because AV is a majoritarian and disproportional system, it would not be at all appropriate for Northern Ireland's polarized multi-party system. As we have already seen in relation to electoral turnout, the distribution of voters is such that many constituencies are predominantly unionist or nationalist. The imposition of a majority threshold by introducing AV would thus be highly unlikely to induce the vote pooling desired by Horowitz. Indeed, there are good reasons to believe that AV would reinforce communal polarization, so that the representation of minority communities would be reduced or even eliminated in many more constituencies than is the case under STV—in 1998 only West Belfast returned six members that were all from the same bloc.

37. Evans, G. and O'Leary, B., 'Northern Irish Voters and the British-Irish Agreement: Foundations of a Stable Consociational Settlement?', *The Political Quarterly*, 71 (2000): 78–101.
38. The SDLP informally recommended that their supporters transfer to pro-Agreement parties, though there was no formal transfer agreement with Sinn Féin despite Gerry Adams's call for one. Perhaps not surprisingly given the sharp competition with the DUP—and in the context of a first post-Agreement election—UUP leader Trimble did not recommend transfers to the SDLP. In these circumstances he probably did as much as he could by saying that UUP voters should make up their own minds on transfers on the basis of local circumstances (*Irish Times*, 24 June 1998).
39. However, note that the UUP has received significant to very dramatic seat bonuses in all Northern Ireland elections under a variety of electoral systems. The bonuses are of course larger with the plurality system (see Mitchell and Gillespie, 'The Electoral Systems', Table 4.4).
40. Evans and O'Leary, 'Northern Irish Voters and the British-Irish Agreement'.
41. *Ibid.*, 89–91.
42. *Ibid.*, 90.
43. Michael Gallagher has noted that due to a recent change of the electoral law in the Republic of Ireland, transfers are not always as informative as they used to be because returning officers are now permitted to perform multiple eliminations of candidates if their combined vote total is less than that of the next lowest placed candidate (Gallagher, 'The Results Analysed', 137). The consequence is that the origin of some transfers is indeterminate. Unfortunately, multiple eliminations are also permitted in Northern Ireland, though they were not all that frequent in 1998. The following results refer only to determinate cases.
44. Elliott and Smith, *Northern Ireland: The District Council Elections of 1989*, 36.
45. See *ibid.*, 35. The figures cited are determinate aggregate transfers—that is, transfers at any stage of the count—rather than terminal transfers when the party of the candidate making the transfer has no other party candidates remaining in the count.
46. In earlier decades Fianna Fáil on average retained around 82 per cent of its transfers (Gallagher, M., 'The Election of the 27th Dáil', in M. Gallagher and M. Laver (eds.) *How Ireland Voted 1992* (Dublin: Folens and PSAI Press, 1993), 57–78; Gallagher, 'The Results Analysed').
47. Evans and O'Leary, 'Northern Irish Voters and the British-Irish Agreement'.
48. Sinnott, 'Historic Day Blemished by Low Poll'.
49. We can also note the one case of a Sinn Féin terminal transfer in which the three candidates remaining in the count were unionists (Fermanagh South-Tyrone). 37 per cent transferred to the UUP candidate and only 6.2 per cent to the two 'No' unionists combined. Irrespective of whether one thinks this should be a pre-condition it is clearly a reality given political dynamics within the UUP.

4

The Character of the 1998 Agreement: Results and Prospects

BRENDAN O'LEARY*

Introduction

The 1998 Agreement was a major achievement, both for its negotiators and for the peoples of Ireland and Britain, emerging from a political desert whose only landmarks were failed 'initiatives'. The Agreement's proposed model of devolution was consociational, meeting the criteria specified by Arend Lijphart *namely*, cross-community executive power-sharing; proportionality rules throughout the governmental and public sectors; community self-government or autonomy and equality in cultural life; and veto rights for minorities.[1] A consociation is an association of communities, in this case British unionist, Irish nationalist, and others,[2] that is the outcome of formal or informal bargains or pacts between the political leaders of ethnic or religious groups. The Agreement was the product of both tacit and explicit consociational thought,[3] and of 'pacting' by most of the leaders of the key ethno-national groups and their respective patron-states.

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

The Internal Settlement: A Distinctive Consociation

The Agreement established a single chamber Assembly, and an Executive for Northern Ireland. The Assembly and Executive were to have full legislative and executive competence for economic development, education, health and social services, agriculture, environment, and finance (including the local civil service). Through 'cross-community agreement' the Assembly was entitled to expand these competencies; and, again through such agreement, and with the consent of the UK Secretary of State and the Westminster Parliament, the Assembly was entitled to legislate for any non-devolved reserved function. Maximum feasible devolved self-government[4] was therefore within the scope of the local decision-makers—and a convention might have developed in which the Secretary of State and Westminster 'rubber stamped' any measures of the Assembly.[5] Indeed it was conceivable that much public policy in Ireland, North and South, would eventually be made without direct British ministerial involvement—though the British budgetary allocation would be pivotal as long as Northern Ireland remains in the UK.

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

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

TABLE 4.1. *The shares of blocs in the 1998 Assembly*

Bloc	Seats won (N)	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	100

Key: 'Nationalists' include the SDLP (nationalist) and Sinn Féin (republican). 'Yes Unionists' supported the Agreement, and included the Ulster Unionist Party (UUP) and the Progressive Unionist Party (PUP). 'No Unionists' opposed the Agreement, and included the Democratic Unionist Party (DUP), the United Kingdom Unionist Party (UKUP) which has since split, and independent unionists. 'Others' include the Alliance party and the Women's Coalition.

Note: The voting system was the Single Transferable Vote in 18 six-member constituencies. Percentages do not add to 100 because of rounding.

that is, 65 members when all members vote, or 64 excluding the Speaker (Presiding Officer). And it required the support of 40 per cent of both nationalist and unionist members, that is, in the 1998–2000 Assembly at least 17 nationalists had to consent under this procedure, and at least 24 unionists. All nationalists (42) and the minimum necessary number of unionists (24) had the required combined support for any measure to pass in this way—without support from the 'others'. By contrast, all the others (8), and the minimum number of nationalists (17) and the minimum number of unionists (24), could not deliver a majority, let alone a weighted majority.

The election outcome suggested that pro-Agreement unionists (30) would be vulnerable to pressure from anti-Agreement unionists (28)—indeed one of the UUP's members (Peter Weir) subsequently resigned the party whip and from then on counted as a 'No Unionist'. Even without this resignation, just one UUP Assembly member could have refused to be part of the unionist majority necessary to work the parallel consent rule. But there was a little room for manœuvre. The UUP could have delivered a workable portion of a cross-community majority under the weighted majority rule, even with six dissidents—providing David Trimble, its leader, could be certain of the support of the two Progressive Unionist Party (PUP) Assembly members—which was likely—and providing that he could live with support from Sinn Féin—a much more uncomfortable prospect.

The cross-community consent rules were vital to the design of the internal consociation, but not entirely predictable. The UK legislation implied that the parallel consent procedure must be attempted first, and then the weighted majority procedure could be followed. The operation of the cross-community rules would have depended not just on how parties registered, but on how disciplined they would be—justified fears about disunity within the UUP acknowledged this fact.

There was, lastly, one super-majority rule that was not explicitly concurrent, cross-community, or consociational in nature. Post-Agreement it was decided that the Assembly might, by a two-thirds resolution of its membership, call an extraordinary general election before its statutory four-year term expired. This was agreed in preference to a proposal that the Secretary of State should have the power to dissolve the Assembly—a sign of the local parties' commitment to increasing their self-government rather than accepting continuing arbitration from Westminster. Subsequently, to suspend the Assembly the Secretary of State had to pass new primary UK legislation outside the remit of the Agreement—which is why Irish nationalists regarded the suspension as a breach of the Agreement.

Executive Power-Sharing

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

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

Government feared that Trimble would not have had sufficient support to return to office under the parallel consent rule. In fact the Assembly could have proposed, under its existing procedures, by weighted majority, an amendment to the procedures for electing the First and Deputy First Ministers—which Westminster could have ratified under the mechanisms discussed above—but this possibility was neglected.

