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## 12

## The Belfast Agreement: The Making, Management and Mismanagement of a Complex Consociation

*Brendan O'Leary*

The Belfast Agreement of 10 April 1998, reached within a year of its general election victory, was the most surprising co-achievement of the new Labour government. The new government should not be praised too much, however. Credit was largely owed to others: the two men awarded the Nobel Peace Prize, John Hume and David Trimble, and their party colleagues and advisers; the representatives of republicans and loyalists, notably Gerry Adams, Martin McGuinness, David Ervine and Gary McMichael; two Irish governments, the Fianna Fáil-Labour coalition of 1992-4, and the Fianna Fáil-Progressive Democrat coalition of 1997 - including their officials in Ireland's Department of Foreign Affairs (DFA); and an array of others, including significant Americans. Tony Blair and his colleagues contributed no fresh ideas to the Agreement, despite courtier Charles Leadbetter's claim that it exemplified 'the Third Way'. Most of the ideas were articulated or prefigured before Blair took office. The Labour government's role was that of an enthusiastic first-time midwife.

### Before history's hand

The bulk of the design of the political architecture agreed in Belfast on 10 April 1998 originated with Irish nationalists of all hues, within and without the Social Democratic and Labour Party (SDLP), Sinn Féin, and the Irish government. Their demands were sculpted into a coherent

negotiating package by the Irish DFA, acting under the skilful leadership of diplomat Sean O Huiginn, now the Irish ambassador in Washington, and embedded in the Irish contributions to the Joint Framework Documents (JFDs), agreed by the Irish and British governments in February 1995 (O'Leary 1995). The JFDs arose from an established 'three-standard' negotiating process in which matters internal to Northern Ireland, North-South issues, and East-West (British-Irish) issues, were respectively addressed.<sup>1</sup> The JFDs anticipated a power-sharing assembly and executive in Northern Ireland, extensive consultative, harmonizing and executive functions for an all-Ireland North-South body, and an innovative model of 'double protection' of rights. They also anticipated referendums in both parts of Ireland, the brainchild of Hume, to give expression to Irish national self-determination. The Belfast Agreement was the baby of the JFDs, though its conception and birth were long and painful, and even though it was mildly genetically modified by the negotiators of the Ulster Unionist Party (UUP) who diminished the powers and autonomy of the proposed North-South Ministerial Council, and added the British-Irish Council.

The outgoing Conservative government deserved little credit for innovative ideas. Fortunately, and partly because of President Clinton's pressure, it avoided its instincts and refused to kill outright the political opportunity created by the antecedents and the materialization of the IRA ceasefire of 31 August 1994. Whitehall's civil servants, but not the local Northern Ireland Office, contributed positively to the agenda for the multiparty negotiations. Quentin Thomas, best known for leading the initial exploratory talks with Sinn Féin's Chief Negotiator Martin McGuinness, was crucial. In drafting the British contribution to the JFDs, he split the differences between the UUP's and the SDLP's preferences for the internal government of Northern Ireland from the previous interparty negotiations of 1991-2 (O'Leary and McGarry 1996: 327-69).

Labour's first Prime Minister for eighteen years had no profound agenda on Ireland, North or South – even though much was made of the fact that he had an Irish mother and a Catholic wife. 'New' Labour's role in Opposition had apparently been simple. It had supported the peace process, and offered bipartisan support for the Major government in its death throes. Behind the scenes the story was less perfumed. Blair's priority was to win the next general election, and Northern Ireland policy, like all others, was utterly subordinated to that objective. In 1994-5 his closest advisers believed some of Labour's existing policies, viz. support for Irish unification by consent and opposition to the draconian powers in the UK's antiterrorism legislation, were

electorally counterproductive – not in themselves, but because they thought they were gifts to the right-wing press, identifying Labour with being soft on terrorism, and with political extremism. In fact, polls showed that weakening British sovereignty over Northern Ireland, and indeed troop withdrawal, enjoyed consistent majority support in Great Britain (O'Leary 1992). But Blair's coterie was driven by the fear that the party might appear soft on crime and terrorism. Blair had established himself with the mantra that he would be tough on crime and tough on the causes of crime. In the summer of 1994, he unilaterally ditched Labour's policy of seeking Irish unity by consent – without the formal approval of the Labour Party Conference – and modified the party's stance on the Prevention of Terrorism Act (PTA). Then he supported whatever the Major government did, whatever contradictions it created (for a mildly jaundiced if accurate view of this see O'Leary 1997).

There was a *prima facie* case for Labour's policy shift. Dropping the policy of encouraging unity by consent appeared to move Labour to a neutral stance on the future of Northern Ireland, at odds with the Sinn Féin demand that a British government become a persuader for Irish unity. Thereby it made unionists more likely to enter into negotiations with republicans and others. This *prima facie* case was not, however, the determining factor in the policy shift, though it would be used retrospectively by the leader's spin-doctors. The case was also doubtful because the Conservatives were persuaders for the Union, and New Labour's shift meant that both the UK's 'parties of government' favoured maintaining the Union, albeit in different formats and with different intensities, and thereby destabilized one of the premises of the republican initiative.

In October 1994 Blair replaced Kevin McNamara in the Northern Ireland portfolio with Dr Marjorie (Mo) Mowlam – an elected member of the shadow cabinet. McNamara concluded that Blair deemed him too old Labour, and too 'fat and bald and green' (Langdon 2000: 269). His able number two, Jim Marshall, was dismissed. Roger Stott MP, another junior spokesman, who had unintentionally embarrassed Blair when he was Shadow Home Secretary by opposing the PTA, also suffered loss of office, and went into a downward spiral that led to his premature death. Clive Soley MP, a former spokesman on Northern Ireland, soon to be a sycophantic chairman of the Parliamentary Labour Party, rationalized Blair's policy shifts as designed to support Major against right-wing Conservatives opposed to the peace process.<sup>2</sup> That appeared plausible, but it was misleading. The Labour leadership's focus was entirely electoral. Northern Ireland policy was wholly constrained by the objective

of minimizing enemies in the right-wing press – which supported the right-wing Conservatives opposed to the peace process. Blair would take no risks for peace while in Opposition. Notes of meetings with Dr Mowlam record her prosaic and characteristically honest appraisal in 1995: 'They [Blair and Mandelson] think we should be so far up Major's \*\*\*\* that he can never accuse us of not being behind him' (personal notes).

Removing McNamara, on the pretext that he did not win a place in the shadow cabinet elections, eased the Labour leadership's parliamentary relations with the UUP, whom they hoped might one day support them in bringing down the Major government in a parliamentary 'no confidence' motion, or at least remain neutral. Mowlam, in contrast to McNamara, was a reluctant appointee who would have preferred the education portfolio. But she embraced the post with characteristic energy, mental sharpness and superb networking skills. She had been appointed a junior Northern Ireland front-bench spokesperson by Neil Kinnock in 1988–9, at McNamara's suggestion, and knew the terrain. She was, in contrast to Blair, not a unionist as far as the Union of Great Britain and Northern Ireland was concerned. She believed that Irish unification by consent was fine in principle but not feasible within this generation. In 1988 with McNamara and others she deliberated over how best to achieve either a negotiated settlement, or, failing that, a system of shared British and Irish sovereignty which would involve a devolved component – work that was later developed and encouraged by Neil Kinnock, and later by John Smith (see, *inter alia*, O'Leary et al. 1993). She had no time for Labour's electoral integrationists – who claimed that bringing Labour's organization and message to the region would salve working-class divisions and transcend sectarianism and nationalism.<sup>3</sup> In private her sympathies lay with the SDLP, though she found its leader, John Hume, remote and unapproachable.<sup>4</sup> Though many of the UUP's MPs called for McNamara's dismissal, Mowlam was not exactly what they wanted; though some unionists harboured illusions about her. On becoming Shadow Secretary of State she supported the agenda of the emerging JFDs, and endorsed them on their publication. She was fun and pragmatic, but had settled principles on the peace process: the priority was an inclusive agreement with which peaceful republicans, nationalists and moderate unionists would be content. Schooled in political science and political anthropology, she was knowledgeable about consociational and federal principles, and had written a Ph.D. dissertation on referendums. She was unusually skilled at making warm connections with people, irrespective of nationality, class or sex, and mastered her new brief. She did not go

down well with the UUP's older males, for whom the flirtatious Redcar MP was the embodiment of secular, profane and liberated woman.

Blair's support for whatever Major did had one negative consequence. After the IRA ceasefire of 31 August 1994, and its reciprocation by loyalists six weeks later, there was a long hiatus of eighteen months, and no rush to start the inclusive negotiations for parties with democratic mandates that had been promised by Major and Albert Reynolds's joint declaration of December 1993. Instead Sinn Féin was put in quarantine in the UK. The blockage to negotiations was simple: Unionists and some Conservative MPs strongly opposed negotiations commencing without prior decommissioning of its weapons by the IRA and without a declaration that its ceasefire was permanent. The blockage strengthened as Major's majority diminished. Blair did not offer, and Major apparently did not seek, his support to bypass these obstacles to negotiations, even though there would have been a cross-party majority in the Commons for such an initiative. The blockage eventually won a name, viz. 'Washington 3', after a clause in a speech made by Secretary of State Sir Patrick Mayhew in March 1995, which demanded some prior decommissioning before inclusive negotiations.

The Irish government, under Taoiseach Reynolds (1992–4), and most Irish nationalists, north and south, took the view that the IRA ceasefire was permanent, and that decommissioning should be left until negotiations were completed. The two governments, steered by Irish officials and with American good offices, agreed to establish an international body, composed of former US Senator Majority Leader George Mitchell, Canadian General Jean de Chastelain and former Finnish premier Harri Holkeri, to propose ways out of the impasse. On 23 January 1996 they did the obvious, but in lucid and effective language. They proposed six peaceful and democratic principles to which parties to the negotiations would be obliged to commit themselves. They also proposed that 'parallel decommissioning' begin *during* the negotiations rather than *before* (the British suggestion) or *after* (the Irish suggestion) (Mitchell, de Chastelain and Holkeri 1996).<sup>5</sup> Major responded by appearing both to accept and reject the report. If prior decommissioning was not to happen, a certainty, then he would call for elections to a Peace Forum, playing fast and loose with a clause in the report,<sup>6</sup> so that parties would have mandates for negotiations, and then decommissioning could be handled as Mitchell had proposed. This was playing with fire. It required Sinn Féin, which already had a mandate, to legitimate a new forum, and thereby the status of Northern Ireland, in advance of negotiations, and to agree to elections that postponed negotiation.

Blair supported Major's manoeuvre. Their myopic consensus had predictable consequences: the IRA went back to war, bombing Canary Wharf on 9 February 1996, killing two British citizens. It was a restart of bombing to force negotiations to begin, rather than a complete republican exit from their new strategy. But the breakdown of the IRA ceasefire deeply damaged the peace process, both in the short and longer run. It heightened distrust all around, and confirmed unionist presumptions that the ceasefire was purely tactical. The same events confirmed republican suspicions that the British political class would behave as perfidiously and as slowly as it could, despite the good offices of international mediators. Fortunately, however, the IRA's bombing campaign in 1996–7 was limited, both in the sense of being largely confined to small-scale operations in Great Britain, and in its impact on the public (with several IRA personnel proving incompetent).<sup>8</sup> Elections to the Forum took place

**Table 12.1** Parties' shares of the vote and of seats in the 30 May 1996 elections to the Northern Ireland Forum

	Votes %	Seats	
		No.	%
<i>Unionists</i>			
Ulster Unionist Party (UUP)	24.2	30	27.3
Democratic Unionist Party (DUP)	18.8	24	21.8
United Kingdom Unionist Party (UKUP)	3.7	3	2.7
Progressive Unionist Party (PUP)	3.5	2	1.8
Ulster Democratic Party (UDP)	2.2	2	1.8
<i>Others</i>			
Alliance Party of Northern Ireland (APNI)	6.6	7	6.4
Northern Ireland Women's Coalition (NIWC)	1.0	2	1.8
(Northern Ireland) Labour	0.8	2	1.8
<i>Nationalists</i>			
Social Democratic and Labour Party of Northern Ireland (SDLP)	21.4	21	19.1
Sinn Féin	15.5	17	15.5

Election system: PR-list system (using the Droop quota, followed by d'Hondt, equivalent to pure d'Hondt) with two seats guaranteed to the top ten parties (four parties achieved representation solely through this mechanism). Deviation from proportionality was quite high ( $d - (1/2) \sum [s_i - v_i] = 7.85$ ) and led to the DUP winning more seats than the SDLP on a lower share of the vote.

