose feasible policing arrangements consistent with the internal and external spirit of the Agreement. Patten delivered in this respect, including on recommendations for better-structured cross-border cooperation with the Garda Síochána in the Republic. Significantly, the Report's recommendations mostly did not depend upon the Agreement's institutions for their implementation. The commissioners explicitly recommended most of their changes, come what may.⁴⁰ The UK government's decision to dilute both the content and the pace of Patten's recommendations meant that policing reform, a core dimension of the Agreement in Irish nationalist eyes, has become a serious source of continuing antagonism.

Communal autonomy and equality

Consociational settlements avoid the compulsory integration of peoples. Instead they seek, through bargaining, to manage differences equally and justly. They do not, however, prevent voluntary integration or assimilation; and, to be liberal, such settlements must protect those who wish to have their identities counted differently or not as collective identities.

The Agreement left in place the arrangements for primary and secondary schooling in Northern Ireland in which Catholic, Protestant,

³⁸ The Commission also made recommendations to make the new service more female-friendly and accommodating towards sexual and new ethnic minorities, but without the same degree of rigour in legal and managerial prescription.

³⁹ Where the Report is deficient is in its tolerance of Orange Order, Ancient Order of Hibernian, and Masonic membership by serving officers. One can be a fully paid-up liberal but believe that certain public officials, such as electoral returning officers, should be seen to be impartial. The Commissioners' counter-argument, that 'it is action or behaviour not attitude that matters', forgets that maintaining membership of a sectarian or secret organization is an action *and* behaviour.

⁴⁰ This analysis has benefited from detailed discussions with four members of the Patten Commission and from the author's attendance at a conference at the University of Limerick on 2 October 1999.

and integrated schools are to be equally funded—in the past Catholic schools received less capital funding, and before that also had to raise a significant proportion of their own staffing resources (McGrath 2000). In this respect Northern Ireland is now consociational but liberal: one can avoid Catholic and Protestant schools. Only the very small minorities of non-Christian religious believers, amounting to less than 1 per cent of the population, lack full and equal funding, and it would be generous and just to make such provisions for them where there is demand and numbers permit. The Agreement made new provisions for the educational use, protection, and public use of the Irish language, along the lines used for Welsh within Wales, thereby adding linguistic to educational protections of Irish nationalist culture. It made analogous provisions for 'Ulster Scots'.

Most significantly, the Agreement completes the equalization of both major communities as national communities, that is, as British and Irish communities, and not just, as is so misleadingly emphasized, as Protestants and Catholics. The European Convention on Human Rights, weak on the protection of collective rights and equality rights, will, it is promised, be supplemented by measures that give Northern Ireland its own tailor-made bill of rights, to protect both national groupings and individuals (O'Leary 2001d).

The worst illusion of parties to the conflict and some of its successive managers, based in London, Belfast, or Dublin, was that which held that Northern Ireland could be stable and democratic while being either British or Irish. The Agreement effectively makes Northern Ireland binational—and opens up the prospect of a fascinating and difficult jurisprudence, not least in the regulation of parades and marches.

The Agreement did not neglect the non-national dimensions of local politics, nor does it exclude the 'others' from effective political participation. All aspects of unjustified social inequalities, as well as inequalities between the national communities, are recognized in the text of the Agreement and given some means of institutional redress and monitoring. The Agreement addresses national equality, the allegiances to the Irish and British nations, *and* social equality, that is, other dimensions that differentiate groups and individuals in Northern Ireland: religion, race, ethnic affiliation, sex, and sexuality. Equality issues, be they national or social, are not left exclusively to the local parties to manage and negotiate, which might be a recipe for stalemate. Instead, under the Agreement and section 75 of the Northern Ireland Act 1998, the UK government has created a new statutory obligation on public authorities: they must carry out all their functions with due regard

to the need to promote equality of opportunity in relation to people's religious background and political opinions, and with respect to their gender, race, disabilities, age, marital status, and sexual orientation. This commitment is 'mainstreaming equality' (McCrudden 1999a, b; 2001). The UK government has established a new Human Rights Commission under the Agreement, charged with a role that is extended and enhanced compared with its predecessor, though still deficient in resources. Its role includes monitoring, the power to instigate litigation, and drafting a tailor-made local bill of rights.

Minority veto rights

The fourth and final dimension of an internal consociation is the protection of minorities through tacit or explicit veto rights. The Agreement achieves this through the Assembly's design, a new human rights regime, a Civic Forum, and through enabling political appeals to both the UK and the Irish governments.

The Assembly has procedures already described—parallel consent, weighted majority, and the petition—that protect nationalists from unionist dominance. Indeed, they do so in such a comprehensive manner that there are fears that the rules designed to protect the nationalist minority might be used by hardline unionist opponents of the Agreement to wreck it: what will happen if and when the DUP and 'No' unionists' become a majority within the unionists in the Assembly?

The 'others' are less well protected in the Assembly: they can be outvoted by a simple majority or any nationalist-unionist supermajority, and their numbers leave them well short of being able to trigger a petition on their own. However, since the 'others' have not been at the heart of the conflict, it is not surprising if they are not at the heart of its pacts—though it is not accurate to claim that they are excluded.

In the courts, the others, as well as disaffected nationalists and unionists, will have means to redress breaches of their human and collective rights. The content of the European Convention on Human Rights is well known. What is less clear is what package of collective rights the new independent Northern Ireland Human Rights Commission will recommend (see O'Leary 2001d). It is still possible that the new policing arrangements, if they follow the Patten Report, will be infused with a human rights culture, and that the absence of legal personnel within the RUC with expertise in human rights will be remedied.

What has not been addressed directly and immediately is the composition of the local judiciary who will supervise the new system(s) of rights protection. The Agreement provides for a review of the criminal justice system that includes 'arrangements for making appointments to the judiciary', and it will be a vital, though so far neglected, part of embedding the settlement that the judiciary reflects the different communities in Northern Ireland and is committed to the human and minority rights provisions that it will increasingly interpret.

Non-national minorities have not been forgotten. In the Civic Forum created in the north and inaugurated on 9 October 2000, with a prospective southern counterpart, and through the Inter-Governmental Conference of the British and Irish governments, mechanisms have been established to ensure that 'others', outside the blocs, will be able to express their voices and ensure that the new 'rights culture' does not exclude them.

The External Settlement: Confederal and Federal Elements of the Agreement

The Agreement is not, however, only internally consociational: it is also externally confederalizing, and federalizing. Its meshing of internal and external institutions marks it out as novel in comparative politics. Let me make it plain why the Agreement is both confederalizing and federalizing, though my emphasis is on the former. The argument rests on these stipulative definitions: confederal relations exist when political units voluntarily delegate powers and functions to bodies that can exercise power across their jurisdictions; and a federal relationship exists when (1) there are at least two separate tiers of government over the same territory and (2) neither tier can unilaterally alter the constitutional capacities of the other.⁴¹

The all-Ireland confederal relationship

The first confederal relationship is all-Ireland in nature: the North-South Ministerial Council (NSMC). Finally brought into being on

⁴¹ My definition is a necessary element of a federal system. Whether it is sufficient is more controversial. Normally a federation has sub-central units that are co-sovereign with the centre throughout most of the territory of the state in question. My point is that any system of constitutionally entrenched autonomy for one region makes the relationship between that region and the centre functionally equivalent to a federal relationship.

the same day as power was devolved to the Northern Ireland Assembly and Executive, 2 December 1999, it brings together those with executive responsibilities in Northern Ireland and in the Republic. Its first plenary meeting was held in Armagh on 12 December 1999; the DUP Ministers did not attend.