This dyarchy, forged in the heat of inter-party negotiations, would have been a novel quasi-presidential development because, unlike executive presidencies, and unlike most prime ministers, neither the First nor the Deputy First Minister formally appointed the other ministers to the Executive Committee. Instead posts in the Executive Committee were to be allocated to parties in proportion to their strength in the Assembly, according to the d'Hondt rule. The premiers did, however, have implicit and explicit co-ordinating functions, as approved by the shadow Assembly in February 1999—see Wilford, in Chapter 6 of this volume.

The d'Hondt rule was fairly clear in its consequences: any party that wins a significant share of seats and is willing to abide by the new institutional rules has a reasonable chance of access to the Executive, a subtle form of Lijphart's 'grand coalition government'. It was a *voluntary* grand coalition because parties were free to exclude themselves from the Executive Committee, and because no programme of government had to be negotiated before executive formation. The initial design created strong incentives for parties to take their entitlement to seats in the executive because if they did not, their entitlement would go either to their ethno-national rivals, or to their rivals in their own bloc. The rules did not, however, formally require any specific proportion of nationalists and unionists. That was temporarily changed: in the course of the crisis over executive formation in the summer of 1999, the Secretary of State introduced a new rule requiring that a well-formed executive consist of at least three designated nationalists and three designated unionists.[7]

The d'Hondt rule meant that parties had the right to nominate ministers according to their respective strength in seats—no vote of confidence was required by the Assembly—and to choose, in order of their strength, their preferred ministries. An individual minister could be deposed from office, by cross-community rules, but the party that held the relevant ministry would have been able to appoint his or her successor from amongst its ranks—see Wilford, in Chapter 6 of this volume.

Crisis over executive formation was the first sign that the Agreement might falter. The crisis arose for political and constitutional reasons. Politically, because David Trimble insisted that Sinn Féin deliver some IRA decommissioning before its members would take their seats in the Executive Committee: 'no government before guns' became his party's slogan. Under the text of the Agreement Trimble had no constitutional warrant to exercise this veto:

1. No party was entitled to veto another party's membership of the Executive—though the Assembly as a whole, through cross-community consent, was free to deem a party unfit for office.
2. The Agreement did not require decommissioning before executive formation on the part of any paramilitaries or of any parties connected to them—though it did require parties to use their best endeavours to achieve the completion of decommissioning within two years, that is, by 22 May 2000. Indeed it was precisely this fact that prompted Jeffrey Donaldson to leave the UUP's negotiating team the day the Agreement was made.
3. Any 'natural' reading of the Agreement mandated executive formation as the first step necessary to bring all of the Agreement's institutions 'on line'.

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

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

The protracted crisis over executive formation was, in principle, resolved in mid-November 1999. Unionists accepted that executive formation would occur—with the IRA appointing an interlocutor to negotiate with the International Commission on Decommissioning (IICD)—while actual decommissioning, consistent with the text of the Agreement, would not be required until after executive formation. Senator George Mitchell in concluding his eleven-week review of the Agreement, and with the consent of the pro-Agreement parties, stated that 'Devolution should take effect, then the executive should meet, and then the paramilitary groups should appoint their authorized representatives, all on the same day, in that order'. This was an honourable resolution to what looked like becoming a fundamental impasse. However, to get it passed by the Ulster Unionist Council David Trimble felt obliged to give his party a post-dated resignation letter—which meant that if there was no IRA decommissioning reported by February 2000 the UUP would walk out of the executive. No such IRA decommissioning occurred, though the IRA did appear to clarify that decommissioning would occur. Fearful that Trimble could not be resurrected as First Minister, the Secretary of State Peter Mandelson sought new powers from Westminster and suspended the Executive and the Assembly.

The consociational criterion of cross-community executive power-sharing was clearly met in the Agreement, but there were special features of the new arrangements that differed from consociational experiments elsewhere. Ministers took a 'Pledge of Office', not an 'Oath of Allegiance'. This cemented the binationalism at the heart of the Agreement: nationalist ministers did not have to swear an Oath of Allegiance to the Crown or the Union. The Pledge required ministers to:

(1) discharge their duties in good faith;
(2) follow exclusively peaceful and democratic politics;
(3) participate in preparing a programme of government; and
(4) support and follow the decisions of the Executive Committee and the Assembly.

The duties of office included a requirement to serve all the people equally, to promote equality and to prevent discrimination—which means, according to the UK's doctrine of ministerial responsibility, that civil servants were bound to run their departments consistent with these obligations.[8] They included a requirement that the 'relevant Ministers' serve in the North-South Ministerial Council, a duty that, in conjunction with other clauses, was designed to prevent parties opposed to this aspect of the Agreement, such as the DUP, from taking office in good faith—*cf* Wilford, in Chapter 6 of this volume.

The special skill of the designers and negotiators of the Agreement was to create strong incentives for executive power-sharing and power-division, but without requiring parties to have any prior formal coalition agreement—other than the institutional Agreement—and without requiring any party to renounce its long-run aspirations. The dual premiership was designed to tie moderate representatives of each bloc together, and to give some drive towards overall policy-coherence. The d'Hondt mechanism not only ensured inclusivity but also saved on the transaction costs of bargaining over portfolios. Distinctive coalitions could form around different issues within the Executive, permitting flexibility, but inhibiting chaos—given the requirement that the budget be agreed by cross-community consent. In these respects and others the Agreement differed positively from the Sunningdale experiment.

What was not foreseen was that failure to timetable the formation of the rest of the Executive immediately after the election of the First and Deputy First

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

Forms of Proportionality

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

The Assembly's Committees

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

The Assembly's Election System: Corrections for Lijphart and Horowitz? Elections to the 108 member Assembly used a proportional representation system, the single transferable vote, STV, in eighteen six-member constituencies—though the Assembly could choose, by cross-community consent procedures, to advocate change from this system. The Droop quota in each constituency was therefore 14.3 per cent of the vote, which squeezed the very small parties, or, alternatively, encouraged them to form electoral alliances.[9] Thus, the smaller of the two loyalist parties, the Ulster Democratic Party (UDP), won no seats in the first Assembly election. However, minor parties which can gather lower order preferences from across the unionist and nationalist blocs, such as the Women's Coalition, have shown that the system need not preclude representation for small parties amongst the 'others'.

This voting system is not what Lijphart recommends: he is an advocate of party-list PR systems, principally because he believes they help make party leaders more powerful, and better able to sustain inter-ethnic consociational deals.[10] Those who would like to see David Trimble in greater control of his party might have hankered after Lijphart's preferred form of proportional representation. The Northern Ireland case, however, suggests that a modification of the consociational prescriptive canon is in order. Had a region-wide list-system been in operation in June 1998 the UUP would have ended up with fewer seats—fewer even than the SDLP—rendering the implementation of the Agreement even more problematic. There is a further and less contingent argument against party list-systems, especially important where the relevant ethnic communities are internally democratic rather than sociologically and politically monolithic. A region-wide party list election gives incentives for the formation of a wide variety of micro-parties. In Northern Ireland it would have fragmented and shredded the votes of the major parties which made the Agreement. Hard-liners under party-list systems have every reason to form fresh parties knowing that their disloyalty will penalize more moderate parties, but without necessarily reducing the total vote and seat share of the relevant ethno-national bloc. This objection to Lijphart's favoured prescription is not merely speculative. The 1996 elections to the Northern Ireland Peace Forum used a mixture of a party-list system and 'reserved seats'. Party-proliferation and the erosion of the UUP first preference vote[11] were some of the more obvious consequences.[12]

STV, of course, does not guarantee party discipline as multiple candidates for the same party in a given constituency may present different emphases on party commitments. Yet, combined with higher effective thresholds than under most forms of party-list PR, the system makes it more likely that parties will remain formally unified, and therefore able to make and maintain consociational deals. At the very least the prescriptive superiority of the party-list system for these purposes is unproven, and Lijphart's consistent counsel in this respect should be modified.[13]

As well as achieving proportionality STV has the great merit of encouraging inter-ethnic 'vote-pooling':[14] in principle, voters could have used their lower-order preferences (transfers) to reward pro-Agreement candidates at the expense

of anti-Agreement candidates.[15] In this respect STV looks tailor-made to achieve the 'inter-ethnic' and 'cross-ethnic' voting favoured by Donald Horowitz, a critic of consociational thinking but a strong advocate of institutional and policy devices to facilitate conflict-reduction.[16] Consistent, however, with his general premises, Horowitz believes that the STV system damages the prospects for inter-ethnic co-operation because the relatively low quota required to win a seat in six-member constituencies (14.3 per cent) makes it too easy for hard-line parties and their candidates to be successful.[17] He also thinks that the Agreement's other institutions, biased towards the key consociational partners—nationalists and unionists—compounded this effect by weakening the prospects of cross-ethnic parties, such as Alliance, which he believed impaired conflict-reduction.

