

Brendan O'Leary

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The Nature of the British-Irish Agreement

It is an academic, personal and political honour to give the ninth John Whyte memorial lecture.* It is an academic honour because John Whyte was the most dispassionate analyst of our conflict—and so is a hard act to follow. *Interpreting Northern Ireland* still conveys his marvellous gifts of clarity and concision in exposition. It is a personal honour because, together with Ernest Gellner, he was the mentor who had the greatest influence on me as a young lecturer. Lastly, it is a political honour. John Whyte worried whether social scientific research on Northern Ireland was worthwhile. Nevertheless, he contributed extensively to public deliberation in defiance of his occasional despair on this matter. He would have been pleased at the extent to which social science, including political science, can be discerned in the making and nature of the Agreement.

The Name of the Agreement

The Agreement of 10 April 1998, ratified in referenda in both parts of Ireland on 22 May 1998, is a major achievement, both for its negotiators and

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Nature of the Agreement

The ninth John Whyte memorial lecture was the most popular to follow. *Interpreting the Agreement* and concision in the next Gellner, he was a lecturer. Lastly, it is the most scientific research on the Agreement, cited extensively to support this matter. He was a lecturer, including political science, on the Agreement.

in both parts of the negotiations and

for the peoples of Ireland and Britain. To make it, many politicians, officials, paramilitaries, and ordinary citizens had been through trials by ordeal. It emerged from a political desert whose only landmarks were failed 'initiatives'. Yet the Agreement that emerged from that desert has no agreed name. It carries no person's name, British or Irish or American, and the names of no roles, be they Prime Ministers, *Taoisigh*, Secretaries of State, Foreign Ministers, or Party Leaders. Some know it by the place it was made, as the Belfast Agreement, or, more controversially, as the Stormont Agreement. But it was not signed by all of its supporters in the final negotiating chambers, and it was made in many places: in Dublin, London and Washington; in smaller cities, towns and villages; and in airports, aeroplanes, and unofficial 'communications'. Some just know it by its date: the 10 April 1998 Agreement, or the Good Friday Agreement. The former seems too limited, while the latter, gives too much credit to Christianity—both as a source of resolution, and as a cause of conflict.

It is also known as the British-Irish Agreement, after the peoples who confirmed it in referenda in both parts of Ireland—though, strictly speaking, only the British in Ireland as well as the Irish in Ireland were asked to ratify it. I prefer to call it the British-Irish Agreement. This name reflects an important fact: the Agreement is the fulfilment of a previous Agreement, the Anglo-Irish Agreement. But we Irish and British know that much resides in names, and, to avoid giving any further offence to anyone's sensibilities, I will refer simply to the Agreement.¹

The Institutional Nature of the Agreement

What kind of institutional Agreement is it? The answer for a student of political science is that it is a consociational agreement, that is, a political arrangement that meets all four of the criteria laid down by Arend Lijphart:

- (i) cross-community executive power-sharing;
- (ii) proportionality rules applied throughout the relevant governmental and public sectors;
- (iii) community self-government (or autonomy) and equality in cultural life; and

¹ This text is an updated version of the ninth John Whyte memorial lecture delivered in Belfast on November 26 1998. It significantly modifies and expands articles written with C. McCrudden and J. McGarry for the *Sunday Business Post* (Dublin) and another two articles by the author published by University College London's Constitution Unit (School of Public Policy, 1998), and by *Scottish Affairs*, 1999. Thanks are especially owed to C. McCrudden, J. McGarry, R. Blackburn, P. Chaudhuri, J. Coakley, W. Connor, G. Evans, C. Gearty, A. Guelke, R. Hazell, D. Horowitz, K. Jacobsen, J. Hall, T. Lyne, P. Mair, M. Mansergh, D. McCrone, I. McLean, P. Mitchell, T. Naitn, M. Qvortrup, J. Todd, R. Wilford, members of the Constitutional Unit at UCL, members of the Politics and Government departments at QUB, UCD and LSE, and many Irish and British public officials and politicians who cannot be named here.

² References will be to *The Agreement: Agreement Reached in the Multi-Party Negotiations*, no place of publication, no date, UK Government.

(iv) veto rights for minorities.²

A consociation is an association of communities—in this case the communities are British unionist, Irish nationalist, and others. A consociation can be created without any explicit consociational theory to guide it—indeed that has often happened.³ More often, consociations are the equilibrium outcomes of bargains or pacts between the political leaders of ethnic or religious communities. This Agreement is the product of tacit and explicit consociational thought,⁴ and of bargaining, or of what is sometimes called 'pacting'.

But the Agreement is not just consociational, and it departs from Lijphart's prescriptions in important respects that have practical implications for Northern Ireland and for regulating ethnic and national conflict elsewhere: it has important external dimensions; it was made with national, and not just ethnic or religious communities; and it has been endorsed by (most of) the leaders and (most of) the led. Indeed, I suspect it is the first consociational pact to have been immediately popularly endorsed by referendum. To be formulaic: the Agreement envisages an internal consociation built within overarching con/federal institutions; it has imaginative elements of co-sovereignty; it promises a novel model of 'double protection'; and it rests on a bargain derived from diametrically conflicting hopes about its likely long-run outcome, but that may not destabilize it. One supplement must be added to this very lengthy formula. The Agreement is vulnerable both to post-Agreement bargaining and to legalism. Let me justify this phrasing.

² See, *inter alia*, Arend Lijphart, *Democracy in Plural Societies*, New Haven 1977, and Michael Walzer, *On Toleration*, New Haven 1997.

³ Lijphart claims that consociational rules were invented by Dutch politicians in 1917, Lebanese politicians in 1943, Austrian politicians in 1945, Malaysian politicians in 1955, Colombian politicians in 1958, Indian politicians in the 1960s and 1970s, South African politicians in 1993–4, and by British politicians addressing Northern Ireland in 1972. One does not have to agree with the citation of any or all of these cases to accept the point: politicians are more than capable of doing theory without the aid of theorists. See *inter alia*, Arend Lijphart, 'Foreword: One Basic Problem, Many Theoretical Options—And a Practical Solution?', in *The Future of Northern Ireland*, edited by John McGarry and Brendan O'Leary, Oxford 1990, p. viii; 'Prospects for Power-Sharing in the New South Africa' in *Election '94 South Africa: the Campaigns, Results and Future Prospects*, edited by Andrew Reynolds, London 1994, pp. 221–33; and 'The Puzzle of Indian Democracy: A Consociational Interpretation', *American Political Science Review*, vol. 90, no. 2, 1996, pp. 258–68.

⁴ One of the makers of the Agreement, Dr Mowlam, the UK Secretary of State for Northern Ireland (1997–), has an academic consociational heritage—she wrote on Swiss federal and consociational practices in her educational career, and at least one of her advisors has had an abiding interest in the subject. Consociational thinking not only formed part of the background thinking of the UK Labour Party. It had an impact on the drafting of the Framework Documents of 1995, and the 'novel' executive formation in the Agreement, based on the d'Hondt rule, see Appendix, reflects consociational coalition principles used elsewhere in Europe and in the European Parliament.

