

THE NATURE OF THE AGREEMENT*

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INTRODUCTION

It is an academic, personal, and political honor to give the Ninth John Whyte Memorial Lecture. It is an academic honor because John Whyte was the most dispassionate of the interpreters of our conflict. In these respects and many others he is a hard act to follow. His major survey, *Interpreting Northern Ireland*,¹ posthumously published in 1990, conveys his marvellous gifts of clarity and concision in exposition. Commemorating John Whyte comes with a warning: be clear. It is a personal honor to give this lecture because John Whyte was one of my mentors as a young academic. He was very helpful, very generous, and robust in argument, as is his son, Nicholas.

This lecture is a belated act of homage to the Whyte family, not least because Jean Whyte is here to hear it. She, like Nicholas, is under no obligation to agree with my arguments, but I do want to make one unfalsifiable claim. I think that John Whyte would have agreed with the analysis that follows. Lastly, this is a political honor. John Whyte worried whether social scientific research on Northern Ireland was worthwhile, but contributed extensively and successfully to public deliberation in defiance of his occasional despair on this matter. He would have been quietly pleased at the extent to which at least some social

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1. JOHN WHYTE, *INTERPRETING NORTHERN IRELAND* (1990).

science, including political science, helped in the making of the Agreement.

I. THE NAME OF THE AGREEMENT

The Agreement Reached in the Multi-Party Negotiations² is a major achievement, both for its negotiators and for the peoples of Ireland and Britain. To make it, many politicians, officials, paramilitaries, and ordinary citizens had been through trials by ordeal. It emerged from a political desert whose only landmarks were failed initiatives. Yet the Agreement that emerged from that desert has no agreed name. It carries no person's name, British or Irish or American, and the names of no roles, be they Prime Ministers, *Taoisigh*, Secretaries of State, Foreign Ministers, or Party Leaders. Some know it by the place that it was made, as the Belfast Agreement, or, more controversially, as the Stormont Agreement. Yet it was not signed by all of its supporters in the final negotiating chambers, and it was actually made in many places, including Dublin, London, and Washington; in smaller cities, towns and villages; and in airports, airplanes, airwaves, by mobile phone, and unofficial communications. Some just know it by its date: the April 10, 1998 Agreement, or the Good Friday Agreement. The former seems too limited, while the latter, gives too much credit to Christianity—both as a source of resolution and as a cause of conflict.

It is also known as the British-Irish Agreement, after the peoples who confirmed it in referendums in both parts of Ireland—though strictly speaking only the British in Ireland as well as the Irish in Ireland were asked to ratify it. I prefer to call it the British-Irish Agreement. This name reflects the importance of the fact that the Agreement is the fulfilment of a previous Agreement, known as the Anglo-Irish Agreement.³ We Irish and British know that much resides in names, and so to avoid giving any further offense to anyone's sensibilities, I will refer to it simply as the Agreement.

2. Agreement Reached in the Multi-Party Negotiations, Apr. 10, 1998 [hereinafter Agreement].

3. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland, Nov. 15, 1985, U.K.-Ir., Cmnd. 9657, reprinted in TOM HADDEN & KEVIN BOYLE, *THE ANGLO-IRISH AGREEMENT* 15-48 (1989) [hereinafter Anglo-Irish Agreement].

II. THE INSTITUTIONAL NATURE OF THE AGREEMENT

What kind of Agreement is it? What is its nature? It is not an example of "the third way," as Charles Leadbetter recently argued at the feet of Tony Blair. It is much more interesting than a courtier's claims. The correct answer for a student of political science, as John Whyte would have recognized, is that it is a consociational agreement. In other words, it is a political arrangement that meets all four of the criteria laid down by that doyen of political science, the Dutchman Arend Lijphart: cross-community executive power-sharing, proportionality rules applied throughout the relevant governmental and public sectors, community self-government or autonomy and equality in cultural life, and veto rights for minorities.⁴

A consociation is an association of communities. In this case, the communities are British unionist, Irish nationalist, and others. A consociation can be created without any explicit consociational theory to guide it, and indeed that has often happened.⁵ More often consociations are the outcomes of bargains or pacts between the political leaders of ethnic or religious leaders. The Agreement is the product of tacit and explicit consociational thought,⁶ and of bargaining, or of what is sometimes called pacting.

4. See, e.g., AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES* (1977); MICHAEL WALZER, *ON TOLERATION* (1997).

5. Lijphart claims that consociational rules were created by Dutch politicians in 1917, Lebanese politicians in 1943, Austrian politicians in 1945, Malaysian politicians in 1955, Colombian politicians in 1958, Indian politicians in the 1960s and 1970s, South African politicians in 1993-1994, and by British politicians addressing Northern Ireland in 1972. One does not have to agree with the citation of any or all of these cases to accept Lijphart's point that politicians are more than capable of doing theory without the aid of theorists. See, e.g., Arend Lijphart, *Foreword: One Basic Problem, Many Theoretical Options—And a Practical Solution?*, in *THE FUTURE OF NORTHERN IRELAND* at viii (John McGarry & Brendan O'Leary eds., 1990); James Carey, *Prospects for Power-Sharing in the New South Africa*, in *ELECTION '94 SOUTH AFRICA: THE CAMPAIGNS, RESULTS AND FUTURE PROSPECTS* 221-33 (Andrew Reynolds ed., 1994); Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, 2 *AM. J. POL. SCI.* 258 (1996).