The Northern Ireland case suggests that normative and empirical challenges to Horowitz's reasoning are in order. Horowitz would generally prefer the use of the Alternative Vote (AV) in single-member constituencies in Northern Ireland, as elsewhere, because its quota—50 per cent plus one—would deliver strong support to moderate ethno-national and cross-ethnic candidates. The problem with this prescription is straightforward. The outcomes it would deliver would be majoritarian, disproportional, and unpredictably so, and they would be disproportional both within and across blocs. They would, additionally, have much more indirectly 'inclusive' effects than STV. In some of Northern Ireland's constituencies there would be unambiguous unionist and nationalist majorities—and thus AV would lead to the under-representation of minority voters within these constituencies, and to local fiefdoms. Secondly, while candidates would have to seek support for lower-order preferences under AV, it would not be obvious that their best strategy would be to seek lower-order preferences across the ethno-national divide because the imperative of staying in the count would dictate building as big an initial first and second preference vote tally as possible.[18] Lastly, AV would never be agreed by hard-line parties entering a consociational settlement if they believed that it would be likely to undermine their electoral support. Since the Agreement was made possible by encouraging 'inclusivity', by facilitating negotiations which included Sinn Féin—the party that had supported the IRA—and the PUP and the UDP—the parties that had supported the UVF and the UDA—it would have been perverse for their leaders to have agreed an electoral system that minimized their prospects.

Indeed STV arguably worked both *before and after* the Agreement to consolidate the Agreement's prospects. It had helped to moderate the policy stance of Sinn Féin. After its first phase of electoral participation in elections in Northern Ireland in the 1980s, and in the Republic in the latter half of the 1980s, the party discovered that it was in a ghetto. Its candidates in some local government constituencies accumulated large numbers of first-preference ballot papers, only to remain unelected as a range of other parties' candidates overtook them to achieve quotas on the basis of lower-order preferences. They received very few lower order preferences from SDLP voters. But once the party moderated its stance, once it promoted the IRA's cease-fire(s), and became the champion of a peace process and a negotiated settlement, it found that its first-preference vote, its transfer-vote, and its seats-won all increased.

The constitutional design argument that can be extracted from this story is this: once there has been party fragmentation within ethno-national blocs then STV can assist accommodating postures and initiatives by parties and candidates, both intra- and inter-bloc.[19] Horowitz's electoral integrationist prescriptions are most pertinent at the formation of a competitive party system. However, once party formation and pluralism have occurred there will be few agents with the incentives to implement Horowitz's preferences, and if a third-party or outside power did so it would be a provocation to the less moderate parties, and would therefore most likely reignite ethno-national tensions.[20] This argument is, of course, a very qualified one: STV is certainly not enough, and it may not be appropriate everywhere. But it can help both to promote accommodative moves and consolidate consociational deals in ways that region-wide party-list systems and the AV system in single member districts cannot.

There has been some empirical confirmation of the merits of STV since the Agreement was made—see Mitchell, in Chapter 3 of this volume. 'Vote-pooling' occurred within the first Assembly elections—as we can surmise, to an extent, from actual counts[21] and, as Geoffrey Evans and I can confirm from a survey we helped design.[22] In our survey, approximately 10 per cent of each bloc's first-preference supporters gave lower-order preference support to pro-Agreement candidates in the other bloc. Within-bloc rewards for moderation also occurred: Sinn Féin won lower order preferences from SDLP voters, and the PUP had candidates elected on the basis of transfers from other candidates.

The *Northern Ireland Act* 1998 and the *Northern Ireland (Elections) Act* 1998 opened one novelty in the practice of STV in Ireland. Both Acts left it open to the Secretary of State to determine the method of filling vacancies: through by-elections, substitutes, or through whichever method the Secretary of State deems fit. By-elections are anomalous in a PR system.[23] A candidate who wins the last seat in a six-member constituency and who subsequently resigns or dies is unlikely to be replaced by a candidate of the same party or persuasion in a by-election—which becomes the equivalent of the alternative vote in a single-member constituency. The *Northern Ireland Assembly (Elections) Order* of 1998 provided for a system of alternates, or personally nominated substitutes with a provision for by-elections if the alternates system fails to provide a substitute. The disproportionality possibly induced by by-elections—with consequent unpredictable ramifications for the numbers of registered nationalists and unionists and the cross-community rules—needed to be engineered out of the settlement, and it was encouraging that the parties co-operated with this concern in mind.

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

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

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

Communal Autonomy and Equality

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

The Agreement left in place the recently established arrangements for primary and secondary schooling in Northern Ireland in which Catholic, Protestant, and integrated schools are equally funded. In this respect Northern Ireland is fully consociational but liberal—one can avoid Catholic and Protestant schools. The Agreement also makes new provisions for the educational use, protection, and public use of the Irish language—along the lines used for Welsh within the principality—thereby adding linguistic to educational protections of Irish nationalist culture.

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

The Agreement did not neglect the non-national dimensions of local politics, nor did it exclude the 'Others'. All aspects of unjustified social equalities, as well as inequalities between the national communities, were recognized in the text of the Agreement, and given some means of institutional redress and monitoring. The Agreement addresses national equality, the allegiances to the Irish and British nations, *and* social equality, that is, other dimensions that differentiate groups and individuals in Northern Ireland: religion, race, ethnic affiliation, sex, and sexuality. And equality issues, be they national or social, were not left exclusively to the local parties to manage and negotiate, which might be a recipe for 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 McCrudden labels 'mainstreaming equality'.[26] The UK Government has also established a Human Rights Commission under the Agreement, tasked with an extended and enhanced role compared with its predecessor, including monitoring, the power to instigate litigation, and drafting a tailor-made local Bill of Rights.

Minority Veto Rights

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

The Assembly has procedures—parallel consent, weighted majority, and the petition of concern—that protect nationalists from unionist dominance. Indeed they did so in such a comprehensive manner that the rules designed to protect the nationalist minority were deployed by hard-line unionist opponents of the Agreement to wreck its initiation and development. Indeed, their threatened use by 'No' unionists was the immediate excuse employed by the Secretary of State to suspend the Assembly. The 'Others' were less well protected in the Assembly—they could be outvoted by a simple majority, and any nationalist-

unionist super-majority, and their numbers left them well short of being able to trigger a petition on their own. However, the 'Others' were not at the heart of the conflict so it is not surprising that they were not at the heart of its pacts—though it is not accurate to claim that they were excluded.

In the courts, the 'Others', as well as disaffected nationalists and unionists, will have means to redress breaches of their human and collective rights. The content of the European Convention on Human Rights is well known. What is less clear is what package of collective rights the new independent Northern Ireland Human Rights Commission will recommend. But the new policing arrangements, if they follow the Patten Report, will be infused with a human rights culture see Walker, C. in Chapter 8 of this volume. The incorporation of the European Convention into public law, and Northern Ireland's forthcoming provisions to strengthen the rights of national, religious, and cultural minorities, will ensure that policing arrangements have to perform to higher standards.

The Agreement provided for a review of the criminal justice system that would include 'arrangements for making appointments to the judiciary'. It was a vital, though delayed, part of embedding the settlement that a judicial appointments body ensure that the judiciary reflected, meritoriously, the different communities in the North, and be committed to the human and minority rights provisions that it will increasingly interpret. The Criminal Justice Review which made these recommendations was published late, after the suspension of the Assembly—its lateness apparently the product of resistance to possible 'read across' effects in Scotland and Wales.

Non-national minorities were not forgotten. A civil society forum was to be created in the North, with a Southern counterpart, and through the Intergovernmental 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.