Source: B. O'Leary and G. Evans, 'Northern Ireland: La Fin de Siècle, the Twilight of the Second Protestant Ascendancy and Sinn Féin's Second Coming', *Parliamentary Affairs*, 50, (1997), 672–80.

**Table 12.2** Parties' shares of the vote and of seats in Westminster elections, 1997

	Votes %	Seats	
		No.	%
<i>Unionists</i>			
Ulster Unionist Party (UUP)	32.7	10	55.6
Democratic Unionist Party (DUP)	13.6	2	11.1
United Kingdom Unionist Party (UKUP)	1.6	1	5.6
Progressive Unionist Party (PUP)	–	–	–
Ulster Democratic Party (UDP)	–	–	–
<i>Others</i>			
Alliance Party of Northern Ireland (APNI)	8.0	–	–
Northern Ireland Women's Coalition (NIWC)	–	–	–
(Northern Ireland) Labour	–	–	–
<i>Nationalists</i>			
Social Democratic and Labour Party of Northern Ireland (SDLP)	24.1	3	16.7
Sinn Féin	16.7	2	11.1

Election system: Plurality rule in eighteen single member districts.

Source: B. O'Leary and G. Evans, 'Northern Ireland', *Parliamentary Affairs*, 50 (1997), 672–80.

in May. Sinn Féin increased its vote share significantly – see table 12.1 – while the unionist vote fragmented, a significant pointer for the future.<sup>9</sup> Negotiations, in principle open to the top ten parties with democratic mandates, began in June 1996, with Sinn Féin excluded. Negotiating teams were separated from the Forum, and nationalists boycotted the Forum. The negotiations remained procedural until the Westminster elections were called in May 1997. In Northern Ireland – see table 12.2 – they led to a further rise in Sinn Féin's vote share, and confirmation of the thesis that the vote for overtly unionist parties was in secular decline (O'Leary and Evans 1997).

The functional, but not entirely intended, consequence of Blair's constant following of Major was mildly to relax the UUP's fear of a new Labour government. Its London supporters started to have fond memories of the Callaghan premiership, and of Callaghan's royalist, unionist and brutish Secretary of State, Roy Mason. This worried Labour's Irish nationalist sympathizers, but they were relaxed because Mowlam had the key portfolio, and was patently the best prepared prospective office-holder since the post was invented in 1972. Blair

privately promised Irish officials that once elected he would deliver; he did not disappoint.

### Taking the cards dealt by history

In the summer of 1997 the new government, with Blair and Mowlam at the helm, orchestrated the renewal of the IRA's ceasefire as the first significant non-economic initiative of the new regime. They correctly judged that the IRA's campaign had been intended to persuade the UK government to change its stance, and to force Sinn Féin's entry into negotiations, rather than to dictate the outcome of the negotiations. The government's judgement would make Sinn Féin's entry into negotiations possible, and was preceded by a speech made by the new Premier in Belfast to assure unionists of Blair's commitment to maintaining the Union as long as a local majority so wished. He declared that 'A political settlement is not a slippery slope to a united Ireland' (speech, Belfast, 16 May 1997), and that he did not expect the latter within his lifetime. The message was intended to keep the UUP at the negotiating tables while bringing Sinn Féin to join them. It would succeed. 'The settlement train is leaving' Blair told republicans, 'I want you on that train... So end the violence now' (ibid.).

The Labour government facilitated the eight parties which would make the Agreement – the UUP, the loyalist PUP and UDP, the SDLP, Sinn Féin, the Alliance, the Women's Coalition and (Northern Ireland) Labour. It was not distressed by the decision of Paisley's DUP and McCartney's United Kingdom Unionist Party (UKUP) to withdraw from the negotiating process after Sinn Féin was admitted – that eased the making of the Agreement. The government's unsung hero would prove to be Minister of State Paul Murphy, the future Secretary of State for Wales, who chaired long months of negotiations about negotiations between the summer of 1997 and the spring of 1998. The crucial performance of the new government, especially of its Premier, was to exhort, cajole and persuade the UUP, and its leader David Trimble, to negotiate and make the Agreement. Trimble had succeeded James Molyneaux after the latter's resignation – the production of the JFDs had been a green bridge too far for his party colleagues. Trimble had been elected because he was seen as a hardliner, the 'hero of Drumcree' and the brightest of the UUP's Westminster MPs.<sup>10</sup> He was also sensitive, underconfident, prickly, and terrified, sensibly, that he might face the fate of previous UUP leaders who had decided to accommodate Irish nationalism, such as Terence O'Neill, Brian Faulkner and Bill Craig. The government's delicate task, with its Irish counterpart, was to encourage Trimble to negoti-

ate on the basis of the JFDs while enabling him to maintain that he had repudiated them. Blair's charm mattered. Trimble had sworn he would not fall for the same trap as Molyneaux, that is, seduction through bilaterals with Number 10. Instead he resolved always to be accompanied by party colleagues when he met the PM. This was a resolution that Blair would wear away, partly because Mowlam's relations with Trimble deteriorated radically.

Blair's government got off to a good start with the Irish government and its officials, and neither Blair nor Mowlam displayed the same sensitivities to America's benign interventions as their Conservative predecessors.<sup>11</sup> This ensured that there were three governments strongly mission-committed to the success of the negotiations. The replacement of the rainbow coalition in Dublin (1994–7) with a new Fianna Fáil-led coalition invigorated the Irish commitment because the new Taoiseach, Bertie Ahern, enjoyed the confidence of Northern nationalists, unlike his predecessor, Fine Gael's John Bruton.<sup>12</sup> The British and Irish governments' decisions to act through Senator Mitchell, the chair of the negotiations, when they concurred, and their decision to set a deadline for completing the negotiations,<sup>13</sup> were important components in delivering a successful outcome.

When the IRA renewed its ceasefire in July 1997 Mowlam took responsibility for monitoring it with the understanding that Sinn Féin would join the negotiations in September if the IRA's conduct withstood scrutiny. At Mitchell's initiative in August the two governments established an Independent International Commission on Decommissioning (IICD), chaired by de Chastelain. This was intended to facilitate the UUP's acceptance of Sinn Féin's presence at the negotiations, and, tacitly, to enable decommissioning to be parked while other substantive issues were addressed. In September Sinn Féin signed up to the Mitchell principles. Despite the provocation occasioned by an IRA statement that it did not accept the Mitchell principles and was not a party to the talks (*An Phoblacht*, 11 September 1997), and a bomb planted by the dissident republican faction, the Continuity-IRA, the UUP, flanked by the loyalist parties, agreed to participate in negotiations with Sinn Féin.

A tacit division of labour developed. The Prime Minister was seen as more empathetic to unionists, the Secretary of State to nationalists – a correct perception. This would mean that in the final negotiations of April 1998 Blair's role was visibly more important, since nationalists bargained on behalf of themselves with the back-up of the Irish government, whereas the unionists looked to Blair for sympathy. Before and during the negotiations Blair and Mowlam overrode the timidity of some of their ministerial colleagues, accepting that the full-scale release of all paramilitaries on ceasefire must form an essential component of the

peace process. Mowlam in particular displayed political courage and nous in visiting the Maze prison to calm loyalist paramilitaries in January 1998, earning the sobriquet 'Mighty Mo'. In the new year the two governments produced 'Heads of Agreement', prefiguring the eventual settlement, while Mowlam and Mitchell successfully managed temporary suspensions of the UDP and Sinn Féin from the negotiations because of violations of their ceasefires by the UDA and the IRA respectively.

The final negotiations were held in late March and April 1998, with a deadline of Thursday 9 April. Strand One, the internal government of Northern Ireland, was negotiated head-to-head by the SDLP and the UUP, with the SDLP making the proposals, and the UUP choosing to reject or accept them. In Strand Two Blair and Ahern agreed to dilute the powers and scope of the proposed North-South Ministerial Council previously agreed by their officials to meet Trimble's and the UUP's requirements. They resisted an explicit linkage between inclusive executive formation in the North and prior decommissioning by the IRA. In Strand Three the governments negotiated constitutional and other peace and confidence-building measures, sometimes with loyalists and republicans. The Agreement was finally produced on 10 April, Good Friday, but not without difficulties. Jeffrey Donaldson MP of the UUP walked out because he was not satisfied that the Agreement required decommissioning before executive formation, and two independent commissions had to be established on policing and the administration of criminal justice because all the parties could agree on was their terms of reference. Nevertheless the Agreement was made, and justified Blair's comment that he had felt the hand of history upon his shoulder. Now what was required was to have it endorsed in referendums and implemented, without fear or favour.

#### Building institutions or a house of cards?

The Agreement was endorsed in both parts of Ireland, with a 95 and a 71 per cent 'Yes' vote in the South and North respectively. Blair, posing as a fully fledged unionist, was successful in persuading at least some unionists to vote 'Yes' – though he also gave hostages to fortune inconsistent with the text of the Agreement. He had almost done the same on the day of the Agreement in an ambiguous letter to Trimble, which suggested that the Prime Minister agreed that decommissioning of its weapons by the IRA 'should' commence before the new executive could be formed with Sinn Féin's participation. The 'should' was subjunctive: the text of the Agreement, by contrast, did not warrant Trimble's position, or that of Blair in some of his later statements, and, in any case, the words of a UK

premier are not law, outside the ranks of New Labour. After the Agreement was made and ratified in the two referendums Mowlam helped override obstruction from some of her Northern Ireland Office's officials and ensured that the Agreement was mostly faithfully reflected in the Northern Ireland 1998 Act.<sup>14</sup> But in general the Blair government would prove much better at managing the making of the Agreement than in managing its successful implementation.

In part, of course, this was because implementation was more difficult. The government could not be faulted, initially, on the hours it put in. Blair was astonished at the time he had to devote to Irish matters, and so were his advisers. At one stage, Jonathan Powell, to his chagrin, ended up trying to micro-manage the Drumcree dispute, occasioned by the Orange Order's demand that its members should be able to parade down the Garvaghy Road without the prior consent of local (mostly nationalist) residents. The government's difficulties in implementation were not, of course, entirely of its own making. The deep polarization that the Agreement occasioned within the unionist bloc as a whole, and more particularly the polarization within the UUP, were obviously not Labour's responsibility. In the elections to the new Assembly in June 1998 – see table 12.3 – the SDLP outpolled the UUP, the 'No Unionists' performed slightly better than they had in the referendum, and Trimble's Westminster parliamentary colleagues mostly opposed the Agreement. Trimble's responses to these intra-unionist crises were to be a key source of tension in the Agreement's implementation. Republican (and loyalist) dilatoriness on the matter of decommissioning would be another.