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

The Agreement, however, is not just consociational. It also departs from Lijphart's prescriptions in important respects that have practical implications for Northern Ireland and for regulating ethnic and national conflict elsewhere. It is a consociational agreement with important external dimensions. It is one made with national and not just ethnic or religious communities, and it is one endorsed by both leaders and the led.

To be formulaic, the Agreement establishes an internal consociation built within overarching confederal and federal institutions. It has imaginative elements of co-sovereignty, and it promises a novel model of double protection. It rests on a bargain derived from mutually conflicting hopes about its likely long-run outcome, but that may not destabilize it. One supplement must be added to this already lengthy formula, the fact that the Agreement is vulnerable both to post-Agreement bargaining and to legalism.

III. THE FOUR CONSOCIATIONAL ELEMENTS

A. Executive Power Sharing

At the heart of any consociational arrangement is executive power sharing. The Agreement establishes two semi-presidential figures in a devolved Northern Assembly—a First Minister and a Deputy First Minister. Once elected, they have presidential characteristics because it is almost impossible to depose them until the next general election. Presidentialism means an executive that cannot be destroyed by an assembly except through impeachment.

Let me make this clear through a currently relevant illustration. Even if David Trimble's party colleagues were to vote unanimously to depose him from the leadership of the Ulster Unionist Party ("UUP"), he could not be forced to resign his position as First Minister. That could happen only if enough nationalists collude with enough unionists to enforce it. To do that, however, nationalists in the Assembly would have to bring down their own Deputy First Minister. This is a fact because the First Minister and the Deputy First Minister are elected together by the parallel consent cross-community consent procedure (see Appendix One). This procedure requires them to have the support of fifty percent of registered nationalists and unionists as well as a majority of the Assembly. Critically, this rule gives very strong in-

centives to unionists and nationalists to nominate a candidate for one of these positions that is acceptable to at least a majority of the other bloc's members in the Assembly. So even if in the future Gerry Adams leads Sinn Féin into surpassing the SDLP in seats won in the Assembly, unionists will be able to block his nomination as Deputy Chief Minister. Likewise, nationalists can veto an unacceptable hard-line unionist.

In the first elections for these posts, pro-Agreement unionists in the UUP and the Progressive Unionist Party voted solidly for the combination of David Trimble of the UUP and Seamus Mallon of the SDLP. Naturally, so did the SDLP. Sinn Féin deliberately abstained to avoid the First and Deputy First Ministers being chosen by more nationalists than by unionists—an outcome that might have endangered Trimble's status with the unionist public, and a sign of Sinn Féin's maturing avoidance of provocation.

The rules practically ensure that a unionist and a nationalist share the top two posts. The Agreement makes it clear that both posts have identical symbolic and external representation functions. Indeed, both posts have identical powers, and their only real difference is in their titles. Both, for example, will preside over the Executive Committee of Ministers and have a role in coordinating its work. The Agreement does not make it clear whether the two will have any of the existing departmental responsibilities in Northern Ireland, though it might make sense for them to run jointly and be served by the existing Finance and Personnel Ministry.⁷

With one notable exception that I will discuss in a moment, David Trimble and Seamus Mallon have successfully and carefully co-ordinated their statements and actions since their joint election, especially in the management of the Drumcree crisis in the first two weeks of July 1998. They are showing how this new diarchy will critically depend upon the personal cooperation of the two holders of these posts. The Northern Ireland Act of 1998 ("Northern Ireland Act"), which has just gone through Westminster's last procedures, has reinforced their interdependence by requiring that "if either the First Minister or the deputy First Minister ceases to hold office, whether by resignation or

7. The Northern Ireland Act makes it plain that the top two Ministers can hold functional portfolios. Northern Ireland Act, 1998, ch. 47, § 16 (Eng.).

otherwise, the other shall also cease to hold office."⁸ The one major exception to the pattern of dyarchic cooperation has arisen over the implementation of the rules for executive formation. Indeed, as I speak, we have a crisis of executive formation.

Unlike some Presidents and most Prime Ministers, neither the First Minister nor the Deputy First Minister formally appoint the other Ministers to the Executive Committee. Instead, under the plain meaning of the Agreement, these posts should be allocated to parties in proportion to their strength in the Assembly, according to a mechanical rule called the d'Hondt rule (see Appendix Two). The rules are simple in their consequences. Any party that wins any significant share of seats and is willing to abide by the Agreement has a reasonable chance of access to the executive. This is a subtle form of what Lijphart calls grand coalition government, though it is a coalition government without a coalition agreement.

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

The current crisis of executive formation has arisen for political and constitutional reasons. Politically, it has arisen because David Trimble has insisted that Sinn Féin must deliver some IRA decommissioning before its members can take seats in the Executive Committee. Under the Agreement, he has no constitutional warrant to exercise this veto. The Agreement does not require prior decommissioning on the part of any paramilitaries or of any parties connected to them, though it does require the completion of decommissioning by May 22, 2000.

Trimble has been given the opportunity to exercise this un-

8. *Id.* § 16(7).

constitutional veto, which has led to a breach in the formal requirements of the Agreement. This breach has been created because the SDLP did not make immediate executive formation a condition of its support for the Mallon-Trimble ticket for Deputy First Minister and First Ministers. The SDLP failed to do so because it wished to shore up Trimble's political position. The price has so far been rather high, and it has yet to be repaid.