The External Settlement: Confederal and Federal Elements

The Agreement was not, however, only internally consociational: it was also externally confederalizing, and federalizing, and as such is novel in comparative politics. Let me make it plain why the Agreement is both confederalizing and federalizing, though my emphasis is on the former. The argument rests on these stipulative definitions: confederations exist when political units voluntarily delegate powers and functions to bodies that can exercise power across their jurisdictions; and a federal relationship exists when there are at least two separate tiers of government over the same territory, and when neither tier can unilaterally alter the constitutional capacities of the other.[27]

The all-Ireland confederal relationship

The first confederal relationship was to be all-Ireland in nature: the North-South Ministerial Council (NSMC). It was to bring together those with executive responsibilities in Northern Ireland and in the Republic, and to be established after the Assembly had come into being and completed a programme of work—the specific deadline for which passed on 31 October 1998. That date passed without agreement, because no Executive had been formed in Northern Ireland to engage with its counterpart in the Republic. Instead the two sovereign governments encouraged the parties to complete this programme of work 'behind the scenes'. They did so.

What was intended by the Agreement was clear. Nationalists were concerned that if the Assembly could outlast the North-South Ministerial Council, it would provide incentives for unionists to undermine the latter. Unionists, by contrast, worried that if the NSMC could survive the destruction of the Assembly, nationalists would seek to bring this about. The Agreement was therefore a tightly written contract with penalty clauses. Internal consociation and external confederalism go together: the Assembly and the Council are 'mutually interdependent'; one could not function without the other.[28]

The NSMC satisfactorily linked northern nationalists to their preferred nation-state, and was one means through which nationalists hoped to persuade unionists of the attractions of Irish unification. Consistent with the Agreement, the Irish Government agreed to change its constitution to ensure that the NSMC, and its delegated implementation bodies, were able to exercise island-wide jurisdiction in those functional activities where unionists were willing to co-operate. The NSMC was intended to function much like the Council of Ministers in the European Union, with ministers having considerable discretion to reach decisions, but remaining ultimately accountable to their respective legislatures. The Council was to meet in plenary format twice a year, and in smaller groups to discuss specific sectors—say, agriculture, or education—on a 'regular and frequent basis'. Provision was made for the Council to meet to discuss matters that cut across sectors, and to resolve disagreements. In addition, the Agreement provided for cross-border or all-island 'implementation' bodies. What scope and powers these North-South institutions would have developed remained uncertain, 'yes unionists' minimizing their importance, nationalists and 'no unionists' doing the converse. The Agreement did, however, require a meaningful Council. It stated 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. The latter were agreed: inland waterways, food safety, trade and business development, special EU programmes, the Irish and Ulster Scots languages, and aquaculture and marine matters. The parties further agreed on six functional

areas of co-operation, including some aspects of transport, agriculture, education, health, the environment, and tourism—where a joint North-South public company was established. These zones and modes of co-operation were to be decided during a transitional period between the Assembly elections and October 31 1998, but were not in fact resolved until December 18 1998. The Agreement provided an Annex listing twelve possible areas for implementation but left it open for others to be considered.

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

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

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

Several economic and sociological developments might underpin the new confederalism. As the Republic's 'Celtic Tiger' continues to expand, Northern Ireland's ministers and citizens, of whatever background, should see increasing benefits from North-South co-operation. And if the European Union continues to integrate, there will be pressure for both parts of Ireland to enhance their co-operation, given their shared peripheral geographical position, and similar interests in functional activities such as agriculture and tourism, and in having regions defined in ways that attract funds.[30] Northern Ireland may even come to think that it would benefit from membership of EMU.

The British-Irish confederal relationship

This is the second, weaker, confederal relationship established by the Agreement. It affects all the islands of Britain and Ireland. Under the new British-Irish Council—see Walker, G. in Chapter 7 of this volume—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 though Northern Ireland has become part of the Republic. Unionists originally wanted any North-South Ministerial Council to be subordinate to a British-Irish, or East-West, Council. This did not happen. There was no hierarchical relationship between the two Councils. Indeed, there are two textual warrants for the thesis that the North-South Council was more important and far-reaching than its British-Irish counterpart. The Agreement required the establishment of North-South implementation bodies, while leaving the formation of East-West bodies a voluntary matter. While the Agreement stated explicitly that the Assembly or North-South Council cannot survive without the other, it made no equivalent statement concerning the British-Irish Council.

A UK-Northern Irish Federalizing Process

The Agreement was perhaps the penultimate blow[31] to unitary Unionism in the UK—already dented by the 1997–8 referendums and legislative acts establishing a Scottish Parliament and a Welsh Assembly.[32] But was the Agreement simply a case of 'devolution within a decentralized unitary state'? That was certainly the unionist perspective. Arguably, however, matters were reasonably construed differently: Northern Ireland would become a 'federacy' if the Agreement stabilizes. 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 distinctly different to the former see Hadfield, in Chapter 5 of this volume.

The Agreement was embedded in a treaty between two states, and based on the recognition of Irish national-self-determination. The UK officially acknowledged that Northern Ireland had the right to join the Republic, on the basis of a local referendum, and it recognized, in a treaty, the authority of Irish national self-determination throughout the island of Ireland. Moreover, the Agreement's institutions were 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. In consequence, the UK's relationship to Northern Ireland, at least in international law, was explicitly federal because the Westminster Parliament and executive could

not, except through breaking its treaty obligations, and except through denying Irish national self-determination, exercise power in any manner in Northern Ireland that is inconsistent with the Agreement.

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

The federalizing possibility, or federacy, that has now been put into deep storage, might have been enhanced if the UK and Northern Irish courts had come to treat Northern Ireland's relationships to Westminster as akin to those of the former Dominions—which had a federal character—as they did in the period of the Stormont Parliament (1921–72).[33] Maximum feasible autonomy for Northern Ireland while remaining within the Union was achievable, provided there was agreement to that within the Northern Assembly. Legalist Diceyians and unionists insisted that Westminster's sovereignty in Northern Ireland remained ultimately intact—ultimately to disastrous effect in February 2000. Nationalists, by contrast, believed that the repeal of section 75 of the *Government of Ireland Act* of 1920 was intended to place the status of Northern Ireland and its institutions in the hand of its people, and not in Westminster's absolute determination. If the Agreement beds down, the political development of a federacy might be assured, but the prospect remains uncertain.

Irish Federalizing Processes

The Agreement opened federalist avenues in the Republic of Ireland—hitherto one of the most centralized states in Europe. Nationalists saw the NSMC, North and South, as the embryonic institution of a federal Ireland: first confederation, then federation after trust had been built. This stepping-stone theory was most loudly articulated by 'No Unionists', but they are not wrong in their calculation

that many nationalists see the North-South Council as 'transitional'. Sinn Féin says so. Fianna Fáil says so.

The Irish Government and its people did not abandon Irish unification when they endorsed the Agreement. Upon the change of the Irish Constitution, it became 'the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognizing that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people expressed, in both jurisdictions in the island' (from the new Article 3). The amended Irish Constitution therefore officially recognizes *two* jurisdictions that jointly enjoy the right to participate in the Irish nation's exercise of self-determination. Unification is no longer linked to 'unitarism', and therefore is entirely compatible with either full confederation or federation.

Irish unification cannot be precluded because of present demographic and electoral trends, which have led to a steady rise in the nationalist share of the vote across different electoral systems.[34] The nature of any eventual unification envisaged in the redrafted Irish Constitution is, however, now very different. It no longer has anything resembling a programme of assimilation. Respect for 'the diversity of . . . identities and traditions' connects with both consociational and con/federal logic. The Republic is bound by the Agreement to structure its laws, and its protection of rights, to prepare for the possibility of a con/federal as well as a unitary Ireland. The Agreement recognizes Northern Ireland as a legal entity within the Irish Constitution. So its eventual elimination as a political unit is no longer a programmatic feature of *Bunreacht na hEireann*. The Agreement also envisages the subjection of both jurisdictions in Ireland to the same regime for the protection of individual and group rights—a situation entirely compatible with a subsequent formal confederation or federation.

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

The con/federal dimensions of the Agreement were not merely pan-Irish or pan-British. They could have evolved within a European Union which has its own strong confederal relationships, and many ambitious federalists. There

would have been no obvious organizational or policy-making contradictions, though multiple networking clashes, that would have arisen from this extra layer of con/federalizing, and they might have helped to transfer some of the heat from binary considerations of whether a given issue is controlled by London or Dublin.