The proportionality of the election results was evident, both with respect to blocs and with respect to parties. But the deviations in seats won compared to the first preference vote benefited the pro-Agreement parties. The UUP was the principal beneficiary of the transfer of lower order preferences, taking its seat share (25.9 per cent) significantly above its first-preference vote-share (21.3 per cent) – though these lower order preferences came from voters who voted 'No' as well as those who voted 'Yes' to the Agreement. The net transfers by voters to the pro-Agreement candidates, though not as significant as had been hoped, converted a bare 'Anti-Agreement' majority of the first preference vote (25.5 per cent) within the unionist bloc of voters into a bare 'pro-Agreement' majority (27.8 per cent) among seats won by unionists, a result that was essential for the Agreement's (partial) stabilization. The Labour government could not be faulted for the palpably evident intra-unionist divisions, but it would significantly contribute to the difficulties in implementing the Agreement, not least in managing its own responsibilities, and the new institutions. This would become especially manifest in a series of

**Table 12.3** The June 1998 elections to the Northern Ireland Assembly

	First preference vote %	Seats	
		No.	%
Social Democratic and Labour Party of Northern Ireland (SDLP)	22.0	24	22.2
Sinn Féin (SF)	17.7	18	16.7
Other nationalists	0.1	–	–
<b>All Nationalists</b>	<b>39.8</b>	<b>42</b>	<b>38.9</b>
Alliance Party of Northern Ireland (APNI)	6.4	6	5.5
Women's Coalition	1.7	2	1.8
Other 'Others'	1.3	–	–
<b>All Others</b>	<b>9.4</b>	<b>8</b>	<b>7.3</b>
Ulster Unionist Party (UUP)	21.0	28	25.9
Progressive Unionist Party (PUP)	2.5	2	1.8
Ulster Democratic Party (UDP)	1.2	–	–
Other Yes Unionists	0.3	–	–
<b>All Yes Unionists</b>	<b>25.0</b>	<b>30</b>	<b>27.7</b>
Democratic Unionist Party (DUP)	18.0	20	18.5
United Kingdom Unionist Party (UKUP)	4.5	5	4.6
Independent No Unionists	3.0	3	2.8
<b>All No Unionists</b>	<b>25.5</b>	<b>28</b>	<b>25.9</b>

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

Source: B. O'Leary, 'The Nature of the Agreement', *Fordham Journal of International Law*, 22 (1999).

unilateral and ill-judged actions, inactions and public lies on the part of Peter Mandelson, who replaced Dr Mowlam as Secretary of State in October 1999.

Mandelson was Blair's best known and least liked confidante, his Prince of Darkness. In 1999 Blair wanted to rehabilitate him after his sins committed in the Notting Hill housing market with the pockets of Geoffrey Robinson. He hoped Mandelson's appointment would spare him endless unionist deputations – largely occasioned by their refusal to engage Mowlam, who had been suffering from treatment of a benign brain tumour, and had, partly in consequence, become immensely popular, more popular than the PM, but whom some UUP MPs nevertheless treated with a mixture of political and sexist disdain. Mowlam had wanted to be promoted to the Foreign Office, which Blair would not

entertain, and at one stage contemplated requesting that she have Mandelson as her deputy. Mandelson saw Northern Ireland as the route to his rehabilitation – given that other ministers would be happy with his 'relegation'. He also thought of it as a route to the ministry he most coveted, the Foreign Office. He had once been friendly with Mowlam – they had holidayed together in Spain – but now was said to regard her as 'terminally undisciplined' (*Sunday Telegraph*, 27 July 1997, cited in Langdon 2000: 8). He, by contrast, tended to be terminally disloyal to past friends, commitments, and the truth. In the spring and summer of 1999 he and his associates, including Labour's unionists, started to damage Mowlam's reputation in the press in much the same manner as they had once defamed David Clark, when Mandelson had coveted his cabinet position.

Mandelson came to Northern Ireland with no obvious preparation in Opposition, unlike Mowlam, though his more credible supporters spun the line that he had made programmes on the region for *Weekend World* in his days as a TV producer. That at least was accurate. Some in the UUP, including Trimble, called for Mandelson's appointment – much as some had once called for Mowlam to replace McNamara. The DUP, by contrast, were not pleased: 'we do not want a sodomite' as one of its typically homophobic members put it.<sup>15</sup> Blair calculated that it was more important to calm Trimble and his party than to continue with the balanced ticket of a soft unionist PM and a soft nationalist Secretary of State. Indeed 'saving Trimble to save the Agreement' would become the government's priority in 1999–2000. The world was told that Mandelson possessed remarkable negotiating skills and diplomatic finesse. This was not evident in his opening parliamentary statement when he described himself as Secretary of State for Ireland – rather than Northern Ireland. He would also quickly demonstrate that he lacked one important element of the normal job description of a normal Foreign Secretary, the capacity to get on with and be appreciated by foreigners. If Blair deserves credit for making the Agreement with Mowlam, as he does, then he must also share with Mandelson the blame for mismanaging its implementation.

#### The nature of the agreement(s)

The Belfast Agreement, incorporated in the British–Irish Agreement (1999), an international treaty, was an exemplary constitutional design. Internally it was 'consociational' (O'Leary 1999a, 1999b). Externally it established confederal relationships, and prefigured imaginative federalist



relationships and a novel model of double protection. If the Agreement fails, debate will arise over whether flaws in its design or in its implementation were the principal factors. The rest of this chapter anticipates that debate. By contrast, if the Agreement is fully successful, albeit outside its scheduled timetable and its own agreed procedures, I hope it will become an export model for conflict regulators. What follows appraises the Agreement's novelties, possible design flaws, and the contributions of Labour's decision-makers to its implementation. Three evaluative arguments are advanced:

- 1 The Labour government correctly grasped that the conflict required external as well as internal resolution, and realized that the sovereignty and self-determination disputes needed to be resolved. But it failed to follow through on its treaty commitments, and broke international law when it unilaterally suspended some of the Agreement's institutions between February and May 2000, and thereby destabilized the Agreement by making all its provisions and commissions negotiable.
- 2 The novel dual premiership, designed by the major moderate parties, the SDLP and the UUP, in the heat of the negotiations, has proved its major institutional weakness, suggesting, paradoxically, that moderates are not always the best designers or caretakers of power-sharing systems.
- 3 The Labour government's, especially Mandelson's, mismanagement of policing reform severely threatened the stabilization of the Agreement, and the reversal of Mandelson's stances was necessary for the resolution of November 2001.

These propositions require a prior analysis of the Agreement as a 'constitution'.

#### *A consociational federacy*

The Agreement met all four standard consociational criteria (Lijphart 1977).

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

- 1 the creation of a quasi-presidential dual premiership, elected by a concurrent majority of unionists and nationalists in the Assembly, and expected to preside over:

- 2 the inclusive grand coalition ten-member executive cabinet of ministers, whose portfolios are allocated according to the d'Hondt voting procedure.

*B. Proportionality norms* These were evident in:

- 1 the d'Hondt procedure used to determine the composition of the cabinet – which resulted in five unionists (three UUP, two DUP) and five nationalists (three SDLP and two Sinn Féin) holding ministries between November 1999 and February 2000, and again from May 2000;
- 2 the electoral system (the Single Transferable Vote in eighteen six-member districts) used to elect the Assembly;
- 3 the d'Hondt procedure used to allocate Assembly members to committees with powers of oversight and legislative initiative; and
- 4 existing and additional legislative provisions to ensure fair and representative employment, especially throughout the public sector, and the promise of a representative police service.

*C. Community autonomy and equality* These commitments were evident in:

- 1 the official recognition of unionists', nationalists' and others' political ethos and identities, notably in the Assembly's procedures, and in a declaration of 'parity of esteem' between the communities and a promise of 'rigorous impartiality' in administration from the current and possibly future sovereign states;
- 2 the decision to leave alone the existing separate but recently equally funded forms of Catholic, Protestant and integrated schooling;
- 3 the renewed outlawing of discrimination on grounds of political or religious belief;
- 4 the replacement of an oath of loyalty to the Crown with a pledge of office for ministers;
- 5 the establishment of a Human Rights Commission tasked with protecting individual equality and liberty, and identity rights;
- 6 the entrenchment of vigorous equality provisions, eventually incorporated in section 75 of the Northern Ireland Act (1998);
- 7 the promise of better legislative and institutional treatment of the Irish language and Ulster Scots – both of which became languages of record in the Assembly; and
- 8 the promise of a civic forum, and 'participatory norms of governance', to facilitate the representation of voices that might not be



heard purely through electoral or party mechanisms (McCrudden 1999).

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

- 1 the legislative procedures in the Assembly which require 'key decisions' to be passed either with a *concurrent majority* (under the 'parallel consent' procedure) of registered nationalists and unionists, or with a *weighted majority* (60 per cent majority including the support of at least 40 per cent of registered nationalists and registered unionists);
- 2 the mutual interdependency of office acquisition and maintenance by the First Minister and Deputy First Minister; and of the running of the Northern Ireland Assembly and the North-South Ministerial Council; and
- 3 the legal incorporation of the European Convention on Human Rights and Freedoms in UK public law and (the promise of) other legal enactments to give Northern Ireland a tailor-made Bill of Rights.

The Agreement led to a devolved government,<sup>16</sup> with full executive and legislative competence for economic development, education, health and social services, agriculture, environment and finance (including the local civil service), though plainly it is constrained by both UK and EU budgetary and other policies in these domains. Non-devolved powers remain with Westminster and the Secretary of State, who continues to be appointed by the UK premier. The form of devolved government originally envisaged few limits on Northern Ireland's capacity to expand its autonomy. Through 'cross-community agreement' the Assembly is entitled to agree to expand its competencies; and, again through such agreement, and the consent of the Secretary of State and Westminster, the Assembly is empowered to legislate for non-devolved functions. Security functions, policing and the courts were not devolved, but could be if sought by 'cross-community' consent. Maximum feasible autonomy was therefore within the scope of the local decision-makers. A convention may have arisen in which the Secretary of State and Westminster 'rubber stamped' the legislative measures of the Assembly. Indeed public policy in Ireland, North and South, might eventually have been made without direct British ministerial involvement.

For these reasons and others, had the Agreement been fully implemented and developed Northern Ireland would have become a specimen

of what Elazar terms a 'federacy' (1987). A federal relationship exists where there are at least two tiers of government over the same territory, and when neither can unilaterally alter the constitutional capacities of the other. Such a relationship is a necessary element of a federal system, but whether it is sufficient is controversial. Normally a federation has subcentral units that are co-sovereign with the centre throughout most of the territory and population of the state. Plainly it is premature to call new Labour's reconstructed UK a federation. But any system of constitutionally entrenched autonomy for one region makes the relationship between that region and the centre functionally equivalent to a federal relationship, and following Elazar, I call such a region – and its relationships with the centre – a federacy. The term 'federacy' captures how Irish nationalists understood the Agreement's institutions, and their entrenchment in the treaty.

Through standard legislative majority rules, the Assembly is empowered to pass 'normal laws', though there is provision for a minority, of 30 of the 108 members, to trigger procedures that require special majorities. Controversial legislation, 'key decisions', including the Budget, require these special procedures demonstrating 'cross-community' support. Two rules, parallel consent and weighted majority, were designed for this purpose (see D1 above). There is also one supermajority rule, which was not explicitly concurrent, cross-community or consociational. The Assembly is entitled by a two-thirds resolution of its membership to call an extraordinary general election before its four-year term expires. This was agreed by the parties, after the Agreement, in preference to a proposal that the Secretary of State should have the power to dissolve the Assembly.