One flexible provision in the Agreement has given Trimble room for this maneuver. The Agreement states that there must be at least six other Ministers, but that there can be up to ten. The number of ministries are to be decided by cross-community consent, presumably after the First and Deputy First Ministers agree on a proposal. That has given Trimble the opportunity to delay on executive formation. The more Ministries there are in the Executive Committee then the more proportional the representation of parties on the Executive. The UUP has been holding out for a seven seat Executive, under which unionists would have an overall majority. The SDLP is holding out for a larger Executive (see Appendix Two).

Imagine for the moment that the crisis of executive formation is eventually resolved. How will the Executive Committee work? Individual ministers will enjoy executive powers under existing U.K. legislation and can operate without collective responsibility, except where the Executive Committee and the Assembly have agreed on a broad program and where they are obliged to engage in cross-departmental activities. No method of reaching agreement within the Executive Committee is specified, though the program must enjoy cross-community support in the Assembly. In practice, agreements within the Executive minimally will require majority support, including the agreement of the First and Deputy First Ministers.

In short, the consociational criterion of cross-community executive power sharing is clearly met in the Agreement. There are, though, special features of the new arrangements that differ from previous consociational experiments in Northern Ireland and elsewhere. Ministers will take a Pledge of Office, not an Oath of Allegiance. This bi-nationalism is at the heart of the Agreement. Nationalist ministers do not have to swear an Oath of Allegiance to the Crown or the Union. The Pledge requires Ministers to discharge their duties in good faith, to follow exclusively peaceful and democratic politics, to participate in prepar-

ing a program of government, and to support and to follow the decisions of the Executive Committee and the Assembly.

The duties of office include a requirement to serve all the people equally, to promote equality, and to prevent discrimination. This means, according to the doctrine of ministerial responsibility, that civil servants will be bound to run their departments consistent with these obligations. The duties of office also include a requirement that the relevant Ministers serve in the North/South Ministerial Council. This duty, in conjunction with other clauses, will prevent parties opposed to this aspect of the Agreement from taking Ministerial office in good faith.

How should we appraise the executive design that is at the heart of the Agreement? The special skill of the designers is that they have created strong incentives for executive power sharing and power division but without requiring parties to have a formal coalition agreement. In these respects, the Agreement differs from the Sunningdale experiment of 1973. What some makers of the Agreement did not foresee, though, was that failure to timetable the formation of the rest of the executive immediately after the election of the First and Deputy First Ministers could precipitate a protracted crisis of executive formation.

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

B. *Proportionality*

Consociational arrangements are built on principles of proportionality. The Agreement meets this test in three clear ways,

in the executive in the manner that I have discussed (see also Appendix One), in the elections to the Assembly, and in public sector positions. All future elections to the 108-member Assembly will use a proportional representation system, the single transferable vote ("STV") in six-member constituencies. The Assembly, though, may choose by cross-community consent procedures to advocate change from this system later. The Droop quota in each constituency is therefore 14.3% of the vote, which squeezes the very small parties or alternatively encourages them to form electoral alliances.⁹

Thus, the smaller of the two loyalist parties, the Ulster Democratic Party ("UDP") led by Gary McMichael, won no seats in the first Assembly election. Conceivably, the rival loyalist parties, the PUP and the UDP, may see the need to coalesce in the future to achieve better representation. Very small parties that can gather lower order preferences from across the unionist and nationalist blocs, such as the Women's Coalition, have shown that the system need not preclude representation for small parties among the "Others."

This system of voting is not what Lijphart recommends for consociational systems. Lijphart is instead an advocate of party-list PR systems because he believes that they help make party leaders more powerful and better able to sustain inter-ethnic consociational deals. Those who would like to see David Trimble in greater control of his party might covet this form of proportional representation. If, however, a region-wide list system had been in operation in June of 1998, then the UUP would have ended up with fewer seats, as well as less seats than the SDLP. The STV, moreover, has the great merit of encouraging "vote-pooling."¹⁰ In principle, voters can use their transfers to reward pro-Agreement candidates at the expense of anti-Agreement candidates.¹¹ Some of the SDLP's and Sinn Féin's voters, then, have found it advantageous to reward David Trimble's Ulster Unionist Party for making the Agreement by giving its candidates their lower-order preferences. In this way, they

9. The Droop quota used in single transferable vote ("STV") is $(\text{Total Vote}/N+1) + 1$, where N = Number of Assembly members to be elected.

10. DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 628 (1985).

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

helped the Ulster Unionist Party defeat Ian Paisley's DUP and Robert McCartney's UKUP.¹²

Tables One and Two illustrate the outcome of the June, 1998, elections to the first Assembly under the Agreement. The proportionality of the results is evident, both with respect to blocs and with respect to parties. The deviations in seats won compared to the first preference vote benefited primarily the pro-Agreement parties. Candidates of such parties gathered support through the transfers of lower order preferences.

The UUP was the principal beneficiary of the transfer of lower order preferences, taking its seat share (25.9%) significantly above its first-preference vote share (21.3%). These lower order preferences, however, came from voters who voted both for and against the Agreement. The Northern Ireland Women's Coalition was the most widespread beneficiary of lower-order preferences, winning two seats despite a very low first-preference vote share. The transfers by voters to the pro-Agreement candidates, though not as significant as had been hoped, performed one very important task. They converted a bare anti-Agreement majority of the first preference vote (25.5%) within the unionist bloc of voters into a bare pro-Agreement majority (27.7%) amongst seats won by unionists, a result that was essential for the stabilization of the Agreement.