Double Protection and Co-Sovereignty

The subtlest and so far least implemented part of the Agreement went well beyond standard consociational thinking. This is its tacit 'double protection model' laced with elements of co-sovereignty. The Agreement was designed to withstand major demographic and electoral change and promised to entrench the protection of rights, collective and individual, on both sides of the present border in functionally equivalent ways. In effect, it promises protection to Northern nationalists now on the same terms that will be given to Ulster unionists should they ever become a minority in a unified Ireland. Communities are to be protected whether they are majorities or minorities, and whether sovereignty lies with the 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 they have created two intergovernmental devices to protect those communities. One is the successor to the Anglo-Irish Agreement, the British-Irish intergovernmental conference that guarantees the Republic's government access to policy formulation on all matters not (yet) devolved to the Northern Assembly or the North-South Ministerial Council—and which can be expected to develop a greater role in what were devolved matters in the event of continuing suspension of the Agreement. The other is the British-Irish Council—see Walker, G. in Chapter 7 of this volume. If Irish unification ever occurs, the Republic's government would find it politically impossible not to offer the British government reciprocal access in the same forums.

It is important to note what did *not* happen between the two sovereign states. Formal joint sovereignty was not established—though elements of co-sovereignty exist because both states are parties to a treaty that creates institutions which cross their jurisdictions and are interdependent with their core governing institutions. Unionists claimed that they have removed the 1985 Anglo-Irish Agreement in return for conceding a North-South Ministerial 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. Moreover, as with that agreement, there will continue to be an intergovernmental conference, chaired by the Minister for Foreign Affairs and the Northern Ireland Secretary of State, to deal with non-devolved matters. This conference will continue to be serviced by a standing secretariat—and under suspension of devolved government it can expect a growth in its remit.

The new Agreement, moreover, promised 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. There is provision for representatives of the Assembly to be involved in the intergovernmental conference—a welcome parliamentarization—but they will not have the same status as the representatives of the governments of the sovereign states. The Anglo-Irish Agreement fully anticipated these arrangements.[35] Therefore it is more accurate to claim that the Anglo-Irish Agreement has been fulfilled than that it has been removed.

The Military and Political Nature of the Agreement

The institutional nature of the Agreement is complex, but matches the conceptual categories I have deployed. There is no need to evolve new terms for what has been agreed, except, perhaps, for what I have called the 'double protection' model. The Agreement was wide-ranging, multilateral and had something in it for everyone who signed it. Its institutions addressed the 'totality' of relationships between nationalists and unionists in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain. It was neither a victory for nationalists, nor for unionists. Both could 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 different.

The Agreement in its totality was an immensely subtle institutional construction and vulnerable to the play of either Orange or Green cards by hard-line loyalists or republicans, and to miscalculations by softer-line politicians. Its successful implementation has proved more difficult than its formulation. The fracas at 'Drumcree 4' in July 1998, the massacre at Omagh in August 1998, and the continuing crisis over executive formation and decommissioning jointly revealed these difficulties. There were, however, reasons to be cheerful about the robustness of these institutions if we analyse the military and political nature of the settlement, though there were also reasons to be cautious.

The Agreement on Ending the Armed Conflict.

The Agreement promised a path to unwind armed conflict, though formally speaking, no military or paramilitary organizations negotiated the Agreement. The Agreement encompassed decommissioning, demilitarization, police reform, and prisoner release. It addressed these issues in this textual order, and though

all these issues are interlinked they were not explicitly tied to the construction or timing of the new political institutions—with one exception.

Decommissioning The Agreement is clear on decommissioning, despite the difficulties it has occasioned. No paramilitaries that abide by the Agreement have to engage in formal surrender to those they opposed in war. The IICD, chaired by Canadian General John de Chastelain, was 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 referendums North and South of the agreement and *in the context of the implementation of the overall settlement*' (The Agreement, page 20, para: 3, emphases mine).

The italicized passages clarify the termination point for decommissioning, not the moment of commencement, and they make it plain 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 and judicial 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, was regarded as a breach of any reasonable interpretation of the text of the Agreement. Without executive formation in the North none of the formal institutions of the Agreement that required the co-operation of the local parties could get underway. Sinn Féin nominated a representative to the International Commission; issued a statement to the effect that the war was over; and for the first time issued an outright condemnation of other republicans—of the Real IRA whose members carried out the Omagh bombing. But until November 1999, David Trimble and some of his senior colleagues were unprepared to regard this activity as sufficient evidence of good intentions. Each move on Sinn Féin's part merely led the UUP to request more. The Mitchell Review of the Agreement, caused by the impasse, recommended an agreed way forward. Devolution, executive formation—triggering the entirety of the institutions of the Agreement—and the appointment of interlocutors to the IICD by the paramilitaries were scheduled to occur, in that order. The scenario duly materialized. However, to win support from his party for reversing his position David Trimble demanded that Sinn Féin achieve an actual start to decommissioning by the IRA otherwise he and his colleagues would resign. Sinn Féin could not or would not deliver the IRA in the way required—and they were not bound legally bound by the Agreement to do so at that time, though their political obligations were clear. This led to a show-down with Peter Mandelson unilaterally deciding to suspend the Assembly to save David Trimble from his own threat of resignation.

Demilitarization, Police Reform, and Prisoner Release The Agreement promises, and the UK Government has begun, a series of phased developments to 'demilitarize' Northern Ireland. 'Normalization' was explicitly promised; reductions in army deployments and numbers, and the removal of security installations and emergency powers were promised 'consistent with the level of overall threat'. There was also a commitment to address personal firearms regulation and control—The Agreement, page 21, paras: 1–4 an extraordinary proportion of Northern Ireland's citizens, mostly Protestants and unionists, have legally held lethal weapons. Demilitarization, however, has been stalled: both by the impasse over decommissioning and security concerns occasioned by dissident republicans and loyalists.

Police reform—see Walker, C. in Chapter 8 of this volume—was addressed through an Independent Commission[36] whose terms of reference required it to propose how to establish a police service that would be 'representative', 'routinely unarmed', 'professional, effective and efficient, fair and impartial, free from partisan political control; accountable. . . [and] conforms with human rights norms'. (The Agreement, page 22, paras: 1–2). Due to report some nine months before decommissioning was scheduled to finish, it is difficult to believe that this timetable agreed by the makers of the Agreement was an accident. The public outline of police reform was to be available as a confidence-building measure for republicans and nationalists before the major part of republican decommissioning could be expected. Some otherwise pro-Agreement unionists publicly wish to prevent the full implementation of the Patten Report, despite their obligations under the Agreement to support the implementation of all its aspects, so further trouble lies ahead on this issue.

The early release of paramilitary prisoners sentenced under scheduled offences, and of a small number of army personnel imprisoned for murders of civilians, has, by contrast, proceeded 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 also worked in creating incentives for some dissident paramilitary organizations, for example, the Loyalist Volunteer Force, agreed to establish a cease-fire in order to benefit their prisoners. So there was an agreement on how to unwind the military and paramilitary conflict. Movement has taken place on some dimensions, much more slowly in some cases than others, notably on decommissioning and demilitarization. But before I address the obstacles to complete implementation let me examine the political nature of the Agreement.

The Political Nature of the Agreement

Recognition The Agreement was an act of recognition between states and national communities. The Republic of Ireland has recognized Northern Ireland's status as part of the United Kingdom, subject to the implementation of the Agreement. The 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, in effect, recognized the paramilitaries that have organized cease-fires as political agencies. They have not required them to surrender to their respective authorities and have accepted the release of their prisoners on the assurances of their organizations' cease-fires. The paramilitaries on cease-fires have, with some minor exceptions, recognized one another. Unionists have recognized nationalists as nationalists, not simply as Catholics or as the minority. Nationalists have recognized Unionists as unionists, and not just as Protestants. Nationalists and unionists have recognized 'others' who are neither nationalists nor unionists. There was no just shortage of recognition: the Agreement would warm the cockles of Hegel's heart.[37]

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

But there were also structural changes beneath the 'frozen surface' that were noted by the late John Whyte.[38] 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 initiatives of John Hume and Gerry Adams responded constructively to this new stalemate. Much work had to be done before their initiative bore fruit.[39]

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

could reasonably claim that only their means have changed, not their end: the termination of partition—see McIntyre, in Chapter 11 of this volume.