The Four Consociational Elements

Executive Power-Sharing

At the heart of any consociational arrangement is executive power-sharing. The Agreement creates a dual premiership. Indeed, it can be argued that it establishes two quasi-presidential figures in a devolved Northern Assembly: a First Minister and a Deputy First Minister. They have presidential characteristics because, once elected, it is almost impossible to depose them until the next general election—presidentialism means an executive that cannot be destroyed by an assembly except through impeachment, and, in future, I maintain that it will be extremely difficult for the Northern Assembly to remove its dual premiers. Let me make this clear through a current illustration. Even if David Trimble's party colleagues were to vote unanimously to depose him from the leadership of the Ulster Unionist Party (UUP), he could not be forced to resign his position as First Minister. If he did not wish to go, he could only be deposed if enough nationalists colluded with enough unionists to enforce it—but, to do that, nationalists in the Assembly would have to bring down their own Deputy First Minister. This possibility exists because the First Minister and the Deputy First Minister are elected together by the *parallel consent procedure* (see Insert 1). This procedure requires them to have the support of fifty per cent of registered nationalists and unionists as well as a majority of the Assembly. Critically, this rule gives very strong incentives to unionists and nationalists to nominate a candidate for one of these positions that is acceptable to at least a majority of the other bloc's members in the Assembly. So, even if in the future Gerry Adams leads Sinn Féin into surpassing the SDLP in seats won in the Assembly, unionists will be able to bloc his nomination as Deputy Chief Minister. Likewise, nationalists can veto an unacceptable hard-line unionist. In the first elections for these posts, pro-Agreement unionists in the UUP and the Progressive Unionist Party voted solidly for the combination of David Trimble of the UUP and Seamus Mallon of the SDLP. Naturally, so did the SDLP. Sinn Féin deliberately abstained to avoid the First and Deputy First Ministers being chosen by more nationalists than by unionists—an outcome that might have endangered Trimble's status with the unionist public, and a sign of Sinn Féin's maturing avoidance of provocation.

The rules practically ensure that a unionist and a nationalist share the top two posts. The Agreement and UK legislation (the 1998 Northern Ireland Act) make it clear that both posts have identical symbolic and external representation functions. Indeed, they have identical powers; the only difference is in their titles. Both, for example, will preside over the 'Executive Committee' of Ministers, and have a role in co-ordinating its work. The Agreement does not make it clear whether the two will have any of the existing departmental responsibilities in Northern Ireland—though it might have made sense for them jointly to run, and be served by, the existing Finance

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Insert One.

How Will the Assembly and its Cross-Community Voting Rules Work?

The Assembly and its Executive will have full legislative and executive competence for economic development, education, health and social services, agriculture, environment and finance (including the Northern Ireland civil service). Through agreement, the Assembly is able to expand these functions; and, again through agreement, and with the consent of the Secretary of State and the Westminster Parliament, the Assembly may legislate for any non-devolved function. So, if the Assembly works well, then maximum feasible devolved self-government is possible; and a convention may arise in which the Secretary of State and Westminster 'rubber-stamp' legislative measures coming from the Assembly with cross-community consent. The road is open to a future in which public policy in Ireland, North and South, is made without direct British ministerial involvement—though the British budgetary allocation will be pivotal as long as Northern Ireland remains in the UK.

Assembly members have to designate themselves as 'Nationalist', 'Unionist' or 'Other'. This ruling poses difficult questions for the middle-class Alliance Party, and other 'cross-community' parties, such as the Northern Ireland Women's Coalition, which have won representation to the new Assembly. If they choose to register as unionist they increase the number of moderate unionists in the Assembly, but with the attendant risk that they may lose the support of some Catholic voters. If they choose to be 'Other' they may, by contrast, weaken their power in critical votes in the Assembly, and run the risk of losing the support of some Protestant voters. In this Assembly they have determined that they are 'Other', though they are free to change their classifications in future.

The Assembly, through majority rule, may pass 'normal laws', though there is provision for a minority, of 30 of the 108 Assembly members, to trigger special procedures. 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.

The first is 'parallel consent'. This requires, amongst those present and voting, both an overall majority of Assembly members and a majority of both unionist and nationalist members to endorse a proposal. Table 2, which records the numbers in each bloc returned in the June 1998 election, suggests that parallel consent with all members present, will require the support of 22 nationalists, and 29 unionists, as well as an overall majority in the Assembly. The second rule is that of 'weighted majority'. This requires, amongst those present and voting, support from 60 per cent of members, that is 65 members when all members vote, or 64 excluding the Speaker. It also requires the support of 40 per cent of nationalist members and 40 per cent of unionist members. The data in Table 2 suggest that at least 17 nationalists must consent under this procedure, and at least 24 unionists. It also suggests that all nationalists (42) and the minimum necessary number of unionists (24) have the necessary combined support in the Assembly as a whole for any measure passed in this way (65). The same figures strongly suggest that in the first Assembly moderate pro-Agreement unionists are vulnerable to pressure from anti-Agreement unionists. They could even refuse to be part of a predominantly nationalist super-majority necessary to work the parallel consent rule. But there is fat built into the Assembly. The bottom line is that David Trimble can survive and deliver a workable portion of the new cross-community majority even with six dissidents in his own party—providing he can be certain of the support of the DUP (which is likely), and providing that he can live with support from Sinn Féin (which is evidently much more uncomfortable for him).

The cross-community rules are vital but not entirely predictable in their consequences. The legislation implies that the parallel consent procedure must be attempted first, and then the weighted majority procedure can be followed. That, however, may have to be clarified when the transitional Assembly decides its rules of procedure—by cross-community consent! The operation of the cross-community rules depends not just on how parties register, but also on how disciplined parties are within the Assembly—the widespread fears that have been expressed about the discipline and unity of the DUP reflect knowledge of this fact.

The Assembly will have committees scrutinizing each of the departments headed by Ministers. Committee Chairs and Deputy Chairs will also be allocated according to the d'Hondt rule. Each committee will have to approve any proposed new law within its jurisdiction tabled by Ministers, and indeed the committee can 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 are subject to the possibility of cross-community special procedures!

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and Personnel Ministry. The first incumbents have decided instead to have an Economic Policy Unit and an Equality Unit working within their Office.⁵

With one notable exception, David Trimble and Seamus Mallon have successfully and carefully co-ordinated their statements and actions since their joint election, especially in the management of the Drumcree crisis in the first two weeks of July and the Omagh massacre of August 1998. They are showing how this new dyarchy will critically depend upon the personal co-operation of the two holders of these posts. The Northern Ireland Act, which has just gone through Westminster's last procedures, has reinforced their interdependence by requiring that 'if either the First Minister or the deputy First Minister ceases to hold office, whether by resignation or otherwise, the other shall also cease to hold office' (Article 14 (6)). The one major exception to the pattern of dyarchic co-operation has arisen over the implementation of the rules for executive formation. Indeed, as I write, there is still a crisis of executive formation.

Unlike some presidents and most prime ministers, neither the First Minister nor the Deputy First Minister formally appoints the other Ministers to the Executive Committee. Under the plain meaning of the Agreement, these posts should be allocated to parties in proportion to their strength in the Assembly, according to a mechanical algorithm, the d'Hondt rule. The rules are simple in their implied consequences. Any party that wins a significant share of seats, and is willing to abide by the Agreement, has a reasonable chance of access to the executive, a subtle form of what Lijphart calls 'grand coalition government'—though it is a coalition government without a coalition agreement.

This is how it should work in law. The d'Hondt rule means that parties get the right to nominate Ministers according to their respective strength in seats—no vote of confidence is required by the Assembly. It also means that parties get to choose, in order of their strength, their preferred ministries. An individual Minister can be deposed from office, by cross-community rules (see Insert 1), but the party that held the relevant Ministry will be able to appoint his or her successor from amongst its ranks. Parties, of course, have the right to refuse a Ministry to which they are entitled, and may voluntarily exclude themselves from their automatic right to a share in executive power.

The Decommissioning Deadlock

The current crisis of executive formation has arisen for political and constitutional reasons. Politically, it has arisen because David

⁵ See *Statement of the Office of the First Minister (Designate) and Deputy First Minister (Designate)*, 18 December 1998. The Northern Ireland Act (1998) makes it plain that the top two Ministers can hold functional portfolios, Clause 15 (10).