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

The Agreement also envisages a representative police force. It is the task of the Independent Commission on policing, headed by former Hong Kong Governor Christopher Patten, to ensure the creation of a police service that is representative of Northern Ireland. The RUC's mono-national culture, and in-

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

deed its monopoly on policing services, must end if the Agreement is to be fully consistent with a consociational model.

Democratic consociation cannot exist where those of military age in one community are almost the sole recruitment pool to police all of those in another community. A fully representative and preferably two-tier model of federal and democratic policing is the best way to ensure that proportional policing supplements the other political institutions of the Agreement.¹³

C. *Communal Autonomy and Equality*

Consociational settlements avoid the compulsory integration of peoples. Instead, they seek to manage differences equally and justly. To be liberal, such settlements must also protect those who wish to have their identities counted differently as well as those who do not want to be identified by collective identities.

The Agreement leaves in place the new arrangements for schooling in Northern Ireland in which Catholic, Protestant, and integrated schools are to be equally funded. In this respect, Northern Ireland is fully consociational and liberal. Only the very small minorities of non-Christian religious believers (less than one percent of the population) lack full and equal funding, and it would be generous and just to make such provisions for them where numbers permit. The Agreement also makes new provisions for the educational use, protection, and public use of the Irish language, along the lines used for Welsh in the United Kingdom. It therefore adds linguistic protections to educational protections of Irish nationalist culture.

Most importantly, the Agreement completes the equalization of both major communities as national communities. Specifically, the Agreement refers to British and Irish communities and not just, as is so misleadingly said, to Protestants and Catholics. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), which is weak on the protection of collective rights and equality rights, will be supplemented by measures that will give Northern Ireland its own tailor-made Bill of Rights, to protect both national groupings as well as individuals. The worst illusion of parties to the conflict and some of its suc-

13. See JOHN MCGARRY & BRENDAN O'LEARY, *POLICING NORTHERN IRELAND: CONSTRUCTIVE PROPOSALS* (1999).

cessive managers, based in London, Belfast, or Dublin, was the belief that Northern Ireland could be stable and democratic while being either British or Irish. The Agreement makes Northern Ireland bi-national and opens up the prospect of a fascinating jurisprudence, not least in the regulation of parades and marches.

The Agreement does not neglect the non-national dimensions of local politics, nor does it exclude the "Others" from what I have heard described in Alliance party circles as a squalid communal deal. All aspects of unjustified social inequalities, as well as inequalities between the national communities, are recognized in the text of the Agreement, and given some means of institutional redress and monitoring. The Agreement addresses national equality, the allegiances to the Irish and British nations, and social equality. In other words, it addresses other dimensions that differentiate groups and individuals in Northern Ireland, such as religion, race, ethnic affiliation, sex, and sexuality.

Equality issues, be they national or social, are not left exclusively to the local parties to manage and to negotiate, which might be a recipe for stalemate. Instead, the U.K. Government has signalled its intention to create a new statutory obligation on public authorities. They will be required to carry out all their functions with due regard to the need to promote equality of opportunity in relation to people's religious background and political opinions. They will be required also to promote equality with respect to people's gender, race, disabilities, age, marital status, and sexual orientation. This commitment entails what Dr. Christopher McCrudden labels mainstreaming equality. The U.K. Government is also likely to establish a Human Rights Commission tasked with an extended and enhanced role, including monitoring, promoting litigation, and drafting a tailor-made Bill of Rights for Northern Ireland.

D. *Minority Veto Rights*

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

The Assembly has cross-community procedures, including

parallel consent, weighted majority, and petition procedures (see Appendix One) that protect nationalists from unionist dominance. Indeed, they do so in such a comprehensive manner that before the election of the First and Deputy First Ministers, there were fears that the rules designed to protect the nationalist minority might be used by hard-line unionist opponents of the Agreement to disable its initiation and to destroy its development.

This possibility remains alive but is somewhat diminished because the weighted majority rule requires a lower level of unionist consent than was required for the election of the First and Deputy First Ministers. The "Others" are less protected in the Assembly. They can, for instance, be outvoted by a simple majority and any nationalist-unionist super-majority. In addition, their numbers leave them well short of being able to trigger a petition on their own. The "Others," however, have not been at the heart of the conflict. It is therefore not surprising if they are not at the heart of the resulting pacts, though it is not accurate to claim that they are excluded from the Agreement.

In the courts, the "Others," disaffected nationalists, and unionists will have means to redress breaches of their human and collective rights. The content of the European Convention on Human Rights is well-known. What is less clear is what package of collective rights the new independent Northern Ireland Rights Commission will recommend. What has also not been addressed directly and immediately is the composition of the local judiciary. The Agreement provides for a review of the criminal justice system that will include "arrangements for making appointments to the judiciary."¹⁴ It will, however, be of great importance that the judiciary reflects the different communities in the North and is committed to the human and minority rights provisions that it will increasingly interpret.

Other non-national minorities have not been forgotten. In the Civil Society Forum to be created in the North with a Southern counterpart, and through the Inter-Governmental Conference of the British and Irish Governments, mechanisms have been established to ensure that the "Others" will be able to express their voices and to ensure that the new rights culture does

14. Agreement, *supra* note 2, Policing and Justice, Annex B: Review of the Criminal Justice System, Terms of Reference.

not exclude them. It would be helpful if progress in establishing these forums were expedited.