Nationalist support for the Agreement was not difficult to comprehend. For them it was a very good each-way bet. But why did the UUP and the loyalist parties make this consociational-plus bargain? 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—see Aughey, in Chapter 10 of this volume. Their calculus suggested that only by being generous now could they reconcile nationalists to the Union, and protect themselves against 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. In short, they made the Agreement to stave off something worse. It is not surprising therefore that there has been greater rejectionism within the unionist bloc. They are conceding more, and some maintain there is no need to concede anything, at least, not yet.[40] Nevertheless, significant proportions of supporters of the 'No' unionist parties, especially in the DUP, tell pollsters they would like the Agreement to work, which implied they were convertible to its merits.

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[41]—see Patterson, in Chapter 9 of this volume—and of the spread-eagled rainbow coalition in Dublin during 1995–7. The crafters of the ideas were many and varied. Defining and understanding the sources of the conflict in national terms—rather than as issuing from religious extremism or terrorism—was vital. Without this shift, the Anglo-Irish Agreement, the 1995 *Framework Documents*, and the Agreement itself would not have been possible. Intimations and imitations of changes elsewhere—the end of the Cold War and its repercussions, political change in South Africa and the Middle East—all had their local register—see Guelke, in Chapter 13 of this volume. The traditional explanations of the causes of the conflict had increasingly ceased to move the local participants, and many were open to compromises and political institutions that would mark a shift from the limitations of either London's or Dublin's conceptions of good governance.

The beauty of the Agreement as a bargain was that both nationalists and unionists had sound reasons for their respective assessments of its merits, that is, for believing that they were right about the long term. They could not be

certain that they were right, and so they were willing to make this elaborate settlement. There were incentives for each bloc to accommodate the other precisely in order to make its vision of the future more likely, that is, both had reasons to act creatively on the basis of self-fulfilling prophecies. The treat of the double protection model was to promise to ease the pain for whoever got it wrong about the future. The confederalizing and federalizing possibilities in the Agreement ensured that both national communities would remain linked, come what may, to their preferred nation-states.

Prospectus

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

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

The UUP

The UUP was always the most likely short-term maximizer and game-player. It split more than any other party under the impact of the making of the Agreement. It made very significant concessions on internal power-sharing and on all-Ireland dimensions. It lost votes to the 'No Unionists'; and subsequently lost some further dissenters that were elected on its platform to the Assembly. The temptation of its leaders was to renegotiate the Agreement in the course of its implementation. That way they could hope to 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 in a weaker Assembly, on the lines established in Wales, and without the elaborate dual premiership and inclusive executive. It would have strongly preferred to govern without the formal participation of Sinn Féin in government. In consequence, the UUP's most tempting game plan was to use the decommissioning issue to split what their supporters saw as a pan-nationalist bloc. The signs of this game were a phoney 'legalism', adversarial and petty-minded interpretation of the Agreement, postponement and prevarication, and brinkmanship. Centre-stage in this game was David Trimble, the UUP's leader.

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

The UK government suspended the Assembly 'in order to save David Trimble' as one Labour minister recently told me in justification. This breach of the Agreement—and international law—did not save Trimble from the wrath of his party's rejectionists who subsequently persuaded 43 per cent of fellow members to demonstrate that they prefer the 69 year old Reverend Martin Smyth MP as their leader. Trimble's political future looks bleak. He has shown more skill in winning power than in its exercise. He displays capacity to surprise, but rarely for effective follow-through. He is still trying to conciliate his party's irreconcilables and those who have personally betrayed him. His major gamble and praiseworthy risk in making the Agreement required him to win his battles with the 'No' unionists, inside and outside his party, and to build an informal and sustainable coalition with Sinn Féin and the SDLP. It was an extremely difficult task, not made easier by republican intransigence on decommissioning, but it is fair to say that Trimble, and his advisors, consistently mishandled their management of their party, their referendum campaign, and all the ensuing elections. By failing to reform their party they kept its Orange Order rejectionists armed with internal votes within their own camp. By appeasing their rejectionist critics they helped them reorganize and recover. By seeking in the implementation of the Agreement to recover what they had lost in its

negotiation they crucially reduced republican and nationalist goodwill, and gave further ammunition to their rejectionists when they finally decided to do what they had agreed to do. David Trimble in consequence is now a First Minister in deep freeze, a leader presiding over a party whose members seem unlikely to recover their senses unless and until two blows come their way—the next Westminster general election and the 2001 census. Trimble is not politically dead, but he looks in mortal danger, with neither republicans nor hard-line unionists willing to lift a finger to help him.

Republicans

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

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

To be fully resurrected this consociational and con/federal agreement requires two things. First, immediate, daily, vigorous and continuing British and Irish co-operation to encourage the Agreement's full implementation—both in institutions and confidence-building measures such as police reform and demilitarization. The governments must use all their available tools to this end. Secondly, it requires greater recognition among the 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—and it requires some joint agreement on managing the matter of decommissioning.

Conclusion

The Mitchell Review of the Agreement temporarily renewed the inspiration that surrounded the making of the Agreement. But even if the full Agreement is not immediately resurrected it will continue to be partially implemented in its non-devolved dimensions. The UK government wants to avoid antagonizing any party or bloc too much. To maintain the major paramilitary organizations' cease-fires, prisoner-releases are likely to continue accompanied by warnings that punishment-beatings will be treated as violations of cease-fires. To create the conditions for legitimate policing where paramilitaries are presently dominant, police reform as recommended by Patten will begin, though delays can be expected to mollify unionist sentiment. The reform of Northern Ireland, embedded in the human rights and mainstreaming equality provisions in the Agreement are likely to be followed through, albeit more slowly than might otherwise be the case. In short, the dimensions of the Agreement that do not require the local parties to co-operate in government may be delivered, slowly, by the two governments of the sovereign states. The British-Irish intergovernmental conference will, gradually, become an active site for policy formulation, and in time encourage sensible functional cross-border co-operation in the zones

marked out for the North-South Ministerial Council and the British-Irish Council.

This is a feasible and but less attractive scenario than the full Agreement. We may be moving into a world of a cold peace with traits of a local cold war, reform without significant devolution tempered by atrocities from the Continuity-Real IRA and the LVF, and their kindred spirits. Wrong moves by any parties might destabilize the cease-fires. Party politics might become more polarized: 'yes unionists' may lose electoral ground to 'no unionists', while the SDLP may lose electoral ground to Sinn Féin within a demographically and electorally growing nationalist bloc, and Sinn Féin may obtain a kingmaker role in southern Irish coalition politics. The Alliance Party, the Women's Coalition, and the reconstructed loyalist parties are unlikely to flourish or make major breakthroughs. And the longer the devolved components of the Agreement persist in institutional limbo the more likely it will be that other options will be considered.

A radical plan B might tempt some: *de facto* co-sovereignty in and over Northern Ireland by the UK and Irish Governments. In the absence of agreed devolution the two governments might increase rather than reduce their co-operation. A formal declaration of shared sovereignty would not, and need not be rushed. Its gradual emergence might act as a standing invitation to unionists to win some control over their own destiny through meaningful devolution, and it might persuade republicans that there is more to be gained through reforming intergovernmentalism than a return to war. Co-sovereignty has many merits, especially when considered from the perspective of justice. But, having just presided over a major institutional failure, the two governments are unlikely to move rapidly to a formal settlement of this kind, though coherent models of how it might operate have been sketched.[42]

The evolution of co-sovereignty could accompany two local government options. The unionist preference may be for a Northern Assembly on the Welsh model, with Stormont stripped of legislative powers and of its strongly consociational rules. Nationalists are unlikely to co-operate with this option. Though they may become interested in reducing the veto-powers of 'no unionists' they are not likely to want a form of majoritarianism from which they might suffer. A second local government strategy would be to abandon the project of one devolved government. Significant multi-functional competencies could be devolved to (reorganized) local governments willing to adopt institutions of the type made in the Agreement. Local governments on the border, mostly dominated by nationalists, could be permitted to develop significant cross-border arrangements with their southern counterparts and the Dublin government. This would isolate the heartlands of unreformed majoritarian unionism while giving nationalists significant incentives to work within a reformed Northern Ireland. The principal danger of this option is that such cantonization might encourage further ethno-national segregation and thereby promote repartitionist thinking.