This distinctive consociation, or consociational federacy, challenges the conventional wisdom of the post-1945 political science of ethnonational questions. For a long time 'external' self-determination, in law and political science, as well as political practice, was accepted solely as a once only right of colonial territories. The Agreement was, in part, a striking rejection of this wisdom. It contained agreed procedures on how a border might be changed, or rather abolished. The Agreement accepted the legitimacy of an irredentist aspiration: the desire of the Irish nation in both parts of Ireland to unify in one state, though its realization was made conditional on the consent of majorities in both current jurisdictions, and the recognition of the aspiration was accompanied by the removal of an irredentist territorial claim-of-right in the 1937 Irish constitution. The Agreement, like the negotiations that preceded it, contained recognition by the UK of the right of the people of Ireland, North and South, to exercise their self-determination to create a united

Ireland. The UK has never officially recognized Northern Ireland as a colonial territory, but its employment of the language of self-determination in the making of the Agreement was an interesting departure. In addition, the Agreement established elaborate cross-border arrangements explicitly seen by nationalist parties as mechanisms to facilitate national reunification. Lastly, the Agreement contained features of an externally protected minority rights regime, a tacit 'double protection model' – laced with elements of co-sovereignty, and designed to withstand major demographic and electoral change. The UK and Irish governments promised to develop functionally equivalent legal protections of rights, collective and individual, on both sides of the present border, promising protection to Northern Irish nationalists now on the same terms that would be given to Ulster unionists if they ever became a minority in a unified Ireland. National communities were to be protected whether they were majorities or minorities, irrespective of the sovereign stateholder – whence the expression 'double protection'. The two governments affirmed that 'whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with *rigorous impartiality* on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of *parity of esteem and of just and equal treatment* for the identity, ethos and aspirations of both communities' (author's emphases).

If conventional postwar political science was correct, then all these linkages, between an internal consociational settlement and measures that envisaged the possibility of a transformation in borders and of sovereignty regimes, should be the key sources of instability in the Agreement, raising expectations among the nationalist minority and arousing deep fears among the local unionist majority. Indeed for nearly ten years after the collapse of the 1973–4 Sunningdale settlement it was an axiom of faith among UK policy-makers that an internal consociational agreement – power-sharing – should be reached without an external agreement – an Irish dimension. Alternatively, it was held that an internal agreement should precede an external agreement. This thinking was reversed in the making of the Anglo-Irish Agreement. Recognizing that the absence of an Irish dimension facilitated republican militancy, the two governments established an intergovernmental conference, giving the Irish government unlimited rights of consultation over UK public policy on Northern Ireland, while encouraging the local parties to agree internal power-sharing. This combination of external and internal arrangements

and incentives, 'coercive consociation', was unacceptable to unionists, in the short term. But since they could not destroy the Anglo-Irish Agreement, through strikes, paramilitarism, civil disobedience or conventional parliamentary tactics, unionists eventually negotiated the Belfast Agreement in return for the modification of what they regarded as deeply unsatisfactory external arrangements.

Northern nationalists certainly had their expectations raised, and unionists certainly had, and still have, anxieties about the Agreement's external dimensions, but both the making of the 1998 Agreement and its stalling in 2000 suggest that the postwar wisdom of political science needs revision. Consociational arrangements can be effectively combined with cross-border regimes, which enable a change in sovereignty, without engendering massive instability. The 'No Unionists' who rejected the Agreement did not like its external features, but they focused their rhetorical fire on the prospects of gunmen getting into (the internal) government, terrorists being released early from jail, the failure to secure the decommissioning of (republican) paramilitaries' weapons, and on those parts of the Agreement, including proposed policing arrangements, which implied the full equality of nationalists with unionists within Northern Ireland. By contrast, the 'Yes Unionists' trumpeted some of the external aspects of the Agreement, pointing out that the Agreement had led to changes in the Irish Republic's constitution, which now requires the active consent of majorities in both parts of Ireland before Irish unification, and claiming that they had 'negotiated away' the Anglo-Irish Agreement of 1985. 'Yes Unionists' defended the cross-border institutions as minimal rational functional cooperation between neighbouring states, and observed, correctly, that they had succeeded in trimming down the more ambitious cross-border institutions advocated by the Irish government, the SDLP and by Sinn Féin. In short, the primary unionist concerns with the Agreement cannot reasonably be said to have lain with its external dimensions.

#### *Confederalizing arrangements*

Confederations exist when political units delegate powers and functions to bodies that can exercise power across their jurisdictions, while retaining veto and opt-out rights. Two confederal relationships were established under the Agreement: the North–South Ministerial Council and the British–Irish Council.

The North–South Ministerial Council (NSMC) brings together those with executive responsibilities in Northern Ireland and in the Republic.

Nationalists were concerned that if the Assembly could outlast the NSMC, 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 a tightly written contract. Internal consociation and all-Ireland external confederalism went together: the Assembly and the NSMC were made 'mutually interdependent'; one could not function without the other. Unionists were unable to destroy the NSMC while retaining the Assembly, and nationalists were not able to destroy the Assembly while keeping the NSMC. The NSMC satisfactorily linked northern nationalists to their preferred nation-state. The Irish government successfully recommended a change in its constitution to ensure that the NSMC, and its delegated implementation bodies, would be able to exercise island-wide jurisdiction in those functional activities where unionists were willing to cooperate. The NSMC functions much like the Council of Ministers in the European Union, with ministers having considerable discretion to reach decisions, but ultimately being accountable to their respective legislatures. The NSMC meets in plenary format twice a year, and in smaller groups to discuss specific sectors on a 'regular and frequent basis'. Provision was made for the Council to discuss matters that cut across sectors, and to resolve disagreements. In addition, the Agreement provided for 'implementation' bodies. The scope of these institutions was somewhat open-ended. The Agreement, however, required 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 cooperation within each separate jurisdiction, and at least six matters where cooperation will take place through implementation bodies. The latter were subsequently agreed to be inland waterways, food safety, trade and business development, special EU programmes, the Irish and Ulster Scots languages, and aquaculture and marine matters. The parties further agreed on six functional areas of cooperation – including some aspects of transport, agriculture, education, health, the environment and tourism, where a joint North–South public company was established.

The NSMC differed from the Council of Ireland of 1974. The name change was significant: a concession to unionist sensibilities. There was no provision for a joint parliamentary forum but the Northern Assembly and the Irish Oireachtas (Ireland's houses of parliament) were asked 'to consider' one. Nationalists wanted the NSMC established by legislation from Westminster and the Oireachtas – to emphasize its autonomy from the Northern Assembly. Unionists wanted it established by the Northern Assembly and its counterpart in Dublin. The Agreement split

these differences. The NSMC and the implementation bodies were brought into existence by British and Irish legislation, but during the transitional period it was for the Northern executive and the Republic's government to decide how cooperation should take place, and in what areas the North–South institutions should cooperate. Once agreed, the Assembly was unable to change these agreements – except by cross-community consent. The signatories to the Agreement promised to work 'in good faith' to bring the NSMC into being. There was not, however, sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement occurring over the NSMC – but this was patently a by-product of the crisis over executive formation and decommissioning. The signatories were required to use 'best endeavours' to reach agreement and to make 'determined efforts' to overcome disagreements over functions where there was a 'mutual cross-border and all-island benefit'.

A second weaker confederal relationship was established, affecting all the islands of Britain and Ireland.<sup>17</sup> Under the new British–Irish Council (BIC) the two governments of the sovereign states, and all the devolved governments and neighbouring insular dependent territories of the UK, can meet, agree to delegate functions, and may agree common policies. This proposal met unionists' concerns for reciprocity in linkages – and provides a mechanism through which they might in future be linked to the UK even if Northern Ireland becomes part of the Republic. Unionists originally wanted the NSMC subordinated to a British–Irish, or East–West, Council. This did not happen. There is no hierarchical relationship between the two councils. Two textual warrants suggest that the NSMC is more far-reaching than the BIC. The Agreement required the establishment of North–South implementation bodies, leaving the formation of East–West bodies a voluntary matter, and stated explicitly that the Assembly and the NSMC were interdependent, making no equivalent provision for the BIC.

The Agreement opened other linkages for Northern Ireland, one within the UK, and another as a possibility with the Republic, which held federalist as opposed to confederalist promise. The Agreement, unlike Scottish and Welsh devolution, was embedded in a treaty between two states, based on the UK's recognition of Irish national self-determination. The UK officially acknowledged that Northern Ireland has the right to join the Republic, on the basis of a local referendum, and it recognized, in a treaty, the authority of Irish national self-determination throughout the island of Ireland. The Agreement's institutions were brought into being by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland – recall the

referendums and the interdependence of the NSMC and the Assembly. In consequence, under the Agreement, the UK's relationship to Northern Ireland, at least in international law, in my view, has an explicitly federal character: Northern Ireland had become a federacy. The Westminster Parliament and executive could not, except through breaking its treaty obligations, and except through denying Irish national self-determination, exercise power in any manner that affected Northern Ireland's autonomy inconsistent with the Agreement. This was believed to be the case immediately after the Agreement was made. Plainly the suspension of the Agreement by Mandelson in February 2000 showed that the UK's authorities did not feel constrained by that reasoning.

The Agreement also opened federalist avenues in the Republic – one of the most centralized states in Europe. The Irish government and its people did not abandon Irish unification. Instead it became 'the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people expressed, in both jurisdictions in the island' (from the new Article 3). Irish unification cannot be precluded because of present demographic and electoral trends – which have led to a steady rise in the nationalist share of the vote across different electoral systems. The unification envisaged in the redrafted Irish constitution is, however, now different. It no longer resembles a programme of assimilation. The Republic is bound to structure its laws to prepare for the possibility of a con/federal as well as a unitary Ireland. Northern Ireland is a recognized legal entity within the Irish constitution, and its elimination as a political unit is no longer a programmatic feature of *Bunreacht na hÉireann* (Constitution of Ireland).

#### *Externally protecting the Agreement*

The two states signed a treaty and created two intergovernmental devices to protect their respective national communities. The most important was the successor to that of the Anglo-Irish Agreement, viz. the new British–Irish intergovernmental conference (BIGC) that guarantees the Republic's government access to policy formulation on all matters not (yet) devolved to the Northern Assembly or the NSMC. The Irish government retains rights of consultation in those Northern Irish matters that have not been devolved to the Assembly, as was the case under Article 4 of the Anglo-Irish Agreement, and as with that agreement,

there continues to be an intergovernmental conference, chaired by the Minister for Foreign Affairs and the Northern Ireland Secretary of State, to deal with non-devolved matters, and it continues to be serviced by a standing secretariat. The new Agreement, moreover, promised to 'intensify cooperation' between the two governments on all-island or cross-border aspects of rights, justice, prison and policing (unless and until these matters are devolved). 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, so it is as accurate to claim that it has been fulfilled as to say it has been deleted.

Formal joint sovereignty over Northern Ireland was not established, but the governments guaranteed the Agreement, and embedded it in an international treaty. Irish officials had been wary since the early 1990s of trading constitutional changes that were likely to be irreversible for institutions that might share the same fate as the Sunningdale settlement. That is why they argued that the Agreement should be incorporated in a treaty. The official Irish belief, and the Irish nationalist belief, was that the Agreement, like Northern Ireland's constitutional choice between membership of the UK and the Republic, now rested on the consent of the Irish people, through the joint act of self-determination of the North and South. The UK government would not, on this view, have the authority to do anything that was not legitimate under the Agreement's procedures. The UK government, under Mowlam, shared this understanding. Under Mandelson it did not. In February 2000 Mandelson obtained from the UK Parliament emergency statutory powers to suspend the Assembly and Executive. In doing so he acted in classic Diceyan fashion, using the doctrine of parliamentary sovereignty to arrogate to himself the power of suspension – which had not been granted in the making of the Agreement, or in its (UK) legislative enactment. The UK government's officials knew that suspension would breach the formal Agreement – because in the summer of 1999, when both governments contemplated a suspension mechanism, Mowlam's officials proposed that the treaty that was about to be signed by the two governments, which incorporated the Belfast Agreement, should be amended, to make it compatible with suspension. No such amendment was made.