IV. *CONFEDERAL AND FEDERAL ELEMENTS OF THE AGREEMENT*

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

Confederations exist when sovereign jurisdictions voluntarily delegate powers and functions to bodies that can exercise power across all jurisdictions. I believe that the Agreement creates two new confederal relationships. I also believe that the Agreement has subtle federalist dimensions if we agree that a federation exists when there are at least two separate tiers of government over the same territory and when neither tier can unilaterally alter the constitutional capacities of the other.

A. *The All-Ireland Confederal Relationship*

The Agreement creates a new confederal relationship that is all-Ireland in nature—the North/South Ministerial Council. When established, it will bring together those with executive responsibilities in Northern Ireland and in the Republic. It will be established after the Assembly has come into being and completed a program of work to establish the Council. The specific deadline for that body of work to be agreed on passed on October 31, 1998. That date passed without an agreement because no executive has been formed in Northern Ireland to engage with its counterpart in the Republic.

Consequently, the signatories to the Agreement are now in breach of their treaty obligations. This breach opens the entire Agreement to constitutional challenge in the Republic, enabling, *in extremis*, any aggrieved citizen to argue for the retention of the old Articles 2 and 3 of the Irish Constitution on the grounds that the United Kingdom is in breach of its treaty obligations.

What is intended by the Agreement is clear. Nationalists were concerned that if the Assembly could outlast the North/

South Council, it would provide incentives for unionists to undermine the latter. Unionists, by contrast, worried that if the Council could survive the destruction of the Assembly, nationalists would seek to bring this about. The Agreement is a tightly written contract with penalty clauses. Internal consociation and external confederalism go together; the Assembly and the Council are mutually interdependent, meaning that one cannot function without the other. Unionists cannot destroy the Council while retaining the Assembly, and nationalists cannot destroy the Assembly while keeping the Council.¹⁵ If the Assembly does not create the Council, then it will effectively destroy itself, enabling, *in extremis*, any aggrieved citizen in Northern Ireland to argue for the suspension of the Northern Assembly until the North/South Ministerial Council is established.

The North/South Ministerial Council is the means by which nationalists hope to persuade unionists of the attractions of Irish unification. In addition, it will satisfactorily link northern nationalists to their preferred nation state. Consistent with the Agreement, the Irish Government has agreed to change its constitution to ensure that the North/South Ministerial Council will be able to exercise island-wide jurisdiction in those functional activities where unionists are willing to cooperate.

The North/South Ministerial Council will function much like the Council of Ministers in the European Union, with ministers having considerable discretion to reach decisions but remaining ultimately accountable to their respective legislatures. The Council will meet in plenary format twice a year, and in smaller groups to discuss specific sectors (say, agriculture, or education) on a regular and frequent basis.

Provision is also made for the Council to meet to discuss matters that cut across sectors and to resolve disagreements. In addition, the Agreement provides for cross-border or all-island

15. The Agreement does not mention what happens if both institutions and thus the Agreement itself collapses. This author's opinion is that Northern Ireland would be governed, as at present, by the British government with input from Dublin through the British-Irish Intergovernmental Conference. The two governments would likely pursue the promotion of equality of esteem, reductions in the employment gap between Catholics and Protestants, and the reform of policing. Eventually, there would be a shift towards direct co-sovereignty over the region. If the Agreement's core institutions are not established, then any legal challenge to the implementation of changes to Articles 2 and 3 of the Republic's Constitution is likely to be successful. Unionists opposed to the Agreement would do well to bear these considerations in mind.

implementation bodies, meaning the same as executive. These bodies are to be responsible for implementing decisions taken in at least six as yet unspecified areas. These areas were to be agreed on during a transitional period between the Assembly elections and October 31, but are currently under discussion. The Agreement provides an Annex that lists twelve possible areas for implementation.

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

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

The question of what scope and powers these North/South institutions will have remains to be decided. Some of this was supposed to have been already decided by October 31, 1998. The Agreement does, however, require a meaningful Council. It states that the Council will, rather than may, identify at least six matters, where existing bodies will be the appropriate mechanisms for cooperation within each separate jurisdiction. The Agreement also identifies at least six matters where cooperation will take place through cross-border or all-island implementation bodies. The Agreement also links Ireland, North and South, to another confederation, the European Union. It requires the

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

Council to consider the implementation of EU policies and programs as well as proposals under way at the European Union and makes provisions for the Council's views to be taken into account at relevant EU meetings.

The signatories to the Agreement have promised to work in good faith to create the North/South Ministerial Council. There has not been sufficient good faith to prevent the first material break in the timetable scheduled in the Agreement. The signatories are required to use best endeavours to reach agreement and to make determined efforts to overcome disagreements in functions where there is a mutual cross-border and all-island benefit.

The crisis over executive formation may have prolonged consequences. The Agreement explicitly envisaged a timetable that would have enabled an interim Northern executive to establish itself and enabled it to make binding agreements with the Republic's ministers. Once North/South cooperation was agreed, any future unionist majority in the Assembly would not be able formally to block it, since any scaling back of the Council's powers would require the consent of both nationalists and unionists.¹⁷ Nationalists are beginning to fear that the crisis of executive formation will throw the entire content of North/South cooperation open to the veto of both "No" Unionists and soft-"Yes" Unionists in the Assembly, which is due to have a full life in February.