What was intended by the Agreement is 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 scenario about. The Agreement was therefore a tightly written contract with penalty clauses. Internal consociation and external confederalism were welded together: the Assembly and the NSMC were made 'mutually interdependent'; one cannot 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.¹²

The NSMC linked northern nationalists to their preferred nation-state, and is one means through which nationalists hope to persuade unionists of the attractions of Irish unification. The Irish government successfully recommended a change to 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 functions 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 meets in plenary format twice a year and in smaller groups to discuss specific sectors 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 and powers of these institutions was somewhat open-ended. The Agreement, however, required a meaningful Council. It states that the Council 'will'—not 'may'—identify at least six matters where 'existing bodies' will be

¹² The Agreement does not mention what happens if both institutions, and therefore the Agreement itself, collapse. In my view what would happen is this: Northern Ireland would be governed, as at present, by the British government with input from Dublin through the British-Irish intergovernmental conference. The two governments would likely pursue those aspects of the Agreement that do not require the devolutionary arrangements. Intergovernmentalism, veering towards a British-Irish condominium, would be the dominant option.

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. These zones and modes of cooperation were to be decided during a transitional period between the Assembly elections and 31 October 1998, but were not in fact resolved until 18 December. The Agreement provided an annex that listed twelve possible areas for implementation¹³ but left it open for others to be considered.

The NSMC differed from the previous attempt to establish a cross-border body of a confederal kind, namely, the Council of Ireland of 1974 which enraged many Ulster Unionists and contributed to the collapse of the Sunningdale settlement. The name change was significant: a concession to unionist sensibilities, even though the reference to the 'North' is more nationalist than unionist. Ireland is not in the title, the equality of North and South is implied. The NSMC, as its name suggests, is a ministerial rather than a parliamentary council. There was no provision in the Agreement to establish a North-South joint parliamentary forum as there was in the Sunningdale Agreement of 1973, but the Northern Ireland Assembly and the Irish *Oireachtas*¹⁴ are asked 'to consider' one.

Nationalists wanted the NSMC to be established by legislation from Westminster and the *Oireachtas* to emphasize its autonomy from the Northern Ireland Assembly. Unionists preferred that the NSMC be established by the Northern Ireland Assembly and its counterpart in Dublin. The Agreement split these differences. The NSMC and the implementation bodies were brought into existence

¹³ 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); European Union 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.

¹⁴ This is the collective name in Gaelic for the two chambers of the Irish Parliament, *Dail Eireann* and *Seanad Eireann*.

by British and Irish legislation, but in 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 these were agreed, the Assembly was unable to change these agreements except by cross-community consent.

The Agreement explicitly linked Ireland, North and South, to another confederation, the European Union (EU). It required the NSMC to consider the implementation of EU policies and programmes as well as proposals under way at the EU, and makes provisions for the Council's views to be 'taken into account' at relevant EU meetings.

The signatories to the Agreement promised to work 'in good faith' to bring the NSMC into being. There was not, however, sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement occurring over the NSMC, though this was patently a by-product of the crisis over executive formation and decommissioning. The signatories are required to use 'best endeavours' to reach agreement and to make 'determined efforts' to overcome disagreements over functions where there is a 'mutual cross-border and all-island benefit'.⁴⁵

Several economic and sociological developments may underpin this new constitutional confederalism. As the Republic's 'Celtic Tiger' economy continues to expand, Northern Ireland's ministers and citizens, of whatever background, should see increasing benefits from North-South cooperation. And, if the EU 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 functional activities such as agriculture and tourism, and in having regions defined in ways that attract funds (Tannam 1999). Northern Ireland may even come to think that it would benefit from membership of the Eurozone, though the

⁴⁵ Participation in the NSMC has been made an 'essential' responsibility attaching to 'relevant' posts in the two Administrations: 'relevant' means, presumably, any portfolio a part of which is subject to North-South cooperation. This leaves open the possibility that a politician opposed to the NSMC may take a seat on it with a view to wrecking it. *But* ministers are required to establish the North-South institutions in 'good faith' and to use 'best endeavours' to reach agreement. Since these requirements are subject to judicial review it means it is unlikely that potential wreckers would be able to take part in the NSMC for long. One of the requirements for membership of the Executive is that ministers must 'support . . . all decisions of the Executive Committee' and they can be removed if they do not—though that presupposes decisions being made by the Executive Committee, and votes on exclusion by cross-community consent by the Assembly.

Northern Ireland 1998 Act, unlike the Agreement, made currency matters non-devolved.

The British-Irish confederal relationship

There is a second, weaker, confederal relationship established by the Agreement, affecting all the islands of Britain and Ireland. In the new British-Irish Council (BIC), the two governments of the sovereign states and all the devolved governments of the UK and neighbouring insular dependent territories of the UK can meet and agree to delegate functions, and may agree common policies. This proposal meets unionists' concerns for reciprocity in linkages and provides a mechanism through which they might in future be linked to the UK even if Northern Ireland becomes part of the Republic.

Unionists originally wanted the NSMC subordinated to a British-Irish, or East-West, Council. This did not happen. There is no hierarchical relationship between the two Councils. Indeed, there are two textual warrants for the thesis that the NSMC is more important and far-reaching than the BIC. The Agreement required the establishment of North-South implementation bodies while leaving the formation of East-West bodies a voluntary matter, and stated explicitly that the Assembly and NSMC were interdependent, making no equivalent provision for the BIC. The development of this confederal relationship may be stunted by an Irish governmental reluctance to engage in a forum where it may be outnumbered by at least seven other governments—of Westminster, Scotland, Wales, Northern Ireland, Jersey, Guernsey, and the Isle of Man—though rules may develop to ensure the joint dominance of the sovereign governments. The BIC may, however, flourish as a policy formulation forum if the devolved governments of the UK choose to exploit it as an opportunity for intergovernmental bargaining within the UK or to build alliances with the Irish government on European public policy—in which case it will give added impetus to other federalist or quasi-federalist processes.

A UK-Northern Irish federalizing process

The Agreement was a blow to unitary unionism in the UK, already dented by the 1997–8 referendums and legislative acts establishing a Scottish Parliament and a Welsh National Assembly (Hazell and O'Leary 1999).⁴⁶ But does the Agreement simply fall within the

⁴⁶ The formation of an English Parliament would be the last blow.

rubric of 'devolution within a decentralized unitary state'? Arguably not. Two unions make up the UK: the union of Great Britain and the union of Great Britain and Northern Ireland. The constitutional basis of the latter union is distinct from the former, at least in nationalist eyes.

The Agreement, unlike Scottish and Welsh devolution, was embedded in a treaty between two states, based on the UK's recognition of Irish national self-determination as well as British constitutional convention. The UK officially acknowledged in the Agreement 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. Moreover, the Agreement's institutions were being brought into being by the will of the people of Ireland, North and South, in concurrent referendums, and not just by the people of Northern Ireland: recall the referendums and the interdependence of the NSMC and the Assembly. In consequence, the UK's relationship to Northern Ireland, at least in international law, in my view, has an explicitly federal character: Northern Ireland had become what Elazar (1987) called 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 is inconsistent with the Agreement.⁴⁷ Plainly the suspension of the Agreement in February 2000 shows that the UK's authorities did not feel constrained by its reasoning.