Mandelson's justification of suspension in February 2000 was that it was necessary to save the First Minister, David Trimble. His threat to resign because the IRA had not delivered on decommissioning, in advance of the deadline mandated by the Agreement, would have become operative in an environment in which 'Yes Unionists' no longer

commanded an absolute majority of the registered unionists in the Assembly.<sup>18</sup> Therefore, it was feared, Trimble could not have been resurrected as First Minister if he did resign. This reasoning was false: the Assembly, by weighted majority, was entitled to pass any measure to amend its current rules for electing the dual premiers, and to send this measure to Westminster for statutory ratification. So there was a mechanism, within the Agreement, under which Trimble could have regained the position of First Minister. But even if Mandelson's justification had been true, the suspension was an unconstitutional and a partisan act. It was unconstitutional in Irish eyes because the suspensory power had not been endorsed with cross-community consent through the negotiation of the Agreement, or in the referendums, or in the UK's legislative enactment of the Agreement. It was partisan because neither the Agreement, nor the Mitchell Review of the Agreement that took place in late 1999, required Sinn Féin to deliver decommissioning by the IRA because of a new deadline set by the leader of the UUP. The then formally agreed deadline for decommissioning required all political parties to use their best endeavours to achieve full decommissioning by 22 May 2000.

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

The central purpose of the UK's agreement to delete section 75 of the Government of Ireland Act of 1920, and of the Irish state's agreement to modify Articles 2 and 3 of the Irish constitution, had been to show that both states were engaged in 'balanced' constitutional change, confirming that Northern Ireland's status as part of the UK or the Republic rested

with its people alone. The UK's Diceyans, including Ulster Unionists, have obviously interpreted the UK's deletion of section 75 of the Government of Ireland Act as meaningless because in their eyes Parliament's sovereignty remains intact in a given domain even when it removes a statutory statement which says it remains intact! Irish negotiators obviously should have been more careful: the UK's 'constitution' is Ireland's British problem. Had the Agreement fully bedded down, perhaps Northern Ireland status as a federacy would have developed the status of a constitutional convention – the UK's mysterious functional poor cousin of constitutionality.

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

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

Thirdly, unionists must, eventually, consider the constitutional consequences of suspension. The 'Yes Unionists', in embracing the doctrine of

parliamentary sovereignty, forget that they may one day suffer from the consequences of the sword they urged Westminster to deploy. What Westminster did on behalf of unionists may be used at their expense tomorrow – including taking from them membership of the Union. Mandelson's action means that the Union does not rest on the consent of its component parts, but rather on Westminster's say so: Westminster is free to modify the Union in any way it likes, for example, through full-scale joint sovereignty over Northern Ireland with the Republic, or through expelling Northern Ireland from its jurisdiction.

Lastly, the suspension spells a blunt warning to the Scottish Parliament and the Welsh Assembly – bodies created with smaller proportions of popular support and lower electoral turnouts than their Northern Irish counterpart. Sovereignty remains indivisibly in Westminster's possession: even under 'modernizing' New Labour.

### *The dual premiership*

Among its institutional novelties the Agreement established two quasi-presidential figures, a dyarchy, to preside over an executive formed through the d'Hondt allocation process.<sup>19</sup> An executive presidency is an executive that cannot be destroyed by an assembly except through impeachment; the dual premiership has presidential characteristics because it is almost impossible to depose the two office-holders, provided they remain united as a team, until the next general election. The First and Deputy First Minister are elected together by the *parallel consent procedure*, an idea that flowed out of the making of the Agreement which required propositions to have the support of a majority of parties, including parties representing a majority of nationalists and of unionists. The carry-over of this concurrent rule of negotiation into the election of the two premiers gave very strong incentives to unionists and nationalists to nominate a candidate for one of these positions who was acceptable to a majority of the other bloc's members. It also meant that the respective unionist and nationalist moderates were guaranteeing their control of these positions. In the first elections for these posts in *designate* or *shadow* form pro-Agreement unionists in the UUP and the Progressive Unionist Party, who between them then had a majority of registered unionists (30 out of 58), 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 (24 out of 42). (The 'No Unionists' voted against this combination, while Sinn Féin abstained.)

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 have identical powers, the sole difference being in their titles: both preside over the 'Executive Committee' of ministers, and have a role in coordinating its work. Their implicit and explicit coordinating functions, as approved by the Shadow Assembly, were elaborated in February 1999. A Department of the First and Deputy First Ministers was created. It was to have an Economic Policy Unit, and an Equality Unit, and was tasked with liaising with the NSMC, the BIC and the Secretary of State on reserved and excepted UK powers, EU/international matters, and cross-departmental coordination.

The prime ministerial dyarchy is quasi-presidential, because neither the First nor the Deputy First Minister formally appoint the other ministers to the Executive – save where one of them is a party leader entitled to nominate the ministries to which his or her party is entitled. Posts in the Executive are allocated to parties in proportion to their strength in the Assembly, according to a mechanical rule, the d'Hondt rule. The rule's consequences were simple: any party that won a significant share of seats and was willing to abide by the new rules established by the Agreement had a reasonable chance of access to the executive. It creates a voluntary grand coalition government because parties are free to exclude themselves from the Executive Committee, and because no programme of government has to be negotiated in advance. The design created strong incentives for parties to take their entitlement to ministries because if they did not, the seats would go either to their ethnonational rivals or to competitors in their own bloc.

This dual premiership critically depends on the personal cooperation of the two holders of these posts, and on the cooperation of their respective majorities (or pluralities – under the weighted majority rule). The Northern Ireland Act (1998) reinforced their interdependence by requiring that 'if either the First Minister or the deputy First Minister ceases to hold office, whether by resignation or otherwise, the other shall also cease to hold office' (Article 14 (6)). This power of resignation has been strategically deployed by both elected office-holders.

In the summer of 1999 the SDLP's Mallon resigned as Deputy First Minister (designate), complaining that the UUP was 'dishonouring' the Agreement and 'insulting its principles' by insisting on decommissioning before executive formation. He did so to speed an intergovernmental review of the implementation of the Agreement. The question immediately arose: did Mallon's resignation automatically trigger Trimble's departure from office, and require fresh elections to these positions



within six weeks? The Initial Presiding Officer's answer to this question was that it did not, because the Assembly was not yet functioning under the Northern Ireland Act. This answer was accepted, and in November 1999 Mallon's resignation was subsequently rescinded with the assent of the Assembly with no requirement that the two men would have to re-stand for office.

Shortly afterwards, however, when the Assembly and Executive came fully 'on line' in November 1999, and ceased to be in designate form, David Trimble was to use the threat of resignation, helping thereby to precipitate the suspension of February 2000. He wrote a postdated letter of resignation to the chairman of his party, who was authorized to deliver it to the Secretary of State if Sinn Féin failed to achieve IRA movement on the decommissioning of its weapons – in the form of 'product' – within a specified period after the Ulster Unionist Party had agreed to full-scale executive formation. As we have seen, the fear that this resignation would become operative was the proximate cause of the Secretary of State's decision to suspend the Assembly.

How should we appraise the executive design in the Agreement? The skill of the designers/negotiators was to create strong incentives for executive power-sharing and power division, but without requiring parties to have any prior formal coalition agreement – other than the institutional agreement – and without requiring any party to renounce its long-run aspirations. The dual premiership, by contrast, was designed to tie moderate representatives of each bloc together, and to give some drive towards overall policy coherence. It was intended to strengthen moderates and to give them significant steering powers over the rest of the executive. The d'Hondt mechanism, by contrast, ensured inclusivity and was carefully explained to the public as achieving precisely that. 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 of 1973. Yet the Executive, and the dual premiership in particular, have proven unstable – and for reasons that go beyond the holders' personalities. Two causes have mattered: the precariousness of the 'Yes Unionist' bloc, and the potency of the resignation weapon available to each premier. Arguably the inter-moderate party deal was a weak spot in institutional design. Had the first and deputy first premierships been allocated according to the d'Hondt procedure, and had parties which threatened not to take up their Executive seats simply lost access to executive power, then there would have been very strong incentives for the Executive to be sustained, especially if the

Secretary of State had decided to take a hands-off approach to any threats of non-participation in the executive.

Using the d'Hondt rule to allocate the dual premierships, with the same Mitchell-inspired ministerial pledge of office, perhaps modified by a rule that one premiership had to go to the unionist party with the highest number of seats and the other to the nationalist party with the highest number of seats, would, however, have had the consequence of making more likely the future success of harder-line party leaders, such as Paisley or Adams. That, of course, was one motivation behind the construction of the dual premiership. However, the prospect feared by the moderates may not have spelled disaster: the prospect of the highest offices might have further moderated the stances of the respective hardline parties. It is a heretical thought.

What was not foreseen was that failure to timetable the formation of the rest of the Executive immediately after the election of the premiers would precipitate a protracted crisis of Executive formation. Trimble availed himself of this loophole to prevent Executive formation until November 1999. If the Agreement survives, amendments to the Northern Ireland Act (1998) could be adopted by the UK Parliament, or by the Assembly, to prevent any recurrence of this type of crisis. In future, candidates for First and Deputy First Minister could be obliged to state the number of Executive portfolios that will be available, and the formation of the Executive should be required immediately after their election. That would plug this particular constitutional hole. It may, however, be unnecessary. It is unlikely that future candidates for First and Deputy First Minister will agree to be nominated without a firm agreement on the number of portfolios and the date of cabinet formation.

The crisis of Executive formation, which dogged the implementation of the Agreement between June 1998 and November 1999, arose for political and constitutional reasons. Trimble insisted that Sinn Féin deliver some IRA decommissioning before its members would take their seats in the Executive: 'no government before guns'. Under the text of the Agreement, Trimble had no warrant to exercise this veto:

- 1 no party can veto another party's membership of the Executive, though the Assembly as a whole, through cross-community consent, may deem a party unfit for office (it has not done so);
- 2 the Agreement did not specify a starting date for decommissioning, 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;



3 any natural reading of the Agreement mandated Executive formation as the first step in bringing all the Agreement's institutions 'on line'.

Trimble's concern was to appease critics of the Agreement within his own party, and he was initially facilitated in exercising this tacit veto by the UK and Irish governments who were sympathetic to his exposed position. One flexible provision in the Agreement gave Trimble time to stall. The Agreement stated that there must be at least six 'other ministers', but that there can be 'up to' ten. The number of ministries was to be decided by cross-community consent and that gave an opportunity to delay Executive formation. It would be December 1998 before the parties reached agreement on ten ministries.