But again, let us imagine that this crisis is eventually over-

17. The possibility of a Unionist Minister refusing to serve on the Council will appear to some as very grave, given that Unionist parties that oppose the Agreement, especially the DUP, are in principle eligible for ministerial portfolios. This, however, is ruled out in practice. Participation in the North/South Ministerial Council has been made an essential responsibility attaching to relevant posts in the two administrations. Relevant posts are, presumably, any portfolio a part of which is subject to North/South cooperation. This leaves open the possibility that a politician opposed to the North/South Ministerial Council might take a seat on it with a view to wrecking it. Ministers, though, are required to establish the North/South Institutions in good faith and to use best endeavours to reach agreement. Because these requirements are presumably subject to judicial review, it is unlikely that potential wreckers, like Ian Paisley or Peter Robinson, would be able to take part in the North/South Ministerial Council, even if they wanted to. One of the requirements for membership of the Executive is that ministers must "support . . . all decisions of the Executive Committee," and they can be removed if they do not show such support. Removal, though, presupposes decisions being made by the Executive Committee. Whether these provisions will be justiciable remains to be seen.

come. If that happens, then several current facts will support the new constitutional confederalism. As the Republic's Celtic Tiger continues to expand, Northern Ireland's Ministers and citizens should see increasing benefits from North/South cooperation. In addition, as the European Union continues to integrate, there will be pressure for both parts of Ireland to cooperate. This pressure comes from their shared peripheral geographical position, similar interests in functional activities such as agriculture and tourism, and in having regions defined in ways that attract funds.¹⁸

B. *The British-Irish Confederal Relationship*

There is a second, weaker confederal relationship established by the Agreement that affects all the islands of Britain and Ireland. Under the new British-Irish Council the two sovereign Governments, all the devolved governments of the United Kingdom, and all the neighboring insular dependent territories of the United Kingdom, can meet and agree to delegate functions. They may also agree on common policies. This proposal meets unionists' concerns for reciprocity in linkages and provides a mechanism through which they may in the future be linked to the United Kingdom even though Northern Ireland has become part of the Republic of Ireland.

Unionists originally wanted any North/South Ministerial Council to be subordinate to a British-Irish, or East-West, Council. This has not happened. There is no hierarchical relationship between the two Councils. Indeed, there are two textual warrants for the thesis that the North/South Ministerial Council is more important and far-reaching than its British-Irish counterpart. The Agreement requires the establishment of North/South implementation bodies, while leaving the formation of East-West bodies a voluntary matter. While the Agreement states explicitly that the Assembly and the North/South Ministerial Council cannot survive without the other, it makes no equivalent statement concerning the British-Irish Council.

The development of this confederal relationship may be

18. Northern Ireland could, in principle, even go into Economic and Monetary Union ("EMU") with the Republic, if Britain itself remained outside, providing there was agreement in the Assembly and the Secretary of State and the Westminster Parliament assented.

stunted by an Irish Governmental reluctance to engage in a forum where it may be outnumbered by at least seven other governments, including the governments of Westminster, Scotland, Wales, Northern Ireland, Jersey, Guernsey, and the Isle of Man. The development of this relationships may be stunted even though rules may develop to ensure the joint dominance of the sovereign governments. The British-Irish Council, however, may flourish as a policy formulation forum if the devolved governments of the United Kingdom choose to exploit it as an opportunity for intergovernmental bargaining within the United Kingdom, or to build alliances with the Irish Government on European public policy, in which case it will give added impetus to other federalist processes.

C. *A United Kingdom-Northern Irish Federalizing Process*

The Agreement is the penultimate blow to unitary Unionism in the United Kingdom, a political persuasion already dented by the 1997-1998 referendums and legislative acts establishing a Scottish Parliament and Welsh Assembly.¹⁹ Does the Agreement simply fall within the rubric of devolution within a decentralized unitary state? Arguably not. Two Unions make up the United Kingdom—the Union of Great Britain and the Union of Great Britain and Northern Ireland. The constitutional basis of the latter union is now distinctly different than the former.

The Agreement is a treaty between two states and it is based on Irish national self-determination as well as British constitutional convention. The United Kingdom officially acknowledges in the Agreement that Northern Ireland has the right to secede into the Republic on the basis of a local referendum. The United Kingdom also recognizes in a treaty the authority of Irish national self-determination throughout the island of Ireland.

Moreover, the Agreement's institutions are being created by the will of the people of Ireland, North and South, and not just by the people of Northern Ireland, considering the interdependence of the North/South Ministerial Council and the Assembly. Consequently, the United Kingdom's relationship to Northern Ireland regarding international law is explicitly federal because the Westminster parliament and executive, except

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

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

This federalizing process will be enhanced if the United Kingdom and Northern Irish courts treat Northern Ireland's relationships to Westminster as akin to those of the former Dominions, which had a federal character, as they did in the period of the Stormont Parliament (1921-1972). Moreover, the nature of devolution in Northern Ireland is not closed by the United Kingdom's Northern Ireland Act of 1998. The Act has created an open-ended mechanism for Northern Ireland to expand its autonomy from the rest of the United Kingdom, albeit with the consent of the Secretary of State and the approval of Westminster. No such open-ended provision has been granted to the Scottish Parliament or the Welsh Assembly. In short, Northern Ireland can gain maximum autonomy while remaining within the Union provided that there is agreement within the Northern Assembly. Legalist Diceyians may insist that Westminster's sovereignty in Northern Ireland remains ultimately intact. If, however, the Agreement beds down the political development of a federal relationship between the United Kingdom and Northern Ireland, then it is assured for the near future whatever might be said in the dry recesses of the Constitution's ancient regime.