The moral of this analysis is clear. The most feasible alternatives to the Agreement are not likely to improve the lot of either 'Yes' or 'No' unionists—though the latter may see a rise in their vote-share they are unlikely to be able to halt reforms for long. The fact is that the Agreement offers unionists a better chance of preserving the Union with their meaningful participation than the alternatives. That is why the 'yes unionists' signed it. Even if republicans are held primarily culpable for the failure of the Agreement's institutions because of their failure to co-operate on decommissioning, it does not follow that they will be politically isolated or that unionists will be able to block the human rights, equality and policing reforms contained in the confidence-building measures promised by the UK Government. Pressure from unionists to halt the release of republican paramilitary prisoners has, so far, not been effective. Demands from the UUP to both keep the unreformed RUC and for a scaled-down Assembly on the Welsh model, are not likely to be fully met. For most republicans any plausible cost-benefit analyses on renewed militarism are clear: they stand to gain more, North and South, through electoral politics, and the implementation of the reforms promised by the Agreement, than they do from an IRA which resumes assassinations or bombings.

The normative implications of this analysis are, I hope, clear. Consociational and confederal devices provide the best repertoires to address ethno-national disputes where a sovereign border has separated a national minority living in its homeland from its kin-state, and where a historically privileged formerly settler colonial portion of a *Staatsvolk* cannot control, or are refused permission to control, the relevant disputed territory on their own. These devices are capable of being constructed without guidance from constitutional designers—though plainly diffusion of institutional repertoires is one of the neglected dimensions of what some call 'globalization'. Comprehensive settlements, after inclusive negotiations, which incorporate hard-liners looking to come in from the cold, and that address the identities, interests, and ideological agendas of all parties, are likely to produce complex, interlinked institutional ensembles that look vulnerable. Referendums may assist their legitimation, and the consolidation of the pre-agreement pacts. Preferential voting in the STV mode enables cross-ethnic 'vote-pooling', and benefits hard-liners willing to become less hard-line. Double protection models offer imaginative ways to make possible changes in sovereignty less threatening, both now and later. But where any bloc is divided over the merits of such a settlement, and where its leaders respond more to the threat of being outflanked than they do to the imperative of making the new (tacit) cross-ethnic coalition work, it may prove impossible to implement the agreement. These agreements are precarious equilibria, but are infinitely better than their alternatives—fighting to the finish, or the panaceas proposed by partisan or naïve integrationists.

OFFICIAL PUBLICATIONS

The Agreement: Agreement reached in the multi-party negotiations (No place of publication, No date, UK Government).

House of Commons, Official Report. Vol. 319, November 18 1998.

Northern Ireland Act 1998 (HMSO: Westminster).

Northern Ireland (Elections) Act 1998 (HMSO: Westminster).

Northern Ireland Assembly (Elections) Order of 1998 (HMSO: Westminster)

Official Report of the New Northern Ireland Assembly, Belfast, 15 July 1999, 317–37.

Report of the Independent Commission on Policing for Northern Ireland (the Patten Report), September 1999 (Belfast, no publisher cited, and published on the web at http://www.belfast.org.uk/report.htm).

ENDNOTES

* This is an edited version of a paper presented at the Conference on 'Constitutional Design 2000' held at the University of Notre Dame, Indiana, US, December 1999. It draws freely and extensively upon a number of my previous publications: 'The 1998 British-Irish Agreement: Power-Sharing Plus', (London: Constitution Unit, Summer 1998); 'The 1998 British-Irish Agreement: Consociation Plus', *Scottish Affairs*, 26 (1999): 1–22; 'The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament', *Representation*, 35 (1999): 106–13; 'The Nature of the Agreement', *Fordham Journal of International Law*, 22 (1999): 1628–67; 'The Nature of the British-Irish Agreement', *New Left Review*, 233 (1999): 66–96. A United States Institute of Peace Grant and the Staff Research Fund at LSE facilitated research. The thanks given to colleagues and friends in these previous publications still stands, particularly to Geoff Evans, John McGarry, and Christopher McCrudden. I would also like to thank the participants at the Notre Dame Constitutional Design 2000 Conference for their comments, especially Bernard Grofman, Donald Horowitz, Arend Lijphart, Andrew Reynolds, Ben Reilly, Fred Riggs, Cheryl Saunders, and Giovanni Sartori.

1. See *inter alia* Lijphart, A., *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT, London: Yale University Press, 1977); and Walzer, M., *On Toleration* (New Haven, CT: Yale University Press, 1997).
2. Lijphart claims that Dutch politicians in 1917, and by their Lebanese (1943), Austrian (1945), Malaysian (1955), Colombian (1958), Indian (in the 1960s), and South African (1993–4) counterparts, invented consociational rules later in the century. One does not have to agree with the citation of any of these cases to accept that politicians are more than capable of doing theory without the aid of theorists—see *inter alia* Lijphart, A., 'Foreword: One Basic Problem, Many Theoretical Options—And a Practical Solution?', in J. McGarry and B. O'Leary (eds.), *The Future of Northern Ireland*, (Oxford: Clarendon Press, 1990) vi–viii; and Lijphart, A., 'The Puzzle of Indian Democracy: A Consociational Interpretation', *American Journal of Political Science*, 90 (1996).
3. One of the makers of the Agreement, Dr Mowlam, the UK Secretary of State for Northern Ireland (1997–9), had an academic consociational heritage, and at least one of her former academic advisors has had an abiding interest in the subject. Consociational thinking had an impact on the drafting of the Framework Documents of 1995. See O'Leary, B., 'Afterword: What is Framed in the Framework Documents?', *Ethnic and Racial Studies*, 18 (1995): 862–72.
4. The Assembly was not allowed to legislate in contravention of the European Convention on Human Rights or European Union law, modify a specific entrenched enactment, discriminate on grounds of religious belief or political opinion, or 'deal with' an excepted power except in an 'ancillary way'—which roughly means it may not enact laws which modify UK statutes on excepted matters such as the Crown.
5. According to the UK's legislative enactment, the *Northern Ireland Act* (1998), the Assembly could expand its autonomy only with regard to *reserved*—not *excepted*—matters.
6. The *Northern Ireland Act* (1998) enabled the top two Ministers to hold functional portfolios, Clause 15 (10).
7. On July 15 1999 in a hand-written note to the Initial Presiding Officer, the Secretary of State introduced an additional Standing Order to the running of d'Hondt, namely 'On the completion of the procedure for the appointment of Ministers (designate) under this Standing Order, the persons appointed shall only continue to hold Ministerial office (designate) if they include at least 3 designated Nationalists and 3 designated Unionists'. This order, authorized under the *Northern Ireland (Elections) Act* 1998, in my view, was the first breach of the letter of the Agreement by the UK government. Given that the parties had agreed that the executive should consist of ten Ministers in addition to the First and Deputy First Ministers, the standing order, in effect, gave a veto-power to both the UUP and the SDLP over executive formation because each party was entitled to three seats on the basis of its strength in seats. The standing order was introduced in a hurry to stop executive formation leading *either* to an all-nationalist executive as would have transpired given the decision of the UUP to fail to turn up to the Assembly when the process of executive formation was triggered, and the decision of the 'no unionists' not to take their designated ministerial entitlements, *or* to an executive in which there would have been no pro-agreement unionists (See *New Northern Ireland Assembly*, Thursday 15 July 1999, Belfast, 317–37). This panic measure, introduced for high-minded motives, subtly changed the executive incentive-structures agreed by the SDLP and the UUP in the negotiation of the Agreement, and was subsequently abandoned. It was consociational, but it was not negotiated by the parties, was not endorsed in the referendums, and encouraged moderate unionists to over-bargain, knowing that they could veto executive formation. Insecure 'moderates' as well as 'hard-liners' can be troublesome in consociational systems.
8. McCrudden, C., 'Mainstreaming Equality in the Governance of Northern Ireland', *Fordham International Law Journal*, 22 (1999): 1696–775.
9. The Droop quota used in STV is V/(N+1) +1, where V = Total Valid Votes, and N = Number of Assembly members to be elected.
10. Lijphart also argues for this system rather than STV because it allows for a high district magnitude enabling greater proportionality, is less vulnerable to gerrymandering, and is simpler for voters and organizers (see Lijphart, A., 'Electroal Systems, Party Systems and Conflict Management in Divided Societies', in R. Schrire (ed.), *Critical Choices for South Africa* (Cape Town: Oxford University Press, 1990), 2–13). In the main text I argue implicitly for high thresholds to reduce fragmentation—as a trade-off against 'better' proportionality. Contra Lijphart, I would maintain that STV, legislatively enacted with uniform district magnitudes, and supervized by independent electoral commissions tasked to create uniform electorates, is not more vulnerable to gerrymandering than regional party-list PR. I concede that STV is only suitable for numerate electorates, but otherwise its complexities are not especially mysterious.
11. The nature of executive formation in the Agreement should have acted as one possible check on the possibilities of fragmentation under party-list PR, but that is true of any electoral system combined with this executive.
12. See Evans, G. and O'Leary, B., 'Frameworked Futures: Intransigence and Inflexibility in the Northern Ireland Elections of May 30 1996', *Irish Political Studies*, 12 (1997); and Evans, G. and O'Leary, B., 'Intransigence and Flexibility on the Way to Two Forums: The Northern Ireland Elections of 30 May 1996 and Public Opinion', *Representation*, 34 (1997): 208–18.
13. My co-researcher John McGarry and I used to assume the prescriptive superiority of the party-list system, see for example McGarry, J. and O'Leary, B., (eds.), *The Future of Northern Ireland* (Oxford: Oxford University Press, 1990), 297. Facts and reflection have made me reconsider the merits of STV: O'Leary, B., 'The Implications for Political Accommodation in Northern Ireland of Reforming the Electoral System for the Westminster Parliament', *Representation* 35/2–3: 106–13; and O'Duffy, B. and O'Leary, B., 'Tales from Elsewhere and an Hibernian Sermon', in H. Margetts and G. Smyth (eds.), *Turning Japanese? Britain with a Permanent Party of Government* (London: Lawrence and Wishart, 1995), 193–210.