Trimble has insisted that Sinn Féin must deliver some IRA decommissioning before its members can take seats in the Executive Committee. Under the Agreement, he has no constitutional warrant to exercise this veto: the Agreement does not require prior decommissioning on the part of any paramilitaries or of any parties connected to them before executive formation takes place—though it does require parties to use their best endeavours to achieve the completion of decommissioning within two years, that is, by 22 May 2000. Trimble has been given the opportunity to exercise this unconstitutional veto, which has led to a breach in the formal requirements of the Agreement, because the SDLP did not make immediate and full executive formation a condition of its support for the Mallon-Trimble ticket for Deputy First Minister and First Minister. The SDLP did so because it wished to shore up Trimble's political position. The price has so far been rather high, and it has yet to be repaid.

One flexible provision in the Agreement gave Trimble room for this manoeuvre. The Agreement states that there must be at least six 'Other Ministers', but that there can be 'up to' ten. The number of ministries is to be decided by cross-community consent, presumably after the First and Deputy First Ministers agree a proposal, and that has given Trimble the opportunity to delay on executive formation. The more Ministries there are in the Executive Committee, the more proportional the representation of parties on the Executive. Until 18 December 1998, the UUP held out for a seven seat Executive under which unionists would have had an overall majority.⁶ By contrast, the SDLP argued for a larger Executive in which nationalists would be better represented, and that has now been agreed. The two major parties have now agreed there will be ten Departments—and presumably ten Ministers in addition to the First and Deputy First Ministers. A moot issue as this article goes to press is whether executive formation can now go ahead 'automatically'—given the agreement on the number of Ministries. In principle, that is constitutionally speaking, it should. The UUP should be offered the first Ministry, and if it refuses to choose then the first choice would be passed to the SDLP. However, an executive without the UUP would make a nonsense of the Agreement, so Trimble will probably be able to maintain a political veto over including Sinn Féin—unless he has subjected to very powerful pressure from the two governments.

Imagine for the moment that the crisis of executive formation is eventually resolved—Secretary of State Dr. Mowlam hopes that this can be done by 10 March 1999. How will the Executive Committee work? Individual Ministers will enjoy executive powers under existing (UK) legislation, and can operate without collective

⁶ Under the 7 Ministries possibility, if the DUP had not taken its seats the UUP would have had 4 out of 7 departments, that is a majority of departments with just over one fifth of the vote, a grossly disproportional scenario.

executive immediately after the election of the First and Deputy First Ministers could precipitate a protracted crisis of executive formation.

Amendments to the Northern Ireland Act (1998) could be adopted by the UK Parliament, or by the Northern Ireland Assembly, that would be consistent with the Agreement, to prevent any recurrence of this type of crisis. In future, candidates for First Minister and Deputy First Minister could be obliged to state the number of executive portfolios that will be available in the Executive Committee, and the formation of that Committee should be required within a week. Otherwise, the election of the First Minister and Deputy First Minister should be rendered null and void. That would plug this particular constitutional hole. It may, however, be unnecessary. It is not likely that any future candidates for Deputy First Minister or First Minister will agree to be nominated without a firm agreement from their opposite number on the number of portfolios and the date of cabinet formation.

Proportionality

Consociational arrangements are built on principles of proportionality. The Agreement meets this test in three palpable ways: on the executive in the manner already discussed; in the elections to the Assembly; and in public sector positions.

All future elections to the 108 member Assembly will use a proportional representation 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 later. 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.⁸ Thus, the smaller of the two loyalist parties, the Ulster Democratic Party (UDP), led by Gary McMichael, won no seats in the first Assembly election. Conceivably, the rival loyalist parties, the DUP and the UDP, may see the need to coalesce in future 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 amongst the 'Others'.

This system of voting is not what Lijphart recommends for consociational systems—he is an advocate of party-list PR systems because he believes they help make party leaders more powerful, and better able to sustain inter-ethnic consociational deals. Those who would like to see David Trimble in greater control of his party, assuming that that is his problem, might hanker after this form of proportional representation.

⁸ The Droop quota used in STV is Total Vote $(N+1) + 1$, where N = Number of Assembly members to be elected.

First and Deputy First Ministers and Executive formation.

3) could be adopted in the Assembly, that would prevent any recurrence of the First Minister and Deputy First Minister and the number of Executive Committee members, and would be decided within a week. The First and Deputy First Ministers would plug this gap if necessary. It is not necessary for the First Minister or First Deputy Minister to agree to the date of the elections and the date of

of proportional representation in the following ways: on the date of the elections to the

will use a proportional vote (STV) in six constituencies. Voters will choose, by cross-voting, from this system a maximum of 14.3 per cent of the vote, or, alternatively, a smaller of the vote (the 'top-up'), led by Gary Adams. Conceivably, we will see the need to try small parties in the unionist and nationalist blocs. It is shown that the parties amongst

is for consociationalism because he is better able to see that that is his representation.

Number of Assembly

However, if a region-wide list-system had been in operation in June 1998, the UUP would have ended up with fewer seats, and less seats than the SDLP. Moreover, STV has the great merit of encouraging 'vote-pooling':⁹ in principle, voters can use their transfers to reward pro-Agreement candidates at the expense of anti-Agreement candidates.¹⁰ Some of the SDLP's and Sinn Féin's voters found it rational to reward David Trimble's Ulster Unionist Party 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 UKUP.¹¹

Tables 1 and 2 report the outcome of the June 1998 elections to the first Assembly under the Agreement. The proportionality of the results is evident, both with respect to blocs and with respect to parties. The deviations in seats won compared to the first-preference vote primarily benefited the pro-Agreement parties—whose candidates gathered support through the transfers of lower-order preferences. The UUP was the principal beneficiary of the transfer of lower-order preferences that 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! The Northern Ireland Women's Coalition was the most widespread beneficiary of lower-order preferences, winning two seats despite a very low first-preference vote share—its inclusive orientation towards both the loyalist and republican movements plainly paid electoral dividends. The 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) amongst seats won by unionists, a result that was essential for the stabilization of the Agreement.

Proportionality rules, combined with accommodative incentives, do not stop with the executive, the committee system in the Assembly, or with the electoral system. The Agreement is consistent with past and future measures to promote fair employment and affirmative action in the public sector that will, one hopes, eventually ensure a proportional and non-discriminatory civil service and judiciary. The Agreement also envisages a representative police force. It is the task

⁹ Donald Horowitz, *Ethnic Groups in Conflict*, Berkeley 1985, pp. 628 ff. The 'cross-community consent procedures' to elect the First and Deputy First Ministers require 'vote pooling' amongst Assembly members.

¹⁰ 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—should that party ever choose to stand for elections.

¹¹ The STV system has arguably helped encourage Sinn Féin to its current path: in the past it won few transfers from other parties' supporters. Since the early 1990s, that is no longer true because SDLP voters have been rewarding Sinn Féin for its increased moderation. STV also has the great merit of having been used in Northern Ireland for local government elections since 1973, and European Parliamentary elections since 1979—so voters do not need to learn a new system.

of the Independent Commission on policing, headed by former Hong Kong Governor Christopher Patten, to ensure the creation of a police service or services that are representative of Northern Ireland. The RUC's mono-national culture and, indeed, its monopoly on policing services must end if the Agreement is to be fully consistent with a consociational model. Democratic consociation cannot exist where those of military age in one community are almost the sole recruitment pool to police all of those in another community. A fully representative, and preferably two-tier model of federal and democratically accountable policing, is the best way to ensure that proportional policing supplements the other political institutions of the Agreement.¹²

Communal Autonomy and Equality

Consociational settlements avoid the compulsory integration of peoples; instead they seek to manage differences equally and justly. To be liberal or social-democratic, such settlements must also protect those who wish to have their identities counted differently, or not as collective identities.