Federalizing processes will be enhanced if the UK and Northern Irish courts treat Northern Ireland's relationships to Westminster as akin to those of the former dominions, which had a federal character, as they did in the period of the Stormont Parliament, that is, 1921–72.⁴⁸ Moreover, the nature of devolution in Northern Ireland is not closed by the 1998 Act. The Act created an open-ended mechanism for Northern Ireland to expand its autonomy from the rest of the UK, albeit with the consent of the Secretary of State and the approval of Westminster. No such open-ended provision has been granted to the Scottish Parliament or the Welsh Assembly. In short, maximum feasible autonomy while remaining within the union is

⁴⁷ The author first composed this last sentence immediately after the Agreement was made, and had it confirmed by Irish governmental sources.

⁴⁸ Legal friends advise me that the UK's legislative enactment of the Agreement may have modified the pertinent precedents in this previous jurisprudence by changing the nature of the *vires* test that the courts will use to deal with jurisdictional disputes.

feasible, provided there is agreement to that within the Northern Assembly. Legal Diceyans insist that Westminster's sovereignty in Northern Ireland remains ultimately intact, but if the Agreement beds down the political development of a quasi-federal relationship between the UK and Northern Ireland may be assured whatever is said in the dry recesses of the Constitution's ancient regime.

Irish federalizing processes

The Agreement also opened federalist avenues in the Republic of Ireland, one of the most centralized states in Europe. The NSMC is seen by nationalists, North and South, as the embryonic institution of a federal Ireland: first confederation, then federation, after trust has been built. This stepping-stone theory is most loudly articulated and feared by 'No' unionists', but they are not wrong in their calculation that many nationalists see the NSMC as 'transitional'. Sinn Féin says so. Fianna Fáil says so.

The Irish people did not abandon their aspiration for 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, recognising 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 Art. 3). The amended Irish Constitution therefore officially recognises *two* jurisdictions that jointly enjoy the right to participate in the Irish nation's exercise of self-determination. Unification is no longer linked to 'unitarism', and therefore is entirely compatible with either full confederation or federation.

Irish unification cannot be precluded because of present demographic and electoral trends, which have led to a steady rise in the nationalist share of the vote across different electoral systems (O'Leary 1990a, b; McGarry and O'Leary 1995a: Ch. 10; see also O'Leary and Evans 1997). The unification envisaged in the re-drafted Irish Constitution is, however, now very different. It no longer has anything resembling a programme of assimilation. Respect for 'the diversity of . . . identities and traditions' in the new Art. 3 connects with both consociational and (con)federal logic. The Republic, I maintain, is bound by the Agreement to structure its laws and its protection of rights so as to prepare for the possibility of a (con)federal as well as a unitary Ireland. Northern Ireland is recognized as a legal entity within the Irish Constitution. So its eventual absorption or elimination as a political unit is no longer a

programmatic feature of *Bunreacht na hEireann* (Constitution of Ireland 1937). The Agreement also envisaged the subjection of both jurisdictions in Ireland to the same regime for the protection of individual and group rights: a situation entirely compatible with a subsequent formal confederation or federation. And there is now an Irish Human Rights Commission tasked with cooperating with its Northern counterpart, and possibly developing a common Charter of Rights for the island.

What might happen if a majority emerged for Irish unification within Northern Ireland—a possibility that is not, of course, guaranteed? If nationalists acquired local majority support it would not necessarily be in their considered interests to promote the region's immediate administrative and legal assimilation into the Republic. They would then have a new interest in preserving Northern Ireland as a political entity within a federated Ireland: after all, they would be a local majority. So would the governing coalition in the Republic, whose calculations might be disturbed by the entry of northern participants. Conversely, some unionists faced with this prospect might prefer a unitary Ireland as the lesser evil, calculating that their chances of being key participants in government formation in a bigger arena might protect them better than being a minority in Northern Ireland. But that is simply one possible future.

Meanwhile, the (con)federal dimensions of the Agreement are not merely pan-Irish or pan-British. They will evolve within a European Union which has its own strong confederal relationships and many ambitious federalists. There will be no obvious organizational or policy-making contradictions—though multiple networking clashes will arise from this extra layer of (con)federalizing—and they might help to transfer some of the heat from binary considerations of whether a given issue is controlled by London or Dublin.

Double protection and co-sovereignty

The subtlest part of the Agreement goes well beyond standard consociational thinking. This is its tacit 'double protection model', laced with elements of co-sovereignty. It is an agreement designed to withstand major demographic and electoral change. The UK and Irish governments promised to develop functionally equivalent protections of rights, collective and individual, on both sides of the present border. In effect, Northern Irish nationalists are promised protection now on the same terms that will be given to British unionists if they ever become a minority in a unified Ireland.

National communities are protected whether they are majorities or minorities, irrespective of the sovereign stateholder—whence the expression 'double protection'.

The two governments not only promised reciprocity for the local protection of present and future minorities, possibly through establishing the functionally equivalent protection or rights on both sides of the border, but they have also created two intergovernmental devices to protect those communities. One is the successor to the Anglo-Irish Agreement, the British-Irish inter-governmental conference (B-IGC) that guarantees the Republic's government access to policy formulation on all matters not—or not yet—devolved to the Northern Ireland Assembly or the NSMC. The B-IGC, in the event of suspension or collapse of the Agreement, is likely to resume the all-encompassing role it had under the prior Anglo-Irish Agreement. The other is the British-Irish Council. If Irish unification ever occurs the Republic's government would find it politically impossible not to offer the British government reciprocal access in the same forums.

It is important to note what has *not* happened between the two sovereign governments. Formal co-sovereignty has not been established. Unionists claim that they have removed the 1985 Anglo-Irish Agreement in return for conceding the formation of the NSMC. This claim is, at best, exaggerated. Under the new Agreement, the Irish government retained a say in those Northern Irish matters that have not been devolved to the Northern Ireland Assembly, as was the case under Art. 4 of the Anglo-Irish Agreement. And, as with that agreement, there will continue to be an intergovernmental conference, that is, the B-IGC, chaired by the Irish Minister for Foreign Affairs and the Northern Ireland Secretary of State, to deal with non-devolved matters, and this conference will continue to be serviced by a standing secretariat—though the secretariat will no longer be located in Belfast. The new Agreement, moreover, promised to 'intensify cooperation' between the two governments on all-island or cross-border aspects of rights, justice, prison, and policing, unless and until these matters are devolved to the Northern Ireland executive. There is provision for representatives of the Northern Ireland Assembly to be involved in the inter-governmental conference—a welcome parliamentarization—but they do not have the same status as the representatives of the sovereign governments. The Anglo-Irish Agreement fully anticipated these arrangements (O'Leary and McGarry 1996: Chs 6–7), so it is more accurate to claim that the Anglo-Irish Agreement has been fulfilled rather than simply removed.

The Military and Political Nature of the Agreement

The constitutional and institutional nature of the Agreement is complex, but matches the conceptual categories I have deployed. There is no need to evolve new terms for what has been agreed, except, perhaps, for the 'double protection' model. The Agreement was wide-ranging and multilateral, and had something in it for everyone who signed it. Its institutions addressed the 'totality' of relationships between nationalists and unionists in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain.

Describing constitutional architecture is one thing; informal political reality is often different. What lies behind this Agreement? And can it hold together? Everyone asks, 'Is it a house of cards, vulnerable to the slightest pressures?' Is it vulnerable to the play of either Orange or Green cards by hardline loyalists or republicans, or to miscalculations by softer-line politicians? Will its successful implementation prove more difficult than its formulation? These are not foolish concerns: far from it. The annual fracas at Drumcree, when the Orange Order demands to march down the Garvaghy Road against the will of its predominantly nationalist residents; the massacre at Omagh in August 1998 carried out by the Real IRA; intermittent breakdowns in the loyalist ceasefires; continuing punishment beatings by all paramilitaries; and the continuing crisis over weapons decommissioning jointly reveal high levels of ethno-national antagonism. However, there are reasons to be cheerful about the robustness of these novel institutions if we analyse the military and political nature of the settlement. There are, equally, reasons to be cautious.