In mid-November 1999 it looked as if the crisis over Executive formation would finally be resolved. The UUP accepted that the running of the d'Hondt procedure to fill the cabinet could occur after the *process* of decommissioning began – with the IRA appointing an interlocutor to negotiate with the IICD – while actual decommissioning, consistent with the text of the Agreement, would not be required until after Executive formation. Senator Mitchell in concluding his Review of the Agreement, and with the consent of the pro-Agreement parties, stated that 'Devolution should take effect, then the executive should meet, and then the paramilitary groups should appoint their authorised representatives, all on the same day, in that order.' This was an honourable resolution to what looked like becoming a fundamental impasse – though the Ulster Unionist Council rendered it problematic. To get their support Trimble offered the previously cited postdated resignation letter to become operative within a specified period not negotiated under the Mitchell Review. The IRA did not deliver, at least not in the way that Mandelson believed was required; suspensory powers were obtained and used. Had the Agreement been followed to the letter, the parties in the Assembly could have determined by cross-community consent that Sinn Féin and the PUP were not fit for office because they had not used their best endeavours to achieve comprehensive decommissioning. That avenue was not deployed.

Suspension did not completely save Trimble from the wrath of his party: 43 per cent of them voted for a stalking horse to replace him, the Reverend Martin Smyth MP. Trimble remained leader but bound by a mandate for reformation of the Executive that neither the UK government or republicans seemed likely to deliver. The 'Yes Unionists' had failed decisively to rout the 'No Unionists', partly through misjudgement and mismanagement, and partly through the over-representation of 'No' and 'soft Yes' unionists among the UUP's activists as opposed to its

voters. Their failure was, of course, rendered more likely by the republican position on decommissioning. The Republicans were locked in a ghetto of insecurity – determined that, at best, the decommissioning of their weapons would be the last or joint last act of implementation.

In May 2000, however, republicans promised to deliver a 'confidence-building measure', viz. inspections of some of the IRA's arms dumps, by two international observers, Cyril Rhamaposa, the former African National Congress negotiator, and Marti Ahtisaari, the former general and premier of Finland. It also seemed clear that they would re-engage with the IICD. In return Trimble promised to lift his resignation threat and Mandelson took the Executive and Assembly out of suspended animation. It was agreed that completing decommissioning be delayed for one year. Republicans appeared to be engaging in the decommissioning process in return for the restoration of the Executive, side-payments for their prisoners and those still facing extradition, and for assurances on demilitarization and police reform: Mandelson appeared vindicated in the eyes of his supporters. Blair gave assurances that the UK government would implement the Patten Commission's proposals on policing, which Trimble was known to oppose. Trimble warned republicans to engage with the IICD; republicans warned Mandelson to deliver on his obligations under the Agreement, which takes us to the crisis over Executive maintenance and policing reform.<sup>20</sup>

### Policing reform and spinning out of control

The institution building of the Belfast Agreement was flanked by confidence-building processes involving ceasefires by paramilitaries, the release of their incarcerated prisoners, and commitments to protect human rights, entrench equality, demilitarize the region, assist in decommissioning, and to the reform of the administration of justice and policing. As of 2000, just four of these items awaited full or effective beginnings in implementation: decommissioning by paramilitaries; the reform of the system of criminal justice; demilitarization; and policing reform. These items were interlinked.

The Labour government initially welcomed the Patten Report issued by the Independent Commission on Policing for charting 'the way forward in the interests of all'. Blair, Mandelson, and the 'Explanatory Notes' issued by the Northern Ireland Office accompanying the Police Bill put before the UK Parliament in the spring of 2000, flatly declared their intention to give effect to Patten's 175 recommendations. That was not true. The UK government also implied, usually in off-the-record

briefings, that it could not implement the Patten Report in full because of the 'security situation'. This position, in dissembling contradiction with its official one, would have had credibility if the necessary preparatory steps to implement Patten in full when the security situation was satisfactory had been taken. They were not.<sup>21</sup>

Policing was so controversial that the parties to the Agreement could not concur on future arrangements (see McGarry and O'Leary 1999).<sup>22</sup> They did agree the terms of reference of a commission, eventually chaired by Christopher Patten, a former minister in the region and now a European Commissioner. To have effective police rooted in, and legitimate with, both major communities was vital to the settlement. Eight criteria for policing arrangements were mandated in the commission's terms of reference. They were to be impartial; representative; free from partisan political control; efficient and effective; infused with a human rights culture; decentralized; democratically accountable 'at all levels'; and consistent with the letter and the spirit of the Agreement. The Patten Commission engaged in extensive research and interaction with the affected parties, interest groups and citizens, and published its report in September 1999. It did not, and could not, meet the hopes, or match the fears, of all, but the commissioners undoubtedly met their terms of reference (see Patten et al. 1999; O'Leary 1999c).

The Patten Report was a thorough, careful and imaginative compromise between unionists who maintained that the existing Royal Ulster Constabulary already met the terms of reference of the Agreement and those nationalists, especially republicans, who maintained that the RUC's record mandated its disbanding. However the Police Bill presented to Parliament in the spring of 2000 was an evisceration of Patten, and condemned as such by the SDLP, Sinn Féin, the Women's Coalition, the Catholic Church, and non-governmental and human rights organizations, such as the Committee on the Administration of Justice. It was also criticized by the Irish government, the US House of Representatives (H. Res. 447, 106th Congress) and Irish Americans, including President Clinton.<sup>23</sup> The veracity of the critics' complaints can be demonstrated by comparing some of Patten's recommendations with the initial bill presented to Parliament:

1 Patten recommended a neutral name, the Northern Ireland Police Service. The Royal Ulster Constabulary was not a neutral title so it was recommended to go. Patten also recommended that the display of the Union flag and the portrait of the Queen at police stations should go. Symbols should be 'free from association with the British or Irish states'. These recommendations were a consequence of

Patten's terms of reference, the Agreement's explicit commitment to establishing 'parity of esteem' between the national traditions, and the UK's solemn commitment to 'rigorous impartiality' in its administration. The original bill, by contrast, proposed that the Secretary of State have the power to decide on the issues of names and emblems.

- 2 Patten recommended affirmative action to change rapidly the proportion of cultural Catholics in the police. Even critics of affirmative action recognized the need to correct the existing imbalance – in which over 90 per cent of the police are local cultural Protestants. The original bill reduced the period in which the police would be recruited on a 50:50 ratio of cultural Catholics and cultural Protestants from ten to three years, requiring the Secretary of State to make any extension, and was silent on 'aggregation', the proposed policy for shortfalls in the recruitment of suitably qualified cultural Catholics.
- 3 Patten proposed a Policing Board consisting of ten representatives from political parties, in proportion to their shares of seats on the Executive, and nine members nominated by the First and Deputy First Ministers. These recommendations guaranteed a politically representative board in which neither unionists nor nationalists would have partisan control. The original bill introduced a requirement that the board should operate according to a weighted majority when recommending an inquiry, tantamount to giving unionist and unionist-nominated members a veto over inquiries, that is, partisan political control, and a direct violation of Patten's terms of reference.
- 4 Patten avoided false economies when recommending a downsizing of the service, advocated a strong board empowered to set performance targets, and proposed enabling local District Policing Partnership Boards to engage in the market-testing of police effectiveness. The original bill empowered the Secretary of State, not the Policing Board, to set performance targets, made no statutory provision for disbanding the police reserve, and deflated the proposed District Policing Partnership Boards, because of assertions that they would lead to paramilitaries being subsidized by taxpayers.
- 5 Patten proposed that new and serving officers should have knowledge of human rights built into their training, and retraining, and their codes of practice. In addition to the European Convention, due to become part of UK domestic law, the Commission held out international norms as benchmarks (Patten et al. 1999: para. 5.17). Patten's proposals for normalizing the police – through merging the special branch into criminal investigations – and demilitarizing the police

met the Agreement's human rights objectives. The original bill was a parody. The new oath was to be confined to new officers. No standards of rights higher than those in the European Convention were to be incorporated into police training and practice. Responsibility for a code of ethics was left with the Chief Constable. Patten's proposed requirement that the oath of service 'respect the traditions and beliefs of people' was excluded. Normalization and demilitarization were left unclear in the bill and the implementation plan.

- 6 Patten envisaged enabling local governments to influence the Policing Board through their own District Policing Partnership Boards, and giving the latter powers 'to purchase additional services from the police or statutory agencies, or from the private sector', and matching police internal management units to local government districts. The original bill, by contrast, maintained or strengthened centralization: the Secretary of State obtained powers that Patten proposed for the First and Deputy First Ministers and the Policing Board, and powers to issue instructions to District Policing Partnership Boards; and neither the bill nor the implementation plan implemented Patten's proposed experiment in community policing.
- 7 Patten envisaged that the Policing Board would be strong, independent and powerful to hold the police to account, and to replace the discredited Police Authority (Patten et al. 1999: para. 6.23). The police would have 'operational responsibility' but be held to account by the board, and required to interact with the Human Rights Commission, the Ombudsman and the Equality Commission. The bill watered down Patten's proposals, empowering the Secretary of State to oversee and veto the board's powers, empowering the Chief Constable to refuse to respond to reasonable requests from the board, and preventing the board from making inquiries into past misconduct.
- 8 Patten was consistent with the terms of reference and spirit of the Belfast Agreement. The original bill was not, being incompatible with the 'parity of esteem' and 'rigorous impartiality' in administration. Manifestly it would not encourage 'widespread community support' since it fell far short of the compromise that moderate nationalists had accepted and that Patten had proposed to mark a 'new beginning'.

What explains the radical discrepancy between the Patten Report and the original police bill? The short answer is that the Northern Ireland Office's officials under Mandelson's supervision drafted the bill. They appeared to 'forget' that the terms of reference came from the Belfast Agreement. They treated the Patten Report as a nationalist report, which

they had to modify as benign mediators. Although Patten warned against 'cherry-picking', the Secretary of State and his officials believed that they had the right to implement what they found acceptable, and to leave aside what they found unacceptable, premature, or likely to cause difficulties for pro-Agreement unionists or the RUC. The Police Bill suggested that the UK government was determined to avoid the police being subject to rigorous democratic accountability; deeply distrustful of the capacity of the local parties to manage policing at any level; and concerned to minimize the difficulties that the partial implementation of Patten would occasion for Trimble, by minimizing radical change to become mere reforms of the RUC.

Under pressure Mandelson beat a partial retreat, whether to a position prepared in advance only others can know. Some speculated that he designed an obviously defective bill so that nationalists would then be mollified by subsequent improvements. That is to make the characteristic error of endowing him with greater political intelligence than his record suggests: all that the defective bill achieved, according to Seamus Mallon, was to 'shatter already fragile faith in the Government's commitment to police reform'.

Accusing his critics of 'hype', 'rhetoric' and 'hyperbole', Mandelson promised to 'listen' and to modify the bill. He declared that he might have been too cautious in the powers granted to the Policing Board. Indeed the government was subsequently to accept over sixty SDLP-driven amendments to bring the bill more into line with Patten. The bill was improved in the Commons and Lords. The quota for the recruitment of cultural Catholics is now better protected. The Policing Board has been given power over the setting of short-run objectives, and final responsibility for the police's code of ethics. Consultation procedures involving the Ombudsman and the Equality Commission have been strengthened, and the First and Deputy First Ministers will now be consulted over the appointment of non-party members to the board. The weighted majority provisions for an inquiry by the board have gone. Yet any honest appraisal of the Act had to conclude that it was still not the whole Patten; it rectifies some of the original bill's more overt deviations, but on the crucial issues of symbolic neutrality and police accountability, vital for a 'new beginning', it was at odds with Patten's explicit recommendations.<sup>24</sup>

### *Symbolic neutrality*

Patten wanted a police rooted in both communities, not just one. That is why he recommended that the name of the service be *entirely* new: The

Northern Ireland Police Service. The Act, because of a government decision to accept an amendment tabled by the UUP, styles the service 'The Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary)'. The Secretary of State promised an amendment to define it 'for operational purposes', to ensure that the full title would rarely be used and that the parenthetic past generally be excluded. He broke this commitment at the report stage of the bill's passage through parliament. Mandelson was mendaciously misleading in declaring that he was merely following Patten's wishes that the new service be connected to the old, avoiding suggestions of disbanding. Patten proposed an entirely new and fresh name, and proposed linkages between the old and new services through police memorials, and *not* the renaming adopted by the government.