The Agreement leaves in place the new arrangements for schooling in Northern Ireland in which Catholic, Protestant and integrated schools are to be equally funded. In this respect, Northern Ireland is fully consociational and liberal—only the very small minorities of non-Christian religious believers (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 numbers permit. The Agreement also makes new provisions for the educational use, protection and public use of the Irish language—along the lines used for Welsh in the UK—thereby adding linguistic to educational protections of Irish nationalist culture.¹³

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

¹² See John McGarry and Brendan O'Leary, *Policing Northern Ireland: A Fresh Start*, Belfast 1999.

¹³ It is significant that the European Charter for Regional or Minority Languages could be accepted by both nationalists and unionists as a basis for regulating the politics of language. See *Statement of the Office of the First Minister (Designate) and Deputy First Minister (Designate)*, 18 December 1998, Annex 2.

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A Fresh Start, Belfast

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Table One. The Shares of Blocs in the 1998 Assembly
(*Percentages do not add to 100 because of rounding)

Party	Seats Won	First Preference Vote (%)	Seats Won (%)
Nationalists	42	39.8	38.8
'Yes' Unionists	30	25.0	27.7
'No' Unionists	28	25.5	25.9
Others	8	9.4	7.4
Total(s)	108	*100.0	*100.0

Table Two. Party Performances in a 1998 Assembly Election
(*Percentages do not add to 100 because of rounding)

Party	Seats Won	First Preference Vote (%)	Seats Won (%)
SDLP	24	22.0	22.2
Sinn Féin	18	17.7	16.6
Other Nationalists	-	0.1	-
UUP	28	21.0	25.9
PUP	2	2.5	1.8
UDP	-	1.2	-
Other 'Yes' Unionists	-	0.3	-
DUP	20	18	18.5
UKUP	5	4.5	4.6
Other 'No' Unionists	3	3	2.8
Alliance	6	6.4	5.5
Women's Coalition	2	1.7	1.9
Other	-	1.3	-

The Agreement does not neglect the non-national dimensions of local politics, nor does it exclude the 'Others' from what I have heard described in Alliance party circles as a squalid communal deal. All aspects of unjustified social equalities, 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, which is to say, 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, the UK Government has created a new statutory obligation on public authorities: they will be required to carry out all their functions with due regard to the need to promote equality of opportunity in relation to people's religious background and political opinions; and with respect to their gender, race, disabilities, age, marital status and sexual orientation. This commitment entails what Dr. Christopher McCrudden labels 'mainstreaming equality'. The UK Government is also establishing a Human Rights Commission tasked with an extended and enhanced role, including monitoring, the power to instigate litigation, and drafting a tailor-made Bill of Rights for Northern Ireland.

Certain doctrinaire new-right libertarians and some rigid socialists converge in complaining that consociational arrangements necessarily institutionalize and freeze national and sectarian identities. Their fears are not entirely without merit, but their criticisms generally display utopianism, myopia and tacit partisanship. Utopianism is evident in the axiom that identities as historically developed as those in Northern Ireland can be rapidly channelled into more desirable individualist or class identities through mass endorsement of classical liberal or socialist ideology. Myopia is evident in the failure to recognize that consociational settlements can, and indeed should, be transitional—by protecting and making secure the most presently dominant identities they may assist in diminishing their public salience, and permitting a deeper pluralism to flourish. And tacit partisanship is evident in those critics of consociation who either recommend Northern Ireland's complete integration into British politics or alternatively commend immediate Irish unification as the best solvent of national or sectarian passions.

Minority Veto Rights

The final dimension of a consociational settlement is the protection of minorities through giving them veto rights. The Agreement fulfils this criterion in the Assembly, in the courts, and through enabling political appeals to both the UK and Irish Governments.

The Assembly has cross-community procedures (parallel consent, weighted majority and petition procedures—see Insert 1) that protect nationalists from unionist dominance. Indeed, they do so in such a comprehensive manner that, before the election of the First

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and Deputy First Ministers, there were fears that the rules designed to protect the nationalist minority might be used by hard-line unionist opponents of the Agreement to wreck its initiation and development. (This possibility remains alive, but is somewhat diminished because the weighted majority rule in the Assembly requires a lower level of unionist consent than was required for the election of the First and Deputy First Ministers). The 'Others' are less well protected in the Assembly—they can be outvoted by a simple majority, and any nationalist-unionist super-majority, and their numbers leave them well short of being able to trigger a petition on their own. However, the 'Others' have not been at the heart of the conflict, so 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 from the Agreement.

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 Rights Commission will recommend. What has also not been addressed directly and immediately is the composition of the local judiciary. The Agreement provides for a review of the criminal justice system that will include 'arrangements for making appointments to the judiciary', but it will be a vital part of embedding the settlement that the judiciary reflects the different communities in the North and is committed to the human and minority rights provisions that it will increasingly interpret.

Other non-national minorities have not been forgotten. In the civil society forum to be created in the North, with a Southern counterpart, and through the Inter-Governmental Conference of the British and Irish Governments, mechanisms have been established to ensure that others will be able to express their voices and ensure that the new 'rights culture' does not exclude them. It would be helpful if progress in establishing these forums were expedited.

Confederal and Federal Elements of the Agreement

The Agreement is not only internally consociational: it is also confederalizing, and federalizing. This meshing of internal and external institutions marks it out as novel in comparative politics. Let me make it plain why I regard the Agreement as both confederalizing and federalizing, though my emphasis is on the former.

Confederations exist when political jurisdictions voluntarily delegate powers and functions to bodies that can exercise power across all jurisdictions. The Agreement creates two such confederal relationships. The Agreement has subtle federalist dimensions if it is agreed that a federal relationship exists when there are at least

two separate tiers of government over the same territory, and when neither tier can unilaterally alter the constitutional capacities of the other.¹⁴

The All-Ireland Confederal Relationship

The first relationship is all-Ireland in nature: the North-South Ministerial Council (NSMC). When established it will bring together those with executive responsibilities in Northern Ireland and in the Republic. It was to be established after the Assembly had come into being and had completed a programme of work to establish the Council—the specific deadline for that body of work to be agreed passed on 31 October. That date passed without agreement, because no executive has been formed in Northern Ireland to engage with its counterpart in the Republic. In consequence, the signatories to the Agreement were in breach of their treaty obligations. That opened the entire Agreement to constitutional challenge in the Republic—enabling, *in extremis*, any aggrieved citizen to argue for the retention of the old Articles 2 and 3 of the Irish Constitution on the grounds that the UK is in breach of its treaty obligations.

The Governments and the parties in the North by-passed the crisis of executive formation by continuing to address the body of work in continuing dialogues with the pro-Agreement parties. By 18 December, the parties in the North agreed on six implementation bodies for the following functions—inland waterways, food safety, trade and business development, special EU programmes, the Irish and Ulster Scots language, and agricultural and marine matters; and they agreed on six areas for functional co-operation including some aspects of transport, agriculture, education, health, the environment, and tourism—where a joint North-South public company is to be established.

What was intended by the Agreement was clear. Nationalists were concerned that if the Assembly could outlast the North-South Council, it would provide incentives for unionists to undermine the latter. Unionists, by contrast, worried that if the Council could survive the destruction of the Assembly, nationalists would seek to bring this about. The Agreement is a tightly written contract with penalty clauses. Internal consociation and external confederalism go together. The Assembly and the Council are 'mutually interdependent'; one cannot function without the other. Unionists cannot destroy the Council while retaining the Assembly, and nationalists cannot

¹⁴ My definition is certainly a necessary element of a federal system. Whether it is sufficient is more controversial. Normally, people expect a federation to have sub-central units of government that are co-sovereign with the centre throughout most of the territory of the state in question. However, any system of constitutionally entrenched autonomy for one region makes the relationship between that region and the centre functionally equivalent to a federal relationship. My thanks to John Coakley, Robert Hazell and Paul Mitchell for discussion of these matters.