The agreement on ending the armed conflict

The Agreement was a political settlement that promised a path to unwind armed conflict and thereby create a peace settlement, although, formally speaking, no military or paramilitary organizations negotiated the Agreement. The Agreement encompassed decommissioning, demilitarization, police reform, and prisoner release. It addressed these issues in this textual order, and it is plain that although all these issues are inter-linked they were not explicitly tied to the construction or timing of the new political institutions—with one exception.

Weapons decommissioning

The Agreement was clear on decommissioning, despite the difficulties it occasioned. No paramilitaries that abide by the Agreement have had to engage in formal surrender to those they opposed in war. The Independent International Commission on Decommissioning (IICD), chaired by Canadian General John de Chastelain, is to assist the participants in achieving 'the total disarmament of all paramilitary organisations'. All parties, but impliedly especially those parties that—informally—represented paramilitary organizations in the negotiations, were required to 'use any influence they may have to achieve the decommissioning of all paramilitary arms *within two years* following endorsement in referendums North and South of the agreement and *in the context of the implementation of the overall settlement*' (Government of the United Kingdom n.d., 1998: 20; para. 3, emphasis added).

The italicized passages above clarified the termination point for decommissioning, but not the moment of commencement. They also made it clear that decommissioning is linked to the implementation of the overall settlement, including the establishment of the governance structures—North, North-South, and East-West—and to police reform. That is why Trimble's demand that Sinn Féin achieve a start to decommissioning by the IRA before executive formation in the North was regarded as a breach of any reasonable interpretation of the text of the Agreement. Without executive formation in the North none of the formal institutions of the Agreement that required the cooperation of the local parties could get under way.

Sinn Féin nominated a representative to the IICD, issued a statement to the effect that the war was over; and for the first time issued an outright condemnation of other republicans—of the 'Real IRA' whose members carried out the Omagh bombing. It even assisted the Basque organization ETA in its organization of a ceasefire and efforts to accomplish political negotiations in Spain. But until November 1999 Trimble and some of his senior colleagues were unprepared to regard this activity as sufficient evidence of good intentions. Each move on Sinn Féin's part merely led the UUP to request more, and we have discussed the problems occasioned by the suspension precipitated by Trimble. In response to suspension the IRA withdrew its nominee to the IICD. But in May 2000 a package deal to restore the Agreement's institutions and to avoid the decommissioning deadline of 22 May was agreed: the deadline was shifted for a year, the IRA agreed to organize confidence-building inspections of its arms dumps and to put its weapons verifiably and

completely beyond use, and the UK government indicated it would honour the Patten Report in full.

Demilitarization, police reform, and prisoner release

The Agreement promised, and the UK government has begun, a series of phased developments to 'demilitarize' Northern Ireland. It has not, however, published any complete demilitarization plan. 'Normalization' is explicitly promised in the Agreement; reductions in army deployments and numbers, and the removal of security installations and emergency powers, were promised 'consistent with the level of overall threat'. There was also a commitment to address personal firearms regulation and control: an extraordinary proportion of Northern Ireland's citizens, mostly Protestants and unionists, have legally held lethal weapons (Government of the United Kingdom n.d., 1998: 21, paras: 1-4).

It was, as discussed above, decided to address police reform through an Independent Commission (McGarry and O'Leary 1999). It was to propose a police service that is 'representative', 'routinely unarmed', 'professional, effective and efficient, fair and impartial, free from partisan political control; accountable . . . [and] conforms with human rights norms' (Government of the United Kingdom n.d., 1998: 22, paras 1-2). It was to report, at the latest, some nine months before decommissioning was scheduled to finish. It is difficult to believe that the choice of this timing on the part of the makers of the Agreement was an accident. The public outline of police reform was to be available as a confidence-building measure for republicans and nationalists before the major part of republican decommissioning could be expected. It remains the case that some pro-Agreement unionists and some UK public officials publicly wish to prevent the full implementation of the Patten Report, despite their obligations under the Agreement to support the implementation of all its aspects—thus contributing to the current crisis.

The early release of paramilitary prisoners sentenced under scheduled offences, and of a small number of army personnel imprisoned for murders of civilians, has, by contrast with decommissioning, police reform, and demilitarization, been proceeding with less disruption than might have been anticipated. Measures to assist the victims of violence have helped ease the pain occasioned in some quarters by these early releases. The early-release scheme has even worked in creating incentives for some loyalist rejectionist paramilitary organizations—such as the Loyalist Volunteer Force (LVF)—to agree to establish a ceasefire in order to benefit their prisoners.

The political nature of the agreement

So there was a bargain on how to unwind the military and paramilitary conflict as well as on institutions. Movement has been taking place on some dimensions, much more slowly in some cases than others. But before examining the obstacles to a final resolution let me examine the political nature of the Agreement. The Agreement was based on multiple forms of recognition, including recognition of the balance of power; it was an act of statecraft, but it was also based on hard-headed calculations, not pious sentiments.

Recognition The Agreement was an act of recognition between states and national communities. The Republic of Ireland has recognized Northern Ireland's status as part of the United Kingdom, subject to the implementation of the Agreement. The sovereign governments of each state have recognized each other's full names for the first time, 'Ireland' and the 'United Kingdom of Great Britain and Northern Ireland' respectively. The United Kingdom has recognized the right of the people of Ireland, meaning the whole island, to exercise their national self-determination, albeit conjointly and severally as 'North' and 'South'. It has confirmed that Northern Ireland has the right to secede, by majority consent, to unify with Ireland. Ireland has recognized unionists' British political identity. The United Kingdom has recognized northern nationalists as a national minority, not simply as a cultural or religious minority, and as part of a possible future Irish national majority. The two states have, in effect, recognized the paramilitaries that have organized ceasefires as political agencies. They have not required them to surrender themselves or their weapons to their respective authorities, and have organized the release of their prisoners on the assurances of their organizations' ceasefires. The paramilitaries on ceasefires have, with some minor exceptions, recognized one another. Unionists have recognized nationalists as nationalists, not simply as Catholics or as the minority. Nationalists have recognized unionists as unionists, and not just as Protestants. Nationalists and unionists have recognized 'others', who are neither nationalists nor unionists. There is no shortage of recognition: contemporary Northern Ireland would warm the cockles of Hegel's heart.⁴⁹ If ethno-nationalist conflicts are rooted in identity politics then this one has at last moved to the stage of multilateral recognition of the identities at stake.

⁴⁹ For sophisticated discussions of recognition that are indebted to Hegel see *inter alia* Ringmar (1996) and Taylor (1992).

Balance of power The Agreement also rested on recognition of a balance of power. The Anglo-Irish Agreement of 1985 led to a new but ultimately productive stalemate. Republicans were left with no immediate prospect of significant electoral growth and their military capacity 'to sicken the Brits' proved limited. Loyalists reorganized in the late 1980s, and by the early 1990s were able to raise the costs of sustaining violence within the republican constituency. Unionists discovered the limits of just saying 'no' as British or bi-governmental initiatives occurred over their heads. There was thus a military stalemate and a political stalemate. But there were also underground structural changes beneath the 'frozen surface', noted by the late John Whyte (Whyte 1993). These included greater equality of opportunity and self-confidence among nationalists, and a shift in the demographic—and therefore electoral—balance of power between the communities. Together these changes underlined the fact that any political settlement could not return nationalists to a subordinate status. The initiatives of John Hume of the SDLP and Gerry Adams of Sinn Féin in the late 1980s and early 1990s constructively responded to this new stalemate. Much work had to be done before their initiative bore fruit (Mallie and McKittrick 1996).