D. *Irish Federalizing Processes*

The Agreement opens federalist avenues in the Republic of Ireland, hitherto one of the most centralized states in Europe. The North/South Ministerial Council is seen by nationalists, North and South, as the embryonic institution of a federal Ireland. Nationalists consider that a confederation must be built first, and then, after trust has been established, a federation should be created. This stepping stone theory is articulated most emphatically by "No" Unionists. These "No" Unionists are not wrong in their calculation that many nationalists see the North/South Ministerial Council as transitional. Sinn Féin says so, and does Fianna Fail.

The Irish Government and its people did not abandon Irish unification when they endorsed the Agreement. Indeed, it has become, in the words of the new provisional Article 3 of the Irish Constitution:

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.²⁰

The amended Irish Constitution, therefore, officially recognizes two jurisdictions that jointly enjoy the right to participate in the Irish nation's exercise of self-determination. Unification is no longer linked to unitarism and is entirely compatible with either full confederation or federation.

Irish unification cannot be precluded because of present demographic and electoral trends, which have led to a steady rise in the nationalist share of the vote across different electoral systems.²¹ The nature of any eventual unification envisaged in the redrafted Irish Constitution is now very different. It no longer provides for anything resembling a program of assimilation. Respect for the diversity of identities and traditions connects with both consociational and con/federal logic. This author maintains that the Republic is bound by the Agreement to structure its laws and its protection of rights in order to prepare for the possibility of a con/federal as well as a unitary Ireland.

The Agreement recognizes Northern Ireland as a legal entity within the Irish Constitution.²² Its ultimate status as a political unit is no longer a programmatic feature of *Bunreacht na Éireann*. The Agreement also envisages the subjection of both jurisdictions in Ireland to the same regime for the protection of individual and group rights, a situation entirely compatible with a subsequent formal confederation or federation.

It is perhaps worth speculating on what might happen if a majority emerged for Irish unification within Northern Ireland. If nationalists acquired local majority support within Northern Ireland, it would not necessarily be in their considered interests to promote the region's immediate administrative and legal assimilation into the Republic. Nationalists would then have an

20. IR. CONST. art. 3 (1937).

21. See JOHN MCGARRY & BRENDAN O'LEARY, *EXPLAINING NORTHERN IRELAND: BROKEN IMAGES* ch. 10 (1995); see also Brendan O'Leary & Geoffrey Evans, *Northern Ireland: La Fin de Siècle, the Twilight of the Second Protestant Ascendancy and Sinn Féin's Second Coming*, in *PARLIAMENTARY AFFAIRS* 672-80 (1997).

22. IR. CONST.

interest in preserving Northern Ireland as a political entity within a federated Ireland. They would after all be a local majority, as would the governing coalition in the Republic whose calculations might be disturbed by the entry of Northern participants. Conversely, some unionists faced with this prospect might prefer a unitary Ireland as the lesser evil, calculating that their chances of being key players in government formation in a bigger arena might protect them better than being a minority in Northern Ireland.

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

V. *DOUBLE PROTECTION AND CO-SOVEREIGNTY*

The subtlest part of the Agreement, its tacit double protection model, goes well beyond standard consociational thinking and is laced with elements of co-sovereignty. The Agreement is designed to withstand major demographic and electoral change. It promises to entrench the identical protection of rights, collective and individual, on both sides of the present border. In effect, it promises protection to Northern nationalists now on the same terms that will be given to Ulster unionists should they ever become a minority in a unified Ireland. Communities are to be protected whether they are majorities or minorities, and whether sovereignty lies with the United Kingdom or the Republic, hence, the expression double protection.

The two states not only promise reciprocity for the local protection of present and future minorities, but also have created two intergovernmental devices to protect those communities. One such a device is the successor to the Anglo-Irish Agreement, the intergovernmental conference that guarantees the Republic's government access to policy formulation on all matters not yet devolved to the Northern Assembly or the North/South Ministerial Council. The other device is the British-Irish Council. If Irish unification ever occurs, then the Republic's govern-

ment would find it politically impossible not to offer the British government reciprocal access in the same forums.

It is important to note what has not happened between the two sovereign governments. Formal co-sovereignty has not been established. Unionists claim that they have removed the 1985 Anglo-Irish Agreement in return for conceding a North/South Ministerial Council. This claim is, at best, exaggerated. Under the new Agreement, the Irish government will retain say in those Northern Irish matters that have not been devolved to the Northern Assembly, as was the case under Article 4 of the Anglo-Irish Agreement.²³ As with that agreement, there will continue to be an intergovernmental conference, chaired by the Minister for Foreign Affairs and the Northern Ireland Secretary of State, to deal with non-devolved matters. This conference will continue to be serviced by a standing secretariat.