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destroy the Assembly while keeping the Council.¹⁵ If the Assembly does not create the Council, it will in effect destroy itself—enabling, in the extreme case, any citizen in Northern Ireland to argue for the suspension of the Northern Assembly until the North-South Ministerial Council is established.

The North-South Ministerial Council is the means by which nationalists hope to persuade unionists of the attractions of Irish unification; and it will, if established, satisfactorily link Northern nationalists to their preferred nation-state, albeit without the range of ambitions that Northern nationalists would have preferred. Consistent with the Agreement, the Irish Government has agreed to change its constitution to ensure that the North-South Ministerial Council will be able to exercise island-wide jurisdiction in those functional activities where unionists are willing to co-operate.

The North-South Ministerial Council will function much like the Council of Ministers in the European Union, with ministers having considerable discretion to reach decisions, but remaining ultimately accountable to their respective legislatures. The Council will meet in plenary format twice a year, and in smaller groups to discuss specific sectors—say, agriculture, or education—on a 'regular and frequent basis'. Provision is also made for the Council to meet to discuss matters that cut across sectors, and to resolve disagreements. In addition, the Agreement provides for cross-border or all-island 'implementation' bodies—which means the same as 'executive'. These are to be responsible for implementing decisions taken in the six areas specified above.

The North-South Ministerial Council differs from the Council of Ireland of 1974, and not just in name. There is no provision for a North-South joint parliamentary forum, as there was in the Sunningdale Agreement of 1973, but the Northern Assembly and the Irish *Oireachtas*¹⁶ are asked 'to consider' developing such a forum. Nationalists wanted the North-South Council to be established by legislation from Westminster and the *Oireachtas*—to emphasize their autonomy from the Northern Assembly. Unionists preferred that it be established by the Northern Ireland Assembly and its counterpart in Dublin. The document produced on 10 April 1998 split the

¹⁵ The Agreement does not mention what happens if both institutions, and therefore the Agreement itself, collapses. 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 the promotion of national equality, reductions in the employment gap between Catholics and Protestants, and the reform of policing; and eventually shift towards direct co-sovereignty over the region. If the Agreement's core institutions are not established then any legal challenge to the implementation of changes to Articles 2 and 3 of the Republic's constitution is likely to be successful. Unionists opposed to the Agreement would do well to bear these considerations in mind.

¹⁶ This is the collective name in Gaelic for the two chambers of the Irish Parliament, *Dáil Éireann* and *Seanad Éireann*.

differences between the two positions. The North-South Council and the implementation bodies are to be brought into existence by British-Irish legislation. During the transitional period—now extended beyond 31 October—it is for the Northern Ireland executive and the Republic's government to decide, by agreement, how co-operation should take place, and in what areas the North-South institutions should co-operate. Once this body of work is agreed, the Northern Ireland Assembly will be unable to change it, unless both communities there consent.

An Open Question

The question of what scope and powers these North-South institutions will have remains open-ended. The Agreement does, however, require a meaningful Council. It states that the Council 'will' (not 'may') identify at least six matters, where 'existing bodies' will be the appropriate mechanisms for co-operation within each separate jurisdiction, and at least six matters where co-operation will take place through cross-border or all-island implementation bodies. Agreement on these matters has now occurred.

The Agreement also links Ireland, North and South, to another confederation, the European Union. It requires the Council 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. It is perhaps significant that one of the implementation bodies will address special EU programmes.

The signatories to the Agreement have promised to work 'in good faith' to bring the North-South Council into being. There was not sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement, but that has now been resolved. The signatories are required to use 'best endeavours' to reach agreement and to make 'determined efforts' to overcome disagreements in functions where there is a 'mutual cross-border and all-island benefit'.

The crisis over executive formation may, however, have long-run consequences. The Agreement explicitly envisaged a timetable that would have enabled an interim Northern executive to establish itself and make binding agreements with the Republic's ministers. Once North-South co-operation was agreed, any future unionist majority in the Assembly would not be able formally to block it—since any scaling back of the Council's powers would require the consent of both nationalists and unionists.¹⁷ Nationalists are beginning to fear

¹⁷ The possibility of a unionist Minister refusing to serve on the Council will appear to some as very grave, given that unionist parties which oppose the Agreement, especially the DUP, are, in principle, eligible for ministerial portfolios. However, this may be ruled out in practice: participation in the North-South Council has been made an 'essential' responsibility attaching to 'relevant' posts in the two Administrations ('relevant' means,

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that the crisis of executive formation will throw the entire content of North-South co-operation open to the veto of both 'no unionists' and soft 'yes unionists' in the Assembly—which is now due to have a full life by March of 1999.

But, again, let us imagine that this crisis is eventually overcome. If that happens, then several current facts will support the new constitutional confederalism. If the expansive prosperity of the Republic's Celtic Tiger establishes deep roots,¹⁸ Northern Ireland's Ministers and citizens, of whatever background, should see increasing benefits from North-South co-operation. And, as the European Union continues to integrate, there will be pressure for both parts of Ireland to cooperate, 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.¹⁹

The British-Irish Confederal Relationship

There is a second weaker confederal relationship established by the Agreement. It affects all the islands of Britain and Ireland. Under the new British-Irish Council, the two sovereign Governments, all the devolved governments of the UK, and all the neighbouring insular dependent territories of the UK, can meet, 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 may in future be linked to the UK even if Northern Ireland becomes part of the Republic of Ireland.

Unionists originally wanted any North-South Ministerial Council to be subordinate to a British-Irish, or East-West, Council. This has not happened. There is no hierarchical relationship between the two Councils. Indeed, there are two textual warrants for the thesis that the North-South Council is more important and far-reaching than its

presumably, any portfolio a part of which is subject to North-South co-operation). This leaves open the possibility that a politician opposed to the North-South Council might take a seat on it with a view to wrecking it. *But* Ministers are required to establish the North-South Institutions in 'good faith' and to use 'best endeavours' to reach agreement. Since these requirements are presumably subject to judicial review, it means it is unlikely that potential wreckers, like Ian Paisley or Peter Robinson, would be able to take part in the North-South Council, even if they wanted to. 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. Whether these provisions will be justiciable remains to be seen.

¹⁸ The Republic's prosperity has, of course, been uneven in its distribution, but seems unlikely simply to wither, even if there is retrenchment within the European Union's structural and regional funds.

¹⁹ The Agreement suggested that Northern Ireland could, in principle, even go into EMU with the Republic, if Britain itself remained outside—providing there was agreement in the Assembly, and the Secretary of State and the Westminster Parliament assented. The UK Northern Ireland Act may have closed this possibility by describing currency as a 'reserved matter'.

British-Irish counterpart. The Agreement requires the establishment of North-South implementation bodies, while leaving the formation of East-West bodies a voluntary matter. While the Agreement states explicitly that the Assembly or North-South Council cannot survive without the other, it makes no equivalent statement concerning the British-Irish Council.

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 British-Irish Council may, however, flourish as a policy formulation forum, especially if the devolved governments of the UK choose to exploit it as an opportunity for inter-governmental 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 processes.

A UK-Northern Irish Federalizing Process

The Agreement is the penultimate blow to unitary unionism in the UK—already dented by the 1997–98 referendums and legislative acts establishing a Scottish Parliament and Welsh Assembly.²⁰ But does the Agreement simply fall within the 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 now very distinctly different to the former.

The Agreement is a treaty between two states, and it is based on Irish national self-determination as well as British constitutional convention. The UK officially acknowledges in the Agreement that Northern Ireland has the right to join the Republic, on the basis of a local referendum, and it recognizes, in a treaty, the authority of Irish national self-determination throughout the island of Ireland. Moreover, the Agreement's institutions are being brought into being by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland—recall the interdependence of the North-South Ministerial Council and the Assembly. Consequently, the UK's relationship to Northern Ireland, *at least in international law*, is explicitly federal because the Westminster parliament and executive cannot, except through breaking treaty obligations, and except through denying Irish national self-determination, exercise power in any manner in Northern Ireland that is inconsistent with the Agreement.