The bargain There is a bargain at the heart of the Agreement. Nationalists endorsed it because it promised them political, legal, and economic equality now, plus institutions in which they have a strong stake, with the possibility of Irish unification later through simple majority consent in both jurisdictions. They get to co-govern Northern Ireland rather than being simply governed by either unionists or the British government. Moreover, they obtained this share of government with promises of further reforms to redress past legacies of direct and indirect discrimination. Republicans in Sinn Féin and the IRA have traded a long war that they could not win, and could not lose, for a long march through institutions in which they can reasonably claim that only their means have changed, not their end: the termination of partition. Sinn Féin has been extensively rewarded for this decision; its vote has consistently increased with the peace process, culminating in passing the SDLP as the largest nationalist party in the 2001 Westminster and local government elections (O'Leary and Evans 1997; Mitchell, O'Leary, and Evans 2001).

Nationalist support for the Agreement is not difficult to comprehend. For them it is a very good each-way bet. But why did the UUP and the loyalist parties make this consociational bargain, this pact

with the nationalist devil? The charms and latent threats of Tony Blair and Bill Clinton, the diplomacy of American Senator George Mitchell (Mitchell 2000), and the process of multiparty inclusive negotiations are not enough to account for Trimble's decision to lead his party where it was most reluctant to go, nor do these factors allow for his intelligence.

The unionists who supported the making of the Agreement were concerned not so much to end the IRA's long war but rather to protect and safeguard the union. Their calculations suggested that only by being generous now could they reconcile nationalists to the union and protect themselves against possibly seismic shifts in the balance of demographic and electoral power. Their calculus was that unionists would get a share in self-government now, avoid the prospect of a British government making further deals over their heads with the Irish government, and have some prospect of persuading northern nationalists that a newly reconstructed union offered a secure home for them. They made the Agreement, in short, to stave off something worse. It is not surprising therefore that there has been greater 'rejectionism' within the unionist bloc: they are conceding more, and some maintain there is no need to concede anything, at least not yet (see also Evans and O'Leary 2000). Nevertheless, significant proportions of supporters of the 'No' unionist parties, especially in the DUP, tell pollsters they would like the Agreement to work—which implies they are convertible to its merits, especially if there is IRA decommissioning, and they are strongly in favour of the Assembly rather than direct rule.

Ideas Recognizing identities and interests is a necessary but not sufficient condition of a constitutional settlement. Ideas, however loosely understood or flexibly deployed, were also important in the Agreement. Their development, dissemination, and impact are harder to trace, but that does not mean the task cannot be accomplished. Fresh language and policy learning were evident in the making of the Agreement, but so were policy obstinacy and recalcitrance within the highest echelons of the dying Major government (O'Leary 1997) and of the spreadeagled rainbow coalition in Dublin during 1995–7. The crafters of the ideas were many and varied, including politicians, public officials, and many unofficial advisers. Defining and understanding the sources of the conflict in national terms, rather than as issuing from religious extremism or terrorism, was vital. Without this shift the Anglo-Irish Agreement, the Framework Documents, and the Agreement itself would not have been possible. Intimations and imitations of changes elsewhere—

the end of the cold war and its repercussions, political change in South Africa and the Middle East—all had their local register. The traditional explanations of the causes of the conflict had increasingly ceased to move the local participants, and many were open to compromises and political institutions that would mark a shift from the limitations of either London's or Dublin's conceptions of good governance.

The beauty of the Agreement is that both nationalists and unionists have sound reasons for their respective assessments of its merits, that is, for believing that they are right about the long term. They cannot be certain they are right, and so they are willing to make this elaborate settlement now. But is it in Yeats's phrase 'a terrible beauty'? Will the Agreement wither and die once it has become apparent who is right about the long term? That possibility cannot be excluded, but that is why the Agreement's architecture repays careful inspection. It is not any consociational model, like that of Lebanon, vulnerable to the slightest demographic transformation in the composition of its constituent communities.

There are incentives for each bloc to accommodate the other precisely in order to make its vision of the future more likely: that is, both have reasons to act creatively on the basis of self-fulfilling prophecies. The treat of the double protection model is that it eases the pain for whoever gets it wrong about the future. The confederalizing and federalizing possibilities in the Agreement ensure that both national communities will remain linked, come what may, to their preferred nation-states. Moreover, the Agreement does not preclude the parties agreeing at some future juncture to a fully-fledged model of British and Irish co-sovereignty.

The politics of the transition: games of unlikely partners and the temptations of 'legalism'

In the first six months of 2001 it was difficult to avoid pessimism about the prospects for the Agreement. The passage of the Police (Northern Ireland) Act in November 2000 had left the SDLP, Sinn Féin, and the Irish government strongly dissatisfied. Even though the final act was better than the original bill, it was still 'Patten lite'. The IRA had not formally re-engaged with the IICD, partly, it seemed, to put pressure on Mandelson to deliver on Patten and demilitarization—though it did facilitate a second inspection of its arms dumps. The UK government was refusing to move fast on demilitarization because of its security concerns, especially about dissident republicans, who were strongest in areas which

have historically been vigorously republican—and where there is the greatest demand for demilitarization. The discipline of loyalist paramilitaries was breaking down: there was internal feuding, and sections of the UDA were targeting vulnerable Catholics with pipe-bomb attacks in predominantly unionist towns. On top of all this Trimble decided to play executive hardball, using what was called 'proportionate action'. To compel Sinn Féin to coerce the IRA to start decommissioning its weapons, as it had appeared to promise in May 2000, he embarked on a series of political sanctions. First, he blocked the two Sinn Féin ministers in the power-sharing executive from participating in the NSMC. The Sinn Féin Ministers and the SDLP Deputy First Minister promptly took Trimble to court, and won: Justice Kerr ruled his action 'unlawful' in January 2001. Trimble immediately appealed the decision—pending at the time of writing, but likely to go against him. Then just before the UK general election and the Northern Ireland local government elections of June 2001, Trimble repeated the tactic he had deployed in 2000. He wrote a post-dated resignation letter, effective on 1 July 2001, which he declared he would make effective if the IRA failed to move on decommissioning. His long-run calculation was that if his resignation became effective then the UK government would have to choose between suspending the Agreement's institutions—Trimble's preferred default—and leaving the Assembly to trigger fresh elections, because of its failure to replace the First and Deputy First Ministers within six weeks, that is, by 12 August 2001. His short-run calculation was that the resignation threat would immunize him and his party's candidates from criticism from other unionists over their willingness to share government with Sinn Féin in the absence of IRA decommissioning. Neither calculation was especially shrewd.

The elections did not deliver Trimble's desires. The DUP did very well, making significant gains at the expenses of the UUP, and Sinn Féin for the first time surpassed the SDLP in the nationalist bloc, consolidating its mandate within its community (Mitchell, O'Leary, and Evans 2001). The IRA did not move on decommissioning and Trimble resigned as First Minister, though not as UUP party leader, on 1 July, thus triggering Mallon's departure from office. Under the rules fresh elections for these positions have to be held within six weeks, and if the Assembly fails to elect new premiers then there must be fresh Assembly elections. This scenario provoked the two sovereign governments into convening negotiations between pro-Agreement parties and themselves at Weston Park, Shropshire, England, in July 2001. A new blame or blame-avoidance game had begun.