Patten unambiguously recommended that the police's new badge and emblems be free of association with the British or Irish states, and that the Union flag should not fly from police buildings. The Act postpones these matters. Avoiding responsibility, the government passed the parcel to the local parties to reach agreement, while providing reassuring but vague words for the parliamentary record. Since Mandelson had already ruled that only the Union Jack, albeit just on specified days, should fly over the buildings of the devolved administration, some nationalists lacked faith that the UK would deliver on cultural neutrality and impartiality.

Why do these symbolic issues matter? Simply because the best way to win widespread acceptance for police reform was to confirm Patten's promised new beginning by following his proposed strategy of symbolic neutrality.<sup>25</sup> Full renaming and symbolic neutrality would spell a double message: that the new police are to be everyone's, and the new police are no longer to be primarily the unionists' police. This symbolic shift would mightily assist in obtaining representative cultural Catholic recruitment and in winning consent for the new order among nationalists as well as unionists.

#### *Oversight and accountability*

Patten recommended an Oversight Commissioner to 'supervise the implementation of our recommendations'. The Labour government – under pressure – put the commissioner's office on a statutory basis, which it did not intend to do originally, but confined the commissioner's role to overseeing changes 'decided by the government'. Had Mandelson and his colleagues been committed to Patten they would have charged the commissioner with recommending, now or in the future, any legislative

and management changes necessary for the full and effective implementation of the Patten Report. Patten recommended a Policing Board to hold the police to account, and to initiate inquiries into police conduct and practices. Mandelson in effect prevented the board from inquiring into any act or omission arising before the eventual Act applies. This was tantamount to an undeclared amnesty for past police misconduct, not proposed by Patten. The Secretary of State will additionally have the authority to approve or veto the person appointed to conduct any present or future inquiry (Police Act 2000, clause 58 (9)). Patten also recommended that the Ombudsman should have significant powers (Patten et al. 1999: para. 6.42) and should 'exercise the right to investigate and comment on police policies and practices', whereas in the Act the Ombudsman may make reports, but not investigate (so it is not a crime to obstruct her work). The Ombudsman is additionally restricted in her retrospective powers (Police Act 2000, clause 62), again circumscribing the police's accountability for past misconduct.

Mandelson suggested his critics were petty, arguing that they were ungrateful, pointing out just how much he had done to implement Patten, and how radical Patten is by comparison with elsewhere. This 'spin' was utterly unconvincing. The proposed arrangements effectively seal off past, present and future avenues through which the police might be held to account for misconduct, for instance in colluding with loyalist paramilitaries or covering up assassinations; and are recipes for leaving the police outside the effective ambit of the law. And be it noted: Patten is not radical, especially by the standards of Canada and the USA that have long made their police democratically accountable and socially representative. Patten is only radical by the past standards of Northern Ireland.

There was a small ray of hope, noted by the SDLP, viz. if the implementation plan on policing brought the UK government much closer into line with Patten then there might be a basis for a new beginning. Over 300 police had been killed in the conflict, the number emphasized by unionists, but nationalists remembered that seven of the first eight deaths in 1969 were partly caused by an illegitimate unreformed police. In the mind-set of the Provisional IRA their formation was the result of the police standing by, or assisting in, the burning of nationalists' homes in the summer of 1969. So, Mandelson's dilution of the Patten report threatened to decouple republicans from the Agreement.<sup>26</sup>

Generously disposed analysts believe Mandelson's conduct was motivated to help Trimble and the UUP who were in a precarious position – aggravated by the absence of a start to decommissioning by the IRA. Perhaps, but that does not account for his efforts to block an accountable service in the future – here the Secretary of State appeared to succumb to

lobbying to prevent the unearthing of past and present policing scandals. And, it neglects the fact that his conduct continued a practice he had established by obtaining the power of suspension, of unilaterally rewriting the rules of the game – perhaps appropriate in normal politics, but entirely inappropriate in bedding down a new constitutional settlement.

### Avoiding a meltdown?

In January 2001 it was difficult to avoid pessimism about the prospects for the Agreement. The passage of the Police (Northern Ireland) Act in November 2000 had left the SDLP, Sinn Féin and the Irish government strongly dissatisfied. Even though the final Act was better than the original bill it was still 'Patten lite'. The IRA had not formally re-engaged with the IICD, partly, it seemed, to put pressure on Mandelson to deliver on Patten and demilitarization – though it did facilitate a second inspection of its arms dumps. The UK government was refusing to move fast on demilitarization because of its security concerns, especially about dissident republicans, who were strongest in areas which have historically been vigorously republican – and where there is the greatest demand for demilitarization. The discipline of loyalist paramilitaries was breaking down: there was internal feuding, and sections of the UDA were targeting vulnerable Catholics with pipe-bomb attacks in predominantly unionist towns.

On top of all this Trimble decided to play Executive hardball. At the end of 2000, besieged by internal party critics demanding a fast exit from the Executive because of the IRA's obstinate stance on decommissioning, he decided to take what was called proportionate action. Acting on poor legal advice, he availed himself of a technical clause in the Northern Ireland (1998) Act and refused to nominate the two Sinn Féin ministers to carry out their obligations under meetings of the North-South Ministerial Council. Sinn Féin's two ministers, Bairbre de Bruin and Martin McGuinness, and the Deputy First Minister, Seamus Mallon, announced they would test the legality of Trimble's decision in the courts. Trimble's lawyer justified his action as intended to put pressure on Sinn Féin to get the IRA to deliver on its obligations. Judge Kerr ruled Trimble's action unlawful on 30 January 2001, partly because Trimble could not inhibit or frustrate one part of the Agreement, cross-border cooperation, to ensure progress on another, viz. decommissioning. He also ruled that Trimble had acted beyond his powers. Trimble immediately decided to appeal.

The political stalemate and legal showdown threatened an acrimonious and messy meltdown. However, on 24 January 2001 something unexpected happened. Peter Mandelson was forced to resign as Secretary of State because of events that had nothing to do with Northern Ireland. He was replaced by Dr John Reid, the former Secretary of State for Scotland.

Mandelson's exit left nationalists, republicans and the Irish government almost as happy as Labour's backbenchers. In the course of the next ten months Dr Reid would establish much better relations with the SDLP and Sinn Féin, while generally retaining the confidence of the UUP.

The remarkable formal political institutions of the Agreement, which merit the description of a complex consociation, had all been established in 1998–9, albeit with delays in their scheduled timetables. But key implementation difficulties were evident in 2000–1:

- 1 The UK government obtained and used the unilateral power of suspension – immensely disliked by nationalists, but sought by unionists, especially as a bargaining chip to compel IRA decommissioning.
- 2 The dual premiership was vulnerable to resignation threats from both the First and Deputy First Ministers – creating reasons for either intra-Agreement Reviews, or extra-Agreement suspensions.
- 3 Unionists who rejected, and unionists who supported, the Agreement tried to create difficulties within the Executive, by refusing to attend plenary sessions of the NSMC and rotating their ministerial nominees in the case of the DUP; by initially refusing in the case of both the UUP and the DUP to nominate their MLAs to their ministerial entitlements, and later obliging their withdrawal from those entitlements; and by refusing to establish or maintain the Executive in the absence of IRA decommissioning.
- 4 The First Minister acted unlawfully in refusing to nominate Sinn Féin ministers to carry out their duties on the NSMC.

The institution-building of the Agreement had, however, led to an ironic historic reversal. Whereas nationalists and republicans had once boycotted devolved arrangements in Stormont (O'Leary and McGarry 1996: ch. 3), it was now unionists who threatened to do so. The difficulties in institutional maintenance, magnified by Mandelson's mismanagement, flowed directly from two sources:

- 1 Unionist dissatisfaction with the failure of the confidence-building measures attached to the Agreement, especially decommissioning, and their dissatisfaction with the inevitable repercussions of

appropriate implementation of the confidence-building measures, especially with regard to police reform, and prisoner releases.

- 2 Internal unionist political competition, within the UUP, and between the UUP and the DUP, rendered it extremely difficult for the UUP to be a confident coalition partner with the nationalists and the republicans who made the Agreement.

The confidence-building measures embedded in the making of the Agreement have been of two kinds: the responsibilities of the two sovereign governments, and the responsibility of agents within Northern Ireland. The Irish government fulfilled its immediate obligations, including the organization of the change of its constitution through a referendum – though it has been slow in building the human rights institutions and measures that would demonstrate its full commitment to the double protection model embedded in the Agreement. The UK government had a much more mixed track record, though it had the most to do. It was the most vulnerable to lobbying, and there has been erratic conduct partly because of three different Secretaries of State. The UK fulfilled its obligations with regard to prisoner releases, organized better arrangements for the victims of violence, made promising starts with respect to better human rights protections and laws on equality – though some of its reforms in this area and the administration of justice are yet to be specified. It has initiated some demilitarization, but, reasonably, has awaited decommissioning before completion. On police reform it zig-zagged dramatically. It radically diluted the Patten Commission's proposals, then moved to satisfy the SDLP's complaints that it had done so, but lost Sinn Féin's confidence that it wanted it be part of new policing arrangements. Its conduct, especially over suspensions, was partial to the interests and threats of the divided moderate unionists. It made it less likely that the IRA would deliver on decommissioning because, especially on police reform, it patently dishonoured its commitments.

The confidence-building measures that lie outside the two governments' control rested with paramilitaries who did not directly negotiate the Agreement. They have, albeit to varying degrees, broadly maintained their ceasefires, and the worst atrocities, on a generally lower scale than before, have been carried out by smaller dissident organizations. The IRA played tit-for-tat with the UK on police reform and decommissioning, and tit-for-tat with the UK and the UUP on the institutions of the Agreement and decommissioning. Nothing in the Agreement warranted its lateness in starting, let alone completing, decommissioning. What inhibited it was the failure of the UK and the UUP fully to honour their obligations, and the fear – among the IRA and its constituents – that they

should not be left defenceless against unreformed police and active loyalists.

Loyalists have failed to prosper politically (Bruce 2001), which partly explains their disorganization, disarray and greater descent into criminality. By contrast Sinn Féin has been the prime electoral beneficiary of the peace process (Mitchell, O'Leary and Evans 2001), because it is seen by cultural Catholics as their (increasingly constitutional) nationalist champion, and because it is the beneficiary of demographic transformations (O'Leary and Evans 1997). And it would be the interplay of electoral calculations and deft manoeuvring by all parties that would produce a remarkable political game in the summer and autumn of 2001 that terminated with the apparent stabilization of the Agreement in November 2001.

Just before the Westminster general elections of June 2001 Trimble decided to gamble, resigning as First Minister, both to position his party for competition with the anti-Agreement DUP in the forthcoming election, and to put pressure on Sinn Féin to deliver the IRA on decommissioning in accordance with the now postponed deadline. His resignation required the UK Secretary of State either to suspend the institutions – thereby provoking nationalists – or to call fresh Assembly elections – widely seen as likely to benefit the 'No Unionists'. In the Westminster general elections Sinn Féin did remarkably well, edging ahead of the SDLP for the first time, both in share of the vote, and in seats won (for full details see Mitchell, O'Leary and Evans 2001). Shortly afterwards the SDLP leader John Hume announced his resignation as party leader, and Seamus Mallon indicated that he would not stand for the next Assembly elections. The DUP also did very well, winning its highest ever share of the vote and of seats in a Westminster election. The conventional wisdom was that all this boded very badly for the Agreement, even though both Sinn Féin and the DUP had done well on much more moderate platforms – Sinn Féin supporting the Agreement, the DUP calling for its renegotiation.