This federalizing process will be enhanced if the UK and Northern Irish courts treat Northern Ireland's relationships to Westminster

²⁰ The formation of an English Parliament would be the last blow.

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as akin to those of the former Dominions—which had a federal character—as they did in the period of the Stormont Parliament (1921–1972). Moreover, the nature of devolution in Northern Ireland is not closed by the UK's 1998 Northern Ireland Act. The Act has 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 viable, provided there is agreement to that within the Northern Assembly. Legalist Diceyians will insist that Westminster's sovereignty in Northern Ireland remains ultimately intact, but, if the Agreement beds down, the political development of a federal relationship between the UK and Northern Ireland is assured for the medium-term—whatever is said in the dry recesses of the Constitution's *ancien régime*.

Irish Federalizing Processes

The Agreement also opens federalist avenues in the Republic of Ireland—hitherto one of the most centralized states in Europe. The North-South Ministerial Council 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 by 'no unionists', but they are not wrong in their calculation that many nationalists see the North-South Council as 'transitional'—Sinn Féin says so; Fianna Fáil says so.

Neither the Irish Government nor its people abandoned Irish unification when they endorsed the Agreement. Indeed, it has become 'the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognizing that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people expressed, in both jurisdictions in the island' (from the new provisional Article 3). The amended Irish Constitution therefore officially recognizes *two* jurisdictions that jointly enjoy the right to participate in the Irish nation's exercise of self-determination. Unification is no longer linked to 'unitarism' and is 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.²¹ The nature of any eventual unification envisaged in the re-drafted Irish

²¹ See John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images*, Oxford 1995, ch. 10. See also Brendan O'Leary and Geoffrey Evans, 'Northern Ireland: La Fin-de-Siècle, the Twilight of the Second Protestant Ascendancy and Sinn Féin's Second Coming', *Parliamentary Affairs*, vol. 50, no. 4, 1997, pp. 672–80.

Constitution is now very different. It no longer has anything resembling a programme of assimilation. Respect for 'the diversity of... identities and traditions' connects with both consociational and con/federal logic. The Republic, I maintain, is bound by the Agreement to structure its laws, and its protection of rights, to prepare for the possibility of a con/federal as well as a unitary Ireland. The Agreement recognizes Northern Ireland 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 hÉireann*.²² The Agreement also envisages the subjection of both jurisdictions in Ireland to the same régime for the protection of individual and group rights—a situation entirely compatible with a subsequent formal confederation or federation.

It is perhaps worth speculating on what might happen if a majority emerged for Irish unification within Northern Ireland. If nationalists acquired local majority support within Northern Ireland, 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 an interest in preserving Northern Ireland as a political entity within a federated Ireland—after all, they would be a local majority. So would the governing coalition in the Republic, whose calculations might be disturbed by the entry of Northern participants. Conversely, some unionists faced with this prospect might prefer a unitary Ireland as the lesser evil—calculating that their chances of being key players in government formation in a bigger arena might protect them better than being a minority in Northern Ireland. But that is simply one possible future.

Meanwhile, we all know that 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 contradictions that will arise from this extra layer of con/federalizing, and they might help to transfer some of the heat from binary considerations of whether London or Dublin controls a given issue.

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 Agreement promises to entrench the identical protection of rights, collective and individual, on both sides of the present border. In effect, it promises protection to Northern nationalists now on the same terms that will be given to Ulster unionists, should they ever

²² *Constitution of Ireland*, Dublin 1937, as amended.

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become a minority in a unified Ireland. Communities are to be protected whether they are majorities or minorities, and whether sovereignty lies with the UK or the Republic—whence the expression 'double' protection.

The two states not only promise reciprocity for the local protection of present and future minorities, but have also created two intergovernmental devices to protect those communities. One is the successor to the Anglo-Irish Agreement, the inter-governmental conference that guarantees the Republic's government access to policy formulation on all matters not (yet) devolved to the Northern Assembly or the North-South Ministerial Council. The other is the British and 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 fora.

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 a North-South Council. This claim is, at best, exaggerated. Under the new Agreement, the Irish government will retain a say in those Northern Irish matters that have not been devolved to the Northern Assembly, as was the case under Article 4 of the Anglo-Irish Agreement. And, as with that agreement, there will continue to be an intergovernmental conference, chaired by the 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. The new Agreement, moreover, promises to 'intensify co-operation' 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 executive. It is true that there is provision for representatives of the Northern Assembly to be involved in the intergovernmental conference—a welcome democratization—but they will not be able to block the two governments from acting within their remits. The Anglo-Irish Agreement fully anticipated these arrangements.²⁵ Therefore, it is more accurate to claim that the Anglo-Irish Agreement has been fulfilled, than it is to say that it has been removed.

The Military and Political Nature of the Agreement

The institutional nature of the Agreement is complex, but accurately matches the conceptual categories I have deployed. There is no need to evolve new terms for what has been agreed—except, perhaps, for what I have called the 'double protection' model. The Agreement is wide-ranging, multilateral, and has something in it for everyone who

²⁵ See Brendan O'Leary and John McGarry, *The Politics of Antagonism: Understanding Northern Ireland*, London 1996, second edition, chs. 6–7.

signed it. Its institutions address the 'totality' of relationships between nationalists and unionists in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain. It is neither a victory for nationalists, nor for unionists. Both can maintain their central aspirations, their core identities and protect or express better their interests. But describing constitutional architecture is one thing; informal political reality is often very different.

The Agreement may be an immensely subtle institutional construction but 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 hard-line 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, as the fracas at Drumcree 4 in July, the massacre at Omagh in August, and the continuing crisis over executive formation and decommissioning jointly reveal. However, there are reasons to be cheerful about the robustness of these institutions if we analyze the military and political nature of the settlement. There are also reasons to be cautious.

The Agreement on Ending the Armed Conflict

The Agreement is a political settlement that promises a path to unwind armed conflict, and thereby create a peace settlement—though, formally speaking, no military or paramilitary organizations negotiated the Agreement. The Agreement encompasses decommissioning, de-militarization, police reform and prisoner release. It addresses these issues in this textual order, and it is plain that, though all these issues are inter-linked, they are not explicitly tied to the construction or timing of the new political institutions.

Decommissioning

The Agreement is clear on decommissioning. No paramilitaries that abide by the Agreement have to engage in formal surrender to those they opposed in war. The Independent International Commission on Decommissioning, chaired by Canadian General John de Chastelain, is to assist the participants in achieving 'the total disarmament of all paramilitary organizations'. The parties that (informally) represented paramilitary organizations in the negotiations are required to 'use any influence they may have to achieve the decommissioning of all paramilitary arms *within two years* following endorsement in referenda North and South of the Agreement and *in the context of the implementation of the overall settlement*'.²⁴

The italicized passages clarify the termination point for decommissioning, not the moment of commencement, and they make it clear

²⁴ *The Agreement*, page 20, para. 3, emphasis mine.

that decommissioning structures reform. The start to deconstruct the North in the text of the Agreement, North, not the co-operation nominated in the Agreement issued a statement for the first time in the Real IRA, even assisted in the negotiation of senior colonels. The evidence is merely leading to only one conclusion: the formation of decommissioning would mean they had both parts.