External observers agreed that two parties and one government shared most of the blame for the impasses in implementing the Belfast Agreement and stabilizing its institutions: Sinn Féin, the UUP, and the UK government. The IRA had initiated decommissioning of its weapons, if one counts international inspections of its arms dumps, but it had not moved to implement its pledge of 2000 to put its weapons completely and verifiably beyond use. None of its complaints about the UK government's failures to deliver on its pledges absolved Sinn Féin from its obligations to build confidence amongst its governmental partners that they were not sharing power with a private army, and nothing in the Agreement warranted the republican line that actual decommissioning must be the very last act of implementation. Prevarication merely maximized distrust about the IRA's long-run intentions.

The UUP had broken several of its obligations under the Agreement, while demanding that others deliver on their promises ahead of time. It blocked rapid executive formation. It rejected the Patten Report on policing, though it met the Agreement's terms of reference. The First Minister blocked Sinn Féin ministers' legitimate participation in the NSMC. He has twice threatened resignation, and the collapse or suspension of the Agreement's institutions, to force Sinn Féin to deliver the IRA to his deadlines. He encouraged the UK government to make the first formal break with the Agreement, and international law, by passing the Suspension Act in 2000, which Mandelson used, and Trimble has continued to press for its use with Mandelson's successor, John Reid.

The UK government so far has dishonoured its pledge of 5 May 2000—which preceded the IRA's promise of 6 May to put its weapons completely and verifiably beyond use—repeated in March 2001, to produce legislation and implementation plans fully reflecting the letter and the spirit of the Patten Report on policing. None of its excuses exonerate it in nationalist eyes, and it also has work to do to fulfil its obligations on demilitarization, the review of the administration of justice, and the protection of human rights. To complicate matters, nationalists see the 5–6 May 2000 statements as bargains essentially between the UK and the IRA, whereas the unionists see them as essentially bargains between Trimble and Sinn Féin.

At Weston Park the two governments sought to put together a package linking police reform, demilitarization, decommissioning, and securing the Agreement's institutions. The talks were not successful, though they were not fruitless. The governments have currently agreed to organize and implement their own package, declaring there will be no further inter-party negotiations. These

will presumably address the outstanding issues: decommissioning, demilitarization, police reform, and securing the institutions of the Agreement. Whatever the outcome of this package the two sovereign governments will then have three choices: to leave further negotiation to the parties; to suspend the Agreement's institutions; or to have fresh Assembly elections. The first option does not seem likely to work, yet. The second option must be rejected by the Irish government, which regards the Suspension Act as a unilateral breach of the treaty accompanying the Belfast Agreement. The third option is to have fresh Assembly elections, consequent upon the failure to re-elect successors to Trimble and Mallon. The argument put against elections is that they will help the DUP and Sinn Féin rather than the UUP and the SDLP. Perhaps that possibility will itself act as an incentive for the UUP to compromise.

But there is another possibility emerging: if in any fresh Assembly elections the DUP and Sinn Féin do very well, then they would do best on moderated platforms. In this scenario we might anticipate IRA initiatives on arms and DUP briefings on how they seek to 'renegotiate', rather than destroy, the Agreement. The emergence of both parties as the clear majority within their respective blocs would create a fascinating if dangerous spectacle. Sinn Féin and the DUP would have to choose: to accept their respective nominees for the posts of First and Deputy First Ministers, or accept moderate SDLP and UUP nominees for these posts, or have fresh elections. That is, they would have to choose between stealing their opponents' clothes and wearing them, or showing that they remain wolves in sheep's clothing.

The Agreement's political entrenchment required that some short-term advantage-maximizing and game-playing temptations be avoided. At the heart of this Agreement lie four internal political forces: the SDLP and the UUP among the historically moderate nationalists and unionists, and Sinn Féin and the PUP/UDP amongst the historically hardline republicans and loyalists.⁵⁰ The Agreement requires these political forces to evolve as informal coalition partners while preserving their bases. Considerations of brevity oblige me to focus on just two of these constellations.

The UUP has been the most vigorous short-term maximizer and game-player, because it is the most divided. The party split most under the impact of the making of the Agreement. It made very

⁵⁰ In the new dispensation there are now eight minorities. Five are for the Agreement: nationalists, republicans, 'Yes' unionists, 'Yes' loyalists, and 'others'. Three are against the Agreement: 'No' unionists, 'No' loyalists, and 'No' republicans. The latter are in 'objective alliance'.

significant concessions on internal power-sharing and on all-Ireland dimensions. It has lost votes to the 'No' unionists in three successive elections. The temptation of its leaders has been to renegotiate the Agreement during its implementation. This way they hoped to refortify the party and draw off support from the 'soft No' camp among unionists. The UUP would have preferred an Agreement which was largely internal to Northern Ireland, and which involved them co-governing Northern Ireland with the SDLP in a weaker Assembly, on the lines established in Wales, and without the dual premiership and inclusive executive. It would have strongly preferred to govern without Sinn Féin. In consequence, the UUP's most tempting game plan has been to use the decommissioning issue to split what it sees as a pan-nationalist bloc. The signs of this game have been a phoney 'legalism', adversarial and petty-minded interpretation of the Agreement, postponement and prevarication, and brinkmanship. One clear example of this was when Trimble, on poor legal advice, availed himself of a technical clause in the Northern Ireland Act 1998 and refused to nominate the two Sinn Féin Ministers to carry out their obligations under meetings of the NSMC.

The other constellation is republican. Republicans too have been tempted to engage in game-playing. Sinn Féin has been tempted by hard legalism: extracting the full literal implementation of its contract with the UK, at the risk of damaging the informal political coalition that made the Agreement. They have insisted on full delivery by others, while postponing decommissioning, even if this insistence created great difficulties for the UUP and the SDLP, their informal partners. They thought they had an each-way bet: if the UUP delivered on the Agreement, well and good; if the UUP did not, then Sinn Féin would position itself to ensure that unionists get the blame for its non-implementation. For some hardline republicans, non-implementation may yet provide a pretext for a return to war. In contrast, softer-liners could only sanction any return to violence if governmental or loyalist forces were responsible for the first military breach, and many softer-liners argue that republicans have more to gain electorally both within Northern Ireland and the Republic through becoming a wholly constitutional movement. Even if there is a defunct Agreement, time and demography, they reason, are on their side.

To survive, and to be implemented in full, this consociational and (con)federal agreement therefore requires six processes to occur:

1. There must be vigorous British and Irish oversight to encourage the Agreement's full implementation.
2. Greater recognition is necessary among the informal coalition partners, especially within the UUP and Sinn Féin, that they may benefit more from not seeking maximum advantage from one another's difficulties and from not exaggerating their own.
3. The two governments and the pro-Agreement parties must agree that the remaining items for implementation are resolved to their mutual satisfaction. This will require the unravelling of some of Mandelson's stances on policing reform.
4. Republicans will have to move from the inspection of the IRA's arms dumps to accomplish wholly credible disarmament.
5. Action and discipline is required from the loyalist parties and paramilitary organizations, whose obligations on decommissioning tend to be forgotten in UK circles.
6. The UUP must be satisfied with republican action on decommissioning, but accept that the UK government has obligations to deliver on demilitarization and the full-scale reform of criminal justice and policing—in ways that are against their preferences.

It is a tall order, though not impossible. We will know soon whether a final deal can happen. But what happens if there is failure ahead?

Conclusion: Alternative Scenarios and Interim Evaluation

It makes good political sense to argue that there is no alternative to the Agreement, especially by its supporters, but only in the mind of Margaret Thatcher is it ever a matter of ontological truth that 'there is no alternative'.