Shortly after the Westminster elections a review of the Agreement was convened by the two governments at Weston Park, Shropshire. The UK government indicated its willingness to deliver further administrative and legislative changes to come very close to the full implementation of the Patten Report – in effect, conceding that Mandelson's critics had been correct. It also promised a series of inquiries on controversial cases involving police collusion in the killing of nationalists and lawyers identified as nationalists – and the Irish government balanced that by permitting the possibility of inquiries into alleged Garda collusion with the IRA. The UK government promised that specific demilitarization moves would

accompany moves by the IRA on decommissioning. The UK's shifts were sufficient to prompt the SDLP soon afterwards to accept its positions on the new police board – which Sinn Féin decided to boycott. The IRA did not, however, move on decommissioning, though it had organized another inspection of its arms dumps during the course of the election campaign. It looked as if republicans were determined to extract further concessions on policing, or that they were internally divided over beginning decommissioning, especially given loyalist activities in North Belfast.

Dr Reid and his advisers found a (unanticipated) loophole in the suspension legislation, and twice opted for one-day unilateral suspensions of the Agreement's institutions – which each time enabled the Assembly to function for a further six weeks without an elected First Minister. The prospects for institutional collapse worsened in mid-summer, partly because of loyalist breaches of their ceasefires in Northern Ireland, and because a team of IRA and Sinn Féin cadres were arrested in Colombia, accused of being engaged in international terrorist advisory counsel. Then came the suicide missions by Islamist militants in New York and Washington on September 11 – which shook US and European public opinion on the capacity of terrorism in general. Trimble and his ministerial colleagues in the UUP threatened to withdraw from the Executive completely – which would force the Secretary of State to choose between a long suspension and fresh elections. These events provided the catalysts for the leadership of Sinn Féin to persuade hardliners in the IRA that it was time to begin decommissioning, to consolidate Sinn Féin's electoral progress, North and South, and to save the institutions of the Agreement. They would likely have done so anyway – September 11 made rapid movement more urgent, and in some respects easier.

When the IRA started to decommission, the UK reciprocated with the promised demilitarization actions it had made at Weston Park, but a new institutional crisis emerged. Trimble and his colleagues were prepared to accept the authenticity of the IRA's actions, as verified by the International Commission, but hardline unionists were not. When the Assembly would vote to try to restore Trimble to office, together with the new prospective leader of the SDLP, Mark Durkan, two of Trimble's party looked likely to desert him. There was not a sufficient – majority – level of support within the unionist bloc for the election of a First Minister and Deputy First Minister, though there was a very large majority in the Assembly overall. Time seemed to have run out. The Secretary of State could not, it seemed, avoid calling for fresh Assembly elections – he had ruled out another suspension, which would have been tantamount to

throwing dust in the faces of the IRA. Pressure was accordingly exerted on the 'Others' to redesignate themselves as unionists to save the Agreement. The Women's Coalition divided in two, designating one of its members as a nationalist and the other as a unionist. It was not sufficient: Trimble and Durkan were not elected, falling one vote short of the required concurrent majority. The Alliance Party demanded a Review of the Agreement, seeking to change its rules, and seeking to end the practice of obligatory designation – even though it was an entrenched part of the Agreement. Over a fateful weekend, and under intense political and media criticism, it reversed its position, and some of its members agreed to be unionists. The Assembly would twice change its standing orders, on a Friday and a Monday, by weighted majority, on how designation might be changed – first to accommodate the Women's Coalition's shift, and then to accommodate the Alliance Party's shift. It would prove enough to put Trimble and Durkan into office. The DUP challenged the legality of the Secretary of State's decision to permit the Assembly to elect new First and Deputy First Ministers, arguing that the UK's legislation required him to call fresh Assembly elections. But because the Secretary of State acknowledged he did indeed have to call such elections – but was not yet required to specify the date – a judge threw out the DUP's legal action, though it was given subsequent leave to appeal.

The complex consociation had therefore obtained a vital new lease of life. The apparently unattainable had occurred. The IRA had started to decommission; the RUC had passed into history. Sinn Féin and the IRA had acted to save the Agreement and Sinn Féin had voted for Trimble and Durkan – whereas in the case of Trimble and Mallon it had simply abstained. Eighteen months of relative stability looked likely before the next Assembly elections. While no one can discount the prospect of fresh crises – over the completion of decommissioning in the case of the IRA, in starting decommissioning in the cases of loyalists, the worst moments seem to be over. The Agreement will not be fully tested on its robustness until Sinn Féin and the DUP emerge as the respective majority parties in their blocs, but for the moment that lies in the future. There will be a Review of the rules on designation and on voting procedures in general. The UK and Irish governments and the makers of the Agreement deserve credit for the making of the Agreement, and more for its implementation – though some of them, as I have argued, had seemed likely to ruin its progress. In the course of the peace process, poet Seamus Heaney coined the phrase that he wanted to see if hope and history could rhyme. The words can certainly now go together, even though both assonance and dissonance will accompany them.



## NOTES

- 1 The origin of most of the ideas for the internal government of Northern Ireland, in Strand One, also stemmed from Irish nationalists, led by the SDLP, and advised by Irish officials and others.
- 2 According to Langdon, Soley was 'acting as a secret and unacknowledged emissary between the Conservative British Government and the leaders of Sinn Féin' (2000: 271ff.). In fact he was one of numerous channels through which Sinn Féin attempted to persuade the UK's parties of government that they were serious about negotiations.
- 3 McNamara's salvo against Labour's electoral integrationists led the party's unionists to argue that he was unfit for office (see McNamara et al. 1992). Electoral integrationists were especially salient among Scottish MPs (convinced that the Scottish sectarian question was the same as the Irish national question), members with communist pasts, those influenced by Ireland's Workers' Party, and those who are Northern Irish cultural Protestants. They campaigned against McNamara, much as they would later campaign against Mowlam, by the politics of 'malicious gossip', a trait they shared with New Labour's principal apparatchiks – for a sharp statement see Ken Follett, *Observer*, 2 July 2000.
- 4 Evidence of her empathy with Irish nationalists was manifest in her willingness to use Ken Livingstone to inform her of Sinn Féin's positions, and her (rejected) proposal to Blair that Livingstone become part of her ministerial team at the Northern Ireland Office (Langdon 2000: 4).
- 5 For the Senator's account of matters see Mitchell 2000, esp. ch. 3.
- 6 The International Body's text had suggested elections if they were widely agreed, viz. 'If it were broadly acceptable, with an appropriate mandate, and within the three-strand structure, an elective process could contribute to the building of confidence.' An elective process was not 'broadly acceptable' to the SDLP and Sinn Féin.
- 7 Mitchell puts matters with characteristic tact: Major's response 'wasn't support, but it wasn't exactly a dumping. It was a temporary sidestep to get to negotiations by a different route' (2000: 39).
- 8 At a meeting with Adams and McGuinness in 1997–8 Blair is said to have told them that he would do everything he could to find an agreement, 'But if you ever do a Canary Wharf on me, I will never talk to you again' (Rawnsley 2000: 123). The irony would not have been lost on them. Canary Wharf prompted the two premiers, Major and Bruton, to specify the date on which negotiations would begin, and the modalities through which negotiations would take place. A year and half's relative inaction by the UK government after the IRA's ceasefire ended three weeks after the bomb. None other than Tony Blair supported the two governments' rapid volte-face.
- 9 For the details, and the state of public opinion at that time, see Evans and O'Leary 1996.
- 10 For a hasty biography of the UUP leader see MacDonald 2000, and for a critical notice see O'Leary in *Sunday Business Post*, 13 April 2000.
- 11 For a treatment of the Clinton administration on Ireland see O'Clery 1996; he does not miss the significance of the Morrison delegation, Clinton's undeclared 'envoy'. See also Mitchell 2000, *passim*.
- 12 Irish Labour leader, Dick Spring, Tánaiste (deputy prime minister) 1992–7, was an essential figure in shaping the Agreement's focus on the protection of rights in both parts of Ireland.
- 13 The legislation establishing the Forum envisaged its termination in May 1998. Though it did not require the negotiations to be concluded by that date, the government argued that since the negotiators' mandates stemmed from their elections to the Forum it was the authorized deadline.
- 14 Some officials of the Northern Ireland office sought to dilute or block the potentially far-reaching equality clauses, mandated by the Belfast Agreement, and now embedded as §75 of the 1998 Northern Ireland Act. Mowlam was critical in blocking these efforts. Her conduct was in striking contrast to that of her successor who allowed his officials to dilute the proposals of the Patten Commission.
- 15 Ian Paisley had once run a campaign to 'Save Ulster from Sodomy'; his party is notoriously homophobic.
- 16 Northern Ireland's devolution arrangements may be contrasted with those of Scotland and Wales, described in James Mitchell's chapter above. In Northern Ireland interparty power sharing and proportionality are required and UK Labour has no party interest at stake. The Northern Ireland Assembly is larger and more powerful than the Welsh National Assembly and may, by the agreement of its blocs, expand its autonomy to the same degree as the Scottish Parliament, and indeed beyond. Northern Ireland's autonomy is both more open-ended, and more constrained. It is tied to the all Ireland North–South Ministerial Council. It has a specified right of secession, to join a unified Ireland (see also Hazell and O'Leary 1999).
- 17 The NSMC 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.
- 18 The resignation of one UUP member from the party whip meant that twenty-nine 'Yes Unionists' exactly matched twenty-nine 'No Unionists' in the Assembly.
- 19 For a fuller discussion of the d'Hondt allocation process see O'Leary 1999a.
- 20 The following section draws on evidence presented in 'Why Failing to Implement the Patten Report Matters', Testimony for the Hearing of the Commission on Security and Co-operation in Europe (the Helsinki Commission), entitled 'Protecting Human Rights and Securing Peace in Northern Ireland: The Vital Role of Police Reform', Friday 22 Sept. 2000, International Relations Committee Room, Raeburn Building, Washington DC.

- 21 Despite the Omagh atrocity of 1998, the key indicators of political violence demonstrate that the security situation has been much better in the period since 1995 than it was in the period running up to 1994, and significantly so by comparison with the entire period of fully active conflict which preceded the first IRA ceasefire (i.e. 1969–93). The death toll during 1995–9 more than halved by comparison with 1990–4.
- 22 A former Irish prime minister, Dr Garret FitzGerald, has described policing in Northern Ireland as having the status of Jerusalem in the Israeli-Palestinian peace process (*Irish Times*, 12 Aug. 2000).
- 23 I described it as betraying Patten's 'substantive intentions in most of its thinly disguised legislative window-dressing' (O'Leary 2000).
- 24 For the defects in the police Bill and the accompanying implementation plan with regard to community policing see Paddy Hillyard's comments (*Irish Times*, 2 Aug. 2000).
- 25 An alternative path, legitimate under the Agreement, would have been to pursue a fully binational symbolic strategy (McGarry and O'Leary 1999). However, even if the police were to have both an English and Irish title in each case, the name should be neutral: Northern Ireland Police Service or Coras Siochana Thuaisceart Eireann.
- 26 The careful and detailed denunciation of Mandelson by Mitchel McLaughlin, Sinn Féin's leading moderate, suggests the depth of the crisis ('The Mandelson Factor', *Belfast Telegraph*, 1 Dec. 2000). It specifically accuses Mandelson of failing to deliver on explicit commitments and obligations.

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