De-Militarization

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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 David Trimble's demand that Sinn Féin achieve a start to decommissioning by the IRA before executive formation in the North is 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 require the co-operation of the local parties can get underway. Sinn Féin has nominated a representative to the International Commission; it has issued a statement to the effect that the war is over; and it has for the first time issued an outright condemnation of other republicans—of the Real IRA, whose members carried out the Omagh bombing. It is even assisting ETA in its organization of a cease-fire and political negotiations in Spain. Evidently, David Trimble and some of his senior colleagues are unprepared to regard this activity as sufficient evidence of good intentions. Each move on Sinn Féin's part has merely led the UUP to request more. On the basis of current postures, only one obvious resolution of this crisis presents itself: executive formation to be announced in the morning, material progress on IRA decommissioning to be announced in the afternoon. This resolution would mean that both the UUP and Sinn Féin could maintain that they had kept to the letter and spirit of the Agreement. But, for now, both parties remain locked in escalating brinkmanship.

De-Militarization, Police Reform and Prisoner Release

The Agreement promises and the UK government has begun a series of phased developments to 'de-militarize' Northern Ireland. 'Normalization' is explicitly promised; reductions in army deployments and numbers, and the removal of security installations and emergency powers are pledged 'consistent with the level of overall threat'. There is 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.²⁵

It was decided to address police reform through an Independent Commission.²⁶ It must report by the summer of 1999. Its terms of reference require it to propose how to establish 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'.²⁷ This Commission is to report a year before decommissioning is to be finished. It is difficult to believe that the choice of this timing on the part of the makers of the Agreement was an accident. Plainly, the

²⁵ *The Agreement*, p. 21, paras. 1–4.

²⁶ See McGarry and O'Leary, *Policing Northern Ireland*.

²⁷ *The Agreement*, p. 22, paras. 1–2.

public outline of police reform is intended to be available as a confidence-building measure for nationalists before the major part of republican decommissioning can be expected. Bringing forward this outline fast might be one way to resolve the crisis of executive formation—though the necessary radicalism of police reform will be difficult for David Trimble and his colleagues to swallow.

The early release of paramilitary prisoners sentenced under scheduled offences, and of a small number of army personnel imprisoned for murders of civilians, has 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 also worked in creating incentives for some ultra paramilitary organizations, for example, the Loyalist Volunteer Force, to agree to establish a cease-fire in order to benefit their prisoners, and, in the case of the UVF, to open the first of what is hoped to be a series of decommissioning moves.

The Political Nature of the Agreement

So there is an agreement on how to unwind the military and paramilitary conflict. Movement is taking place on some dimensions, but not on others. Before we address the obstacles to a final resolution, let us examine, briefly, the political nature of the Agreement. The Agreement is based on multiple forms of recognition—including recognition of the balance of power. It is an act of statecraft, but it is also based on hard-headed calculations, not pious sentiments.

Recognition. The Agreement is 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 United Kingdom has recognized the right of the people of Ireland to exercise their national self-determination, albeit conjointly and severally. It has confirmed that Northern Ireland has the right to secede, by majority consent, to unify with the Republic of Ireland. The Republic of Ireland has recognized 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 recognized the paramilitaries that have organized cease-fires as political agencies. It has not required them to surrender to their respective authorities and has accepted the release of their prisoners on the assurances of their organizations' cease-fires. The paramilitaries on cease-fires have, with some minor exceptions, recognized one another. Unionists have recognized nationalists as nationalists, not simply as Catholics or as the minority. Nationalists have recognized unionists as unionists, and not just as Protestants. Nationalists and unionists have recognized 'others'—who are neither nationalists nor unionists. There is just no shortage of recognition: contemporary

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Northern Ireland would warm the cockles of Hegel's and Charles Taylor's hearts.²⁸

Balance of Power. The Agreement also rests 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 a military stalemate and a political stalemate. But there were also structural changes beneath the 'frozen surface' that were noted by John Whyte in his last essay.²⁹ These included, greater equality of opportunity and self-confidence amongst nationalists, and a shift in the demographic (and therefore) electoral balance of power between the communities—together, these changes underlined the fact that any political settlement could not return nationalists to a subordinate status. The initiative of John Hume and Gerry Adams constructively responded to this new stalemate. Much work had to be done before their initiative bore fruit.

The Bargain. There is a bargain at the heart of the Agreement. Nationalists have endorsed it because it promises them political, legal and economic equality now, plus institutions in which they have a strong stake, with the possibility of Irish unification later. They get to co-govern Northern Ireland, rather than being simply governed by either unionists or the British government. Moreover, they get 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 can trade 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.

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 plus bargain, this pact with the nationalist devil? The charms and latent threats of Tony Blair and Bill Clinton, the diplomacy of George Mitchell, and the process of multi-party inclusive negotiations are not enough to account for David Trimble's decision to lead his party where it was most reluctant to go, nor do these factors allow for his intelligence.

²⁸ For sophisticated discussions of recognition, see *inter alia*, Erik Ringmar, *Identity, Interest and Action: A Cultural Explanation of Sweden's Intervention in the Thirty Years War*, Cambridge 1996 and Charles Taylor, *Multiculturalism and the Politics of Recognition*, Princeton 1992.

²⁹ John Whyte, 'Dynamics of Political and Social Change in Northern Ireland', in *Northern Ireland and the Politics of Reconciliation*, edited by Dermot Keogh and Michael Halzfel, Cambridge 1993, pp. 103–16.

In my judgement, the unionists who supported the Agreement were concerned not so much to end the IRA's long war, but rather to protect and safeguard the Union. Their calculi 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 power. Unionists would get a share in self-government now, avoid the prospect of a British Government making further deals over their heads with the Irish State, and have some prospect of persuading Northern nationalists that a newly reconstructed Union offers a secure home for them. They made an Agreement to stave off something worse.

Ideas. Recognizing identities and interests are necessary but not sufficient conditions of a constitutional settlement. Ideas, however loosely understood or flexibly deployed, were also important in the making of the Agreement. Their development, dissemination and impact is harder to trace, but that does not mean the task cannot be accomplished. Fresh language and policy learning were evident in the making of the Agreement—though so were policy obstinacy and recalcitrance within the highest echelons of the dying Major government and of the spread-eagled rainbow coalition in Dublin during 1995–97. The crafters of the ideas were many and varied—including politicians, public officials and many unofficial advisers. Defining 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 of 1995, 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 as a bargain 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 just any type of consociational model, like that of Lebanon, vulnerable to the slightest demographic transformation in the make-up 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: in other words, both have reasons to act creatively on the basis of self-fulfilling prophecies. The treat of the double protection model is that it eases

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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 in and over Northern Ireland.

There will, of course, be difficulties ahead, but Northern Ireland has a new, if slightly precarious and slightly unbalanced, bi-national super-majority. The Assembly and its Executive Committee can work, and become mechanisms for accommodating the diverse peoples of the North. There will be difficulties in agreeing a budget and a broad programme of government, and die-hards or kill-hards will be hoping to capitalize on them. Managing the twilight of the second Protestant ascendancy in Irish history, and the re-rustication of militant republicanism, are not easy tasks, but the Agreement may deliver many impossibilities before its first birthday.

The Politics of the Transition: Games of Unlikely Partners and the Temptations of 'Legalism'

Before the optimistic picture can materialize, much work remains to be done. The Agreement's political entrenchment requires 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 amongst the historically moderate nationalists and unionists, and Sinn Féin and the PUP/UDP amongst the now more moderate republicans and loyalists.³⁰ Maintaining 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 is the most likely short-term maximiser and game-player. The party split most under the impact of the making of the Agreement. It lost votes to the 'no unionists'; and it has lost some further dissenters that were elected on its platform. The temptation of its leaders is to re-negotiate the Agreement in the course of its implementation. That way they can hope to refortify the party, and draw off support from the 'soft no' camp amongst unionists. The UUP would have preferred an Agreement which was largely internal to Northern Ireland, and which involved them co-governing Northern Ireland with the SDLP. It would strongly prefer to govern Northern Ireland without the formal participation of Sinn Féin. Consequently, the UUP's most tempting game plan is to use the decommissioning issue to split what their supporters see as a pan-nationalist bloc. If they

³⁰ 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: 'no unionists', 'no loyalists' and 'no republicans'. The latter are in what Marxists used to call an 'objective alliance of reactionaries'.

achieve decommissioning they may reckon that they will split the republican base of Sinn Féin—and they can live with that; and, if they do not, they may think that they can sabotage the more radical agenda of the Agreement if they can retain British support on the issue of decommissioning. The temptation of the UUP is towards post-Agreement negotiation, motivated by an opportunism that is aggravated by perceived political weakness. The signs of this game will be a phoney 'legalism', adversarial and petty-minded interpretation of the Agreement, postponement and prevarication, and brinkmanship. These signs may appear familiar.