Let us imagine three scenarios in which unionists are held culpable for the breakdown through wrecking the workings of the executive. In scenario 1 the UK government would come under strong pressure to shut the Assembly because nationalists did not negotiate for a purely internal settlement, though it would naturally want to avoid antagonizing anyone too much. The pressure to deliver policing reform to calm nationalists would be strong, but probably resisted by 'securocrats'. The reforms embedded in the human rights and mainstreaming equality provisions in the Agreement would continue. Dimensions of the Agreement that do not involve the local parties would be delivered. The British-Irish intergovernmental conference would become an active site for policy formulation, and in time would encourage sensible functional cross-border cooperation. This is a feasible but unattractive scenario: a cold peace with traits

of a local cold war, reform without significant devolution, tempered by atrocities from the breakaway Continuity IRA and Real IRA, and the LVF and its kindred spirits. Any wrong moves would destabilize the ceasefires. The review of the Agreement would increasingly resemble the most famous play by an Irish Protestant, *Waiting for Godot*. Party politics might become more polarized: 'Yes' unionists would lose further electoral ground to 'No' unionists, and the SDLP to Sinn Féin within a demographically growing nationalist bloc. The Alliance Party and the Women's Coalition are unlikely to flourish.

In scenario 2, a default plan would tempt some: de facto co-sovereignty in and over Northern Ireland by the UK and Irish governments. In the absence of agreed devolution the two governments would increase their cooperation. The formal declaration of shared sovereignty would not, and need not, be rushed. Its gradual emergence would act as a standing invitation to unionists to win some control over their own destiny through meaningful devolution. Co-sovereignty has many merits, especially when considered from the perspective of justice; but having just presided over a major institutional failure the two governments are unlikely to move rapidly to a formal settlement of this kind, though coherent models of how it might operate have been sketched (O'Leary *et al.* 1993).

In scenario 3, co-sovereignty could be accompanied by a local government option. This strategy would abandon the Assembly, and stop treating Northern Ireland in a uniform and unitary fashion. Significant multi-functional competencies could be devolved to reorganized local governments willing to adopt institutions of the type made in the Agreement: in 20 of the existing 26 local councils, political parties practise power-sharing or senior-office rotation, the remaining six being dominated by unionists in areas where the nationalist minority is electorally weak. The proposals in the Patten Report to link local government boundaries to police organization and accountability could be built on. Local governments on the border, dominated by nationalists, could develop significant cross-border arrangements with their southern counterparts—and the Irish government. This would isolate the heartlands of unreformed unionism while giving nationalists significant incentives to participate in a reformed Northern Ireland. The danger in this option is that its 'cantonization qualities' might encourage further segregation and promote re-partitionist thinking.

The moral of all these three scenarios is clear. Worlds in which unionists are held culpable for breakdown would not improve their lot. The Agreement offers them a better chance of preserving the union with their meaningful participation than the alternatives.

What of scenario 4, in which republicans are held culpable for breakdown? What happens if the IRA has failed to cooperate on decommissioning, though everyone else has delivered on their obligations? In these circumstances the UUP could trigger the collapse of the institutions of the Agreement, while retaining the benefits occasioned by the changes to Arts 2 and 3 of the Irish Constitution. A review would be initiated. The UK government would come under strong pressure from unionists to reconsider the imprisonment of republican paramilitary prisoners. Every punishment beating would prompt calls to review the ceasefires. There would be demands from the UUP to halt police reform. The SDLP would be pressed to condemn Sinn Féin, Sinn Féin to condemn the IRA, the IRA to condemn its hardliners. The present world, which offers mostly improving prospects for nationalists, would start to look much messier and uncertain. The Agreement has the solid endorsement of nationalists. Reforms are in train, whether the Agreement is fully implemented or not, but these reforms, especially police reform, might be jeopardized by republican intransigence. In short, for most republicans plausible cost-benefit analyses on renewed militarism are clear: they stand to gain more, North and South, through electoral politics than they do from an IRA which does not cooperate in decommissioning or which resumes assassinations or bombings. For that reason I expect actual IRA decommissioning to occur, provided the UK government delivers fully on police reform. That is a clear and testable prediction, with, I hope, the minimum infusion of wishful thinking.

The normative political science in this analysis is, I hope, clear. Consociational and confederal devices provide excellent repertoires where a sovereign border has separated a national minority living in its homeland from its kin-state, and where an historically privileged settler colonial portion of a *Staatsvolk* cannot, or is refused permission to, control the disputed territory on its own. Such devices are capable of being constructed with and without guidance from constitutional designers, though plainly diffusion of institutional repertoires is one of the neglected dimensions of what some call 'globalization'.

Comprehensive settlements, after inclusive negotiations, that incorporate hardliners and that address the identities, interests, and ideological agendas of all parties are likely to produce complex and interlinked institutional ensembles that look very vulnerable. Referendums may, however, assist the legitimization of such agreements and the consolidation of the pre-agreement pacts. Preferential voting in the STV mode both makes possible cross-ethnic

'vote-pooling' and benefits hardliners willing to become less hard-line. 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 out-flanked 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 equilibria, but they are infinitely better than their alternatives: fighting to the finish, or the panaceas proposed by partisan or naive integrationists. What is rational, or optimal, does not always become real; and what is morally better is not always politically correct. But in this case Hegel may yet have to eat his heart out if the rational becomes real, and the new millennium marks the beginning of the end of what was British-Irish history.

Annex: The Mysterious Work of Viktor d'Hondt in Belfast

I had never heard of d'Hondt until I went into the talks process, but we hear of nothing else nowadays.

Paul Murphy, Minister of State, Northern Ireland Office,
House of Commons, *Official Report* (319, 18 November 1998).

Viktor d'Hondt is a good answer to the *Trivial Pursuit* challenge to name a famous Belgian. This lawyer devised a method of proportional representation that is used for many purposes, including allocating political offices in the European Parliament. The method works by iteration, using a simple series of divisors, 1, 2, 3, . . . n , that are divided into a party's share of votes or seats. The two tables below show how the allocation worked for the Northern Ireland Executive Committee. The seats won by political parties and the order in which ministries were obtained are displayed in Table 11.3.⁵¹

All parties entitled to seats were willing to take them up. The party with the largest number of seats, the UUP with 27, obtained the first ministry, and then its seat share was divided by two, leaving it with 13.5. The next largest remaining number of seats was held by the SDLP, with 24; it chose the second ministry, and its seat

⁵¹ The principal change from Table 11.1 above is that the UUP had lost one member to the 'No' unionists, reducing the party's membership in the Assembly to 27, and the UKUP had split, the party leaving its leader—or vice versa, depending upon the source—reducing its seat-share from five to four.

TABLE 11.3: *The d'Hondt rule and the distribution of ministries*

Divisor	UKUP		DUP		PUP		UUP		APNI		NIWC		SDLP		SF		M
	S	M	S	M	S	M	S	M	S	M	S	M	S	M	S	M	
1	4	-	20	(3)	2	-	27	(1)	6	2	-	24	(2)	18	(4)		
2			10	(7)			14	(5)				12	(6)	9	(9)		
3			6.6				9	(8)				8	(10)	6			
4			5				7					6		4.5			
All			20	2			28	3				24	3	18	2		

M stands for Ministerial portfolio choice; the numbers in brackets in the M columns indicate the order in which parties won ministries of their choice; S is the number of seats each party has during each stage of the allocation.

share was divided by two, leaving it with 12. The next largest remaining number of seats was held by the DUP, with 20; it chose the third ministry, and its seat share was divided by two, leaving it with 10. The next largest remaining number of seats was held by Sinn Féin, with 18; it chose the fourth ministry, and its seat share was divided by two, leaving it with 9. The next largest remaining number of seats was the UUP, with 13.5; it chose the fifth ministry, and its total seat share was divided by three, leaving it with 9. And so on. Great foresight was shown in the legislative enactment of this agreement: where there was a tie in the number of seats held by parties during any stage of the allocation, precedence was given to the party with the higher share of the first-preference vote. The tie-breaker was required at stage 8, when both the UUP—27⁵² seats—and Sinn Féin—18 seats—had a remaining seat total of 9. In accordance with the rule the UUP was given precedence in portfolio choice.