14. Horowitz, D., *Ethnic Groups in Conflict* (Berkeley, CA: University of California Press, 1985).
15. 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 to choose to stand for elections.
16. See Horowitz, D., *Ethnic Groups in Conflict*; Horowitz, D., 'Ethnic Conflict Management for Policymakers', and 'Making Moderation Pay: The Comparative Politics of Ethnic Conflict Management' in J. P. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies* (Lexington, MA: Heath, 1989) 115–30, 451–75; Horowitz, D., *A Democratic South Africa? Constitutional Engineering in a Divided Society*, (Berkeley, CA: University of California Press, 1991).
17. Personal conversations with Donald Horowitz during his period as a distinguished visiting professor at the London School of Economics, 1998–9.
18. It may be that AV's presumptively 'Horowitzian' moderating effects materialize better in multi-ethnic political systems with no actual or potentially dominant group in given districts—a situation that does not describe Northern Ireland.
19. The corollary is that STV's positive affects apply to already polarized and pluralized party systems in ethno-nationally divided societies. If there has been no prior history of ethnicized party polarization within a state, or of pluralization of parties within ethno-national blocs, the merits of its implementation may be doubted on Horowitzian grounds. This point raises what may be the key problem with Horowitz's electoral integrationist prescriptions: they apply best to forestalling or inhibiting ethnic conflict and are less effective remedies for cases of developed, protracted, and intense ethnic and ethno-national conflict.
20. The primary normative objection that can be levelled against Horowitz's position is that proportionality norms better match both parties' respective bargaining strengths, and their conceptions of justice. Once party pluralism has already occurred, some form of proportionality is more likely to be legitimate than a shift to strongly majoritarian systems such as AV, or to systems with *ad hoc* distributive requirements that will always be (correctly) represented as gerrymanders—albeit well-intentioned.
21. Sinnott, R., 'Centrist politics makes modest but significant progress: Cross-community transfers were low', *Irish Times*, 29 June 1998.
22. Evans, G. and O'Leary, B., 'Northern Irish Voters and the British-Irish Agreement: Foundations of a Stable Consociational Settlement?', *Political Quarterly*, 71 (2000).
23. Gallagher, M., 'Does Ireland Need a New Electoral System?', *Irish Political Studies*, 2 (1987): 27–48.
24. O'Leary, B., 'A Bright Future and Less Orange (Review of the Independent Commission on Policing for Northern Ireland)', *Times Higher Education Supplement*, 19 November 1999, 22–3.
25. This analysis has benefited from discussions with four members of the Patten Commission, and from the author's attendance at a conference at the University of Limerick on 2 October 1999.
26. See McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland', and his 'Equality and the Good Friday Agreement', in J. Ruane and J. Todd (eds.), *After the Good Friday Agreement: Analysing Political Change in Northern Ireland* (Dublin: University College Dublin Press, 1999), 96–121.
27. My definition is a necessary element of a federal system. Whether it is sufficient is more controversial. Normally a federation has sub-central units that are co-sovereign with the centre throughout most of the territory of the state in question. My point is that any system of constitutionally entrenched autonomy for one region makes the relationship between that region and the centre functionally equivalent to a federal relationship. Elazar calls such a system 'a federacy'.
28. The Agreement did not consider what would happen if one government unilaterally suspended its set of institutions—because neither government expected that to occur.
29. The possibility of a Unionist minister refusing to serve on the Council appeared very grave. However, this seemed to be ruled out in practice: participation in the North-South Council was made an 'essential' responsibility attaching to 'relevant' posts in the two administrations—'relevant' means, presumably, any portfolio a part of which is subject to North-South co-operation. This left open the possibility that a politician opposed to the North-South Council might take a seat on it with a view to wrecking it. *But* Ministers were required to establish the North-South Institutions in 'good faith' and to use 'best endeavours' to reach agreement. Since these requirements were presumably subject to judicial review it is unlikely that potential wreckers would have been able to sustain a negative role in the North-South Council for very long.

30. Tannam, E., *Cross-Border Cooperation in the Republic of Ireland and Northern Ireland* (Basingstoke: Macmillan, 1999).
31. The formation of an English Parliament would be the last blow.
32. Hazell, R. and O'Leary, B., 'A Rolling Programme of Devolution: Slippery Slope or Safeguard of the Union?' in R. Hazell (ed.), *Constitutional Futures: A History of the Next Ten Years* (Oxford: Oxford University Press, 1999), 21–46.
33. Legal friends advise me that the UK's legislative enactment of the Agreement may have modified the pertinent precedents in this previous jurisprudence by changing the nature of the '*vires*' test that the courts will use to deal with jurisdictional disputes.
34. O'Leary, B., 'Appendix 4: Party Support in Northern Ireland, 1969–89', in J. McGarry and B. O'Leary (eds.), *The Future of Northern Ireland* (Oxford: Oxford University Press, 1990), 342–57; O'Leary, B., 'More Green, Fewer Orange', *Fortnight*: 12–15 & 16–17 (1990); McGarry, J. and O'Leary, B., *Explaining Northern Ireland: Broken Images* (Oxford and Cambridge, MA: Basil Blackwell, 1995); O'Leary, B. and Evans, G., 'Northern Ireland: *La Fin de Siecle*, 'The Twilight of the Second Protestant Ascendancy and Sinn Féin's Second Coming', *Parliamentary Affairs*, 50 (1997): 672–80.
35. O'Leary, B., and McGarry, J., *The Politics of Antagonism: Understanding Northern Ireland*, 2nd Edn. (London: Athlone Press, 1996), chs. 6–7.
36. McGarry, J. and O'Leary, B., *Policing Northern Ireland* (Belfast: Blackstaff Press, 1999).
37. For sophisticated discussions of recognition see *inter alia* Ringmar, E., *Identity, Interest and Action: A Cultural Explanation of Sweden's Intervention in the Thirty Years War* (Cambridge: Cambridge University Press, 1996); and Taylor, C., *Multiculturalism and the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1992).
38. Whyte, J., 'Dynamics of Social and Political Change in Northern Ireland', in D. Keogh and M. Haltzel (eds.), *Northern Ireland and the Politics of Reconciliation* (Cambridge: Cambridge University Press 1993), 103–16.
39. See Mallie, E. and McKittrick, D., *The Fight for Peace: The Secret Story Behind the Irish Peace Process* (London: Heinemann, 1996); McKittrick, D., *The Nervous Peace* (Belfast: Blackstaff Press, 1996).
40. See Evans and O'Leary, 'Northern Irish Voters and the British-Irish Agreement'.
41. O'Leary, B., 'The Conservative Stewardship of Northern Ireland, 1979–97: Sound-bottomed Contradictions or Slow Learning?', *Political Studies*, 45 (1997): 663–76.
42. O'Leary, B., Lyne, T., Marshall, J., and Rowthorn, B., *Northern Ireland: Sharing Authority* (London: Institute of Public Policy Research, 1993).