The other constellation is republican. Republicans, too, may be tempted to engage in game-playing, of a different kind. They can and may insist on the full letter of the Agreement to sustain their constituency and their long-term political strategy, even if this insistence creates great difficulties for the UUP and the SDLP, their informal partners. They may think they have an each-way bet. If the UUP delivers on the Agreement, well and good; if the UUP does not deliver, then Sinn Féin will position itself to ensure that unionists get the blame for its non-implementation. For hard-line republicans, non-implementation of the Agreement may provide a pretext for a return to war. In contrast, softer-liners will argue that any return to violence could only be sanctioned if governmental or loyalist forces were responsible for the first military breach, and many softer-liners would argue that republicans would have more to gain electorally both within Northern Ireland and the Republic through remaining a wholly constitutional opposition to a defunct Agreement. Sinn Féin may, ironically, be tempted by hard legalism—extracting the full letter of its contract with the UUP, at the risk of damaging the informal political coalition that made the Agreement.

To survive, this consociational and con/federal agreement therefore requires three things. First, immediate, daily, vigorous and continuing British and Irish oversight to encourage the Agreement's implementation before it is threatened by a constitutional time bomb in a Dublin Court. Though the Republic's referendum result enables the Irish Government to timetable some delays in implementing the Treaties that will complete the Agreement—and thereby activate the proposed changes to Articles 2 and 3 of its Constitution—the Supreme Court is unlikely to maintain that indefinite delay in establishing the Northern Assembly and the North-South Ministerial Council is compatible with what was endorsed by Irish citizens. The two governments must use all their available tools—from rhetorical appeals, through to politicians' salaries and expenses—to avoid such a juridical mess. Second, progress requires an immediate end to what appears to be a new meta-administrative principle being expressed by some officials in the Northern Ireland Office, that is that any disagreement over the meaning of the Agreement and its legislative encapsulation in UK law must be subject to cross-community consent procedures. If this does become official wisdom, then it will be an

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invitation to legalism on the part of parties tempted continually to re-negotiate the Agreement. Third, success requires greater recognition among the informal coalition partners, especially within the UUP and Sinn Féin, that they may benefit more in the long run from not seeking maximum short-run advantage from one another's difficulties and from not over-hyping their own. They should reflect on the fact that a Northern Assembly election is not required before 2002. The benefits of meeting these requirements will be demonstrated if two crises are resolved. One is the present crisis linking decommissioning and executive formation; the other is the widely anticipated future crisis over police reform. If these are not resolved, there will be a constitutional and policy mess that will require the making of another Agreement to end all Agreements. That should not be necessary. If these things are to be done, it were well that they were done quickly.

Appendix One.

The Mysterious Work of Viktor d'Hondt in Belfast

Viktor d'Hondt is the best answer to the Trivial Pursuit challenge to name a famous Belgian. He was a mathematician who devised a proportional method that is used for many purposes, including allocating political offices according to the shares of seats held by parties in the European Parliament. The method works by iteration, using a simple series of divisors, 1, 2, 3 etc. Rules like this are needed because assembly-persons do not come in convenient fractions. The table below shows how the allocation works, assuming parties have the seats displayed in Table 2 (above) and assuming all parties are willing and entitled to take their seats. The party with the largest number of seats, the UUP, must get the first Ministry, and then its seat share would then be divided by 2. We then look for the next largest number of seats, held by the SDLP, and they get the second Ministry. In Table 3 below 10 Ministries are allocated. The numbers in square brackets in the M columns indicate the order in which parties win Ministries of their choice, whereas S is the number of seats each party has during each stage of the allocation.

Table Three. The Distribution of Ministries (assuming all parties use their entitlements)

	UKUP		DUP		PUP		UUP		APNI		NIWC		SDLP		SF	
	S	M	S	M	S	M	S	M	S	M	S	M	S	M	S	M
1	5	-	20	[3]	2	-	28	[1]	6	-	2	-	24	[2]	18	[4]
2			10	[7]			14	[5]					12	[6]	9	[9]
3			6.6				9.3	[8]					8	[10]	6	
4			5				7						6		4.5	
All			20	2			28	3					24	3	18	2

Key: S=Seats, M=Ministries

³¹ At the beginning of 1999 Robert McCartney's UK Unionist Party split asunder, leaving McCartney isolated. His colleagues maintained, amongst other things, that he planned to withdraw the UKUP from the Assembly, an action that would have made matters easier for the pro-Agreement parties. One unionist journalist put it to me that 'Mr. McCartney's ideological problem is that he does not know with which part of Mr. Blair's disintegrating Kingdom he wishes to integrate'.

In this scenario, unionists are entitled to five Ministries (3 UUP and 2 DUP) and nationalists get five (3 SDLP and 2 SF). If, by contrast, the First Minister and Deputy First Minister had decided that there should only be six Ministries, then unionists would have three (2 UUP, 1 DUP) and nationalists would have three (2 SDLP and 1 SF). If they had opted for seven, the UUP's negotiating preference, then there would be four unionist Ministries and three for nationalists. What happens if the DUP does not take its Ministries because it will not accept the obligations of office? The results are shown below. If there are to be ten Ministries, then the UUP would win one more Ministry and the Alliance would win a Ministry. Nationalists would keep the same number of Ministries as before but improve their position in the 'pecking order', that is, the choice of ministries.

Table Four. The Allocation of Ministries (with a DUP boycott or exclusion)

	UKUP		DUP		PUP		UUP		APNI		NIWC		SDLP		SF	
	S	M	S	M	S	M	S	M	S	M	S	M	S	M	S	M
1	5	-	20	n/a	2	-	28	[1]	6	[10]	2	-	24	[2]	18	[3]
2			10	n/a			14	[4]					12	[5]	9	[7]
3			6.6	n/a			9.3	[6]					8	[8]	6	
4			5				7	[9]					6		4.5	
All			20	n/a			28	4	6	1			24	3	18	2

There is only one important ambiguity in the Agreement about how the d'Hondt rule will operate. Two possibilities exist. Either the First and Deputy First Ministers count as part of the allocation of Ministers, or they do not. If they do count, then, in the examples above, UUP would start the allocation with 27 seats and the SDLP with 23. In some possible scenarios, this method would have the important consequence of helping other parties. But if they do not count, as I think is the most reasonable reading of the text, then allocations would proceed as in the above examples.

The d'Hondt rule is also to be used to allocate Committee Chairs and Deputy Chairs. It would be fair to do so with the figures resulting from the subtraction of Ministers from parties' seats in the Assembly, but the Agreement is not clear on this. It is also not clear if the d'Hondt rule will be used to allocate all Committee places. I am assuming that that will happen—in which case some Committees may not have unionist majorities.

The UUP and the SDLP have provisionally agreed the creation of junior ministers—presumably to be allocated places on the d'Hondt rule. If so, then every major pro-Agreement party will have most of its members 'having prizes' of one sort or another—something which can only assist the cementing of the Agreement, and will provide incentives for a shift of posture on the part of ambitious anti-Agreement Assembly members. It will also mean that the new Assembly is likely to have a rather small part of its membership free for standard adversarial parliamentary debating in the classical Westminster mould. Perhaps that is also to the good.

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