Unionists therefore obtained five ministries—three UUP and two DUP—and nationalists obtained five—three SDLP and two SF—a mild disproportionality by bloc, but not by party. What was not foreseen was that unionists would not fare as well as nationalists in strategic decision-making over portfolio allocation. Nationalists obtained almost the entire welfare state portfolio—education at all levels, health and social services, and agriculture—as well as finance and personnel. What happened? Table 11.4 below shows the actual portfolios chosen by parties at each stage in the allocation.

Table 11.4: *Party choices of ministerial portfolios, 1999*

	Portfolio	Nominee	Party
1.	Enterprise, Trade, and Investment	Empey	UUP
2.	Finance and Personnel	Durkan	SDLP
3.	Regional Development	Robinson	DUP
4.	Education	McGuinness	SF
5.	Environment	Foster	UUP
6.	Higher and Further Education, Training and Development	Farren	SDLP
7.	Social Development	Dodds	DUP
8.	Culture, Art, and Leisure	McGimpsey	UUP
9.	Health, Social Services, and Public Safety	de Brun	SF
10.	Agriculture	Rogers	SDLP

⁵² See n. 51.

There was no coordination between the UUP and the DUP, or between the SDLP and Sinn Féin; but since the negotiation and making of the Agreement relations between the SDLP and Sinn Féin have been more amicable than those between the UUP and the DUP. The UUP did not, as expected, take the Finance and Personnel portfolio with its first choice. This decision may have been affected by Empey's own preferences—as Trimble's right-hand man during the negotiations he may have had a free hand—or by the fact that Enterprise, Trade and Investment will mesh well with the Economic Policy Unit in the First and Deputy First Ministers' Office. More likely, the UUP may have calculated that it would be best to give the SDLP the lead negotiation and arbitration role over the budget, knowing that the SDLP would be better able to face down Sinn Féin's suggestions. The SDLP's choice of Finance and Personnel was no surprise given that the post was available. The DUP then had the choice of the third ministry. The party had decided to take office while refusing to interact with Sinn Féin ministers. It appeared to be seeking to wreck the Agreement from within, while obtaining some of the perks of office to which it was entitled. Its leader, Ian Paisley, nominated his deputy leader, Robinson, to the Regional Development portfolio, consisting largely of transport. Whether this was to prevent vigorous cross-border initiatives in this area, or for some other reason, is not known. This choice did, however, leave Sinn Féin free to pick the Education portfolio, which plainly shocked many unionist Assembly members. Sinn Féin's choice made strategic sense for a radical nationalist party; the ministry gives it access to a high-profile, big-spending, potentially redistributive and socializing ministry. The UUP then chose Environment, and the party leader nominated a relative unknown, Foster, to the portfolio. The ministry contains Local Government within its remit and Foster is a local government councillor; he was being rewarded by his party leader for delivering him crucial support. The choice may partly have been motivated by a desire to block unwelcome changes that might be proposed for local government. Whatever its rationale, it left the SDLP free to pick the Higher and Further Education, Training and Development portfolio. The DUP then claimed that the UUP's decisions, both in making the Agreement and in its choice of portfolios, had left nationalists in full control of education throughout Northern Ireland—this was not true because of the checks and balances in the Assembly, but a rhetorically powerful claim; and in any case the DUP could have picked either education portfolio for itself, but did not do so. It is not known whether it wanted to benefit from

unionists' anxieties over nationalists' grip on the education portfolios—the Machiavellian view—or whether it prioritized other matters. The DUP then chose the Social Development portfolio, a choice that left the UUP with a major headache. If it took either of Health, Social Services and Public Safety or Agriculture then it would leave one nationalist in charge of the Ministry of Culture, Arts and Leisure, with its potential agenda-setting control over items such as parades and binational and bi-lingual matters. The UUP chose to sacrifice access to a big-spending ministry for this reason. Sinn Féin and the SDLP then took the remaining portfolios, appointing women to the last two ministries in a display of progressive politics.

This story is intrinsically interesting, but also suggests some major political science questions for formal theorists and comparative analysts. How does the Northern Ireland story fit with theories of coalition government? Is the d'Hondt rule—and variations on it, such as a Saint-Laguë rule—an efficient way of solving coalition-making problems, one that saves on the transactions' costs of bargaining? Should parties be prevented from forming post-election coalition pacts for the purpose of improving on their total number of portfolios and the pecking order in which they receive ministries? Is the d'Hondt rule a more likely outcome and a more efficient rule in complex bargaining than the fair division rules for dispute resolution suggested by game theorists? How do the formal and informal rules of executive formation vary across past and present consociational executives in the world, and is there any evidence of cross-national learning?

The Eritrean Experience in Constitution Making: The Dialectic of Process and Substance

Bereket Habte Selassie

Historical Background

Eritrea's constitution was ratified on 23 May 1997 by a constituent assembly formed for that purpose. This event occurred on the eve of the sixth liberation anniversary from Ethiopian occupation, following 30 years of war. With the end of Ethiopia's occupation, the Eritrean People's Liberation Front (EPLF) created a provisional government pending formal independence, which came two years later. The delay came at the insistence of the EPLF leadership, which wanted to hold an internationally observed referendum. The leadership was confident that the people would freely choose independence and thus show a hitherto sceptical or indifferent world that the independence struggle had full popular backing.

The result of the referendum of 23–5 April 1993 fully justified this confidence. In voting certified as fair by a UN observer mission, 99.8 per cent majority opted for full independence. Soon after, Eritrea became a UN member. Then there began a transition process that culminated in the ratification of the constitution, capping three years of intense public debate and consultation, as will be explained in more detail below.

Eritrea is a creation of colonial history, not unlike most African countries. In pre-colonial times, the territory was known by various names, experienced different systems of government, and was subject to expansion and contraction, as well as population migrations that led to the intermingling of different cultures, including influences from ancient Greece and Egypt. Orthodox Christianity, centred around the city of Axum, has been present since the fourth century. Three centuries later came the rise of Islam. Eritrea is thus

late 1980s. Civil society, if present and especially if vibrant, can provide self-regulating mechanisms, even when the state runs into a crisis.

India's repeated encounters with ethnic violence of all kinds—religious, linguistic, caste—and its equally frequent return from the brink have a great deal to do with the self-regulation that its largely integrated and cross-cutting civil society provides. Local structures of resistance and recuperation, as well as local knowledge about how to fix ethnic relations, have ensured that even the worst moments—1947–8 and 1992–3—do not degenerate into an all-out collapse of the country into ethnic warfare. A Rwanda, a Burundi, a Yugoslavia are not possible in India unless the state, for an exogenous reason such as a long-protracted war, kills all autonomous spaces of citizen activity and organization.

To conclude, constitutional or policy engineering undoubtedly has partial validity in explaining outcomes of peace and violence in India, but a large part of the explanation for what we observe has to come from the character and pattern of civil society, which tends to be locally or regionally differentiated, whereas institutional or policy factors have been common across States or the whole nation.

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