The new Agreement, moreover, promises to intensify cooperation between the two governments on all-island or cross-border aspects of rights, justice, prison, and policing, unless and until these matters are devolved to the Northern executive. There are provisions for representatives of the Northern Assembly to be involved in the intergovernmental conference, which would signify a welcome proclivity for democratization. The Anglo-Irish Agreement fully anticipated these arrangements.²⁴ Therefore, it is more accurate to claim that the Anglo-Irish Agreement has been fulfilled than it is to say that it has been removed.

VI. *THE MILITARY AND POLITICAL NATURE OF THE AGREEMENT*

The institutional nature of the Agreement is complex, but it accurately matches the conceptual categories that I have deployed. There is no need to use new terms for what has already been agreed on, except, perhaps, for what I have called the double protection model. The Agreement is wide-ranging, multilateral, and has something in it for everyone who signed it. Its institutions address the totality of relationships between nationalists and unionists in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain. It is

23. Anglo-Irish Agreement, *supra* note 3, art. 4.

24. See BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* chs. 6-7 (2d ed. 1996).

neither a victory for nationalists, nor for unionists. Both can maintain their central aspirations, their core identities, and protect or express better their interests. While describing constitutional architecture is one thing, informal political reality is often very different.

The Agreement may be an immensely subtle institutional construction, but everyone asks, "Is it a pack of cards, vulnerable to the slightest pressures?" "Is it vulnerable to the play of either Orange or Green cards by hard-line loyalists or republicans, or to miscalculations by softer-line politicians?" "Will its successful implementation prove more difficult than its formulation?"

These are hardly foolish concerns, as revealed by the fracas at Drumcree 4 in July, the massacre at Omagh in August, and the continuing crisis over executive formation and decommissioning. There are, however, reasons to be cheerful about the robustness of these institutions if we analyze the military and political nature of the settlement. There are also reasons to be cautious.

A. *The Agreement on Ending the Armed Conflict*

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

I. Decommissioning

The Agreement is clear on decommissioning. No paramilitaries that abide by the Agreement have to engage in formal surrender to those they opposed in war. The Independent International Commission on Decommissioning, chaired by Canadian General John de Chastelain, is to assist the participants in achieving the total disarmament of all paramilitary organizations. The parties that informally represented paramilitary organizations in the negotiations are required to "use any influence they may have, to achieve the decommissioning of all

paramilitary arms *within two years* following endorsement in referendums North and South of the agreement and *in the context of the implementation of the overall settlement.*"²⁵

The emphasized passages clarify the termination point for decommissioning, not the moment of commencement. The passages also make it clear that decommissioning is linked to the implementation of the overall settlement, including the establishment of the North, North/South, and East-West governance structures, and to police reform. That is why David Trimble's demand that Sinn Féin achieve a start to decommissioning by the IRA before executive formation in the North is regarded as a breach of any reasonable interpretation of the text of the Agreement. Without executive formation in the North, none of the formal institutions of the Agreement that require the cooperation of the local parties can get underway.

Sinn Féin has nominated a representative to the International Commission. It has issued a statement effectually stating that the war is over. For the first time it has issued an outright condemnation of other republicans, namely the Real IRA whose members carried out the Omagh bombing. It is even assisting ETA in its organization of a ceasefire and political negotiations in Spain. Evidently, David Trimble and some of his senior colleagues are unprepared to regard this activity as sufficient evidence of good intentions. Each move on Sinn Féin's part has merely led the UUP to request more. On the basis of current postures, only one obvious resolution of this crisis presents itself, namely that executive formation should be announced in the morning, and material progress on decommissioning should be announced in the afternoon.

2. De-militarization, Police Reform, and Prisoner Release

The Agreement promises, and the United Kingdom government has begun, a series of phased developments to de-militarize Northern Ireland. Normalization is explicitly promised. The Agreement promises reductions in army deployments and quantity, as well as the removal of security installations and emergency powers. The Agreement also addresses personal firearms regulation and control, as an extraordinary proportion of Northern Ireland's citizens, mostly Protestants and unionists,

25. Agreement, *supra* note 2, Decommissioning ¶ 3 (emphasis added).

have legally-held lethal weapons.²⁶

Police reform is addressed in the Agreement through an Independent Commission,²⁷ which must provide a report by the summer of 1999. The terms of reference of the Independent Commission require that the commission propose how to establish a police service that is representative, routinely unarmed, professional, effective and efficient, fair and impartial, free from partisan political control, accountable, and conforms with human rights norms.²⁸ This commission is to report a year before decommissioning is finished. It is difficult to believe that the choice of timing on the part of the makers of the Agreement was an accident. Plainly, the public outline of police reform was to be available as a confidence-building measure for nationalists before the major part of republican decommissioning could be expected. Bringing forward this outline fast might be one way to resolve the crisis of executive formation, though the necessary radicalism will be difficult for David Trimble and his colleagues to swallow.

The early release of paramilitary prisoners sentenced under scheduled offenses, and of a small number of army personnel imprisoned for murders of civilians, has proceeded with less disruption than might have been anticipated. Measures to assist the victims of violence have helped ease the pain occasioned in some quarters by these early releases. The early release scheme has also worked in creating incentives for such ultra-paramilitary organizations as the Loyalist Volunteer Force to agree to a ceasefire in order to benefit their prisoners.

B. *The Political Nature of the Agreement*

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

26. *Id.*, Security ¶¶ 1-4.

27. See McGARRY & O'LEARY, *supra* note 13.

28. Agreement, *supra* note 2, Policing and Justice, ¶¶ 1-2.

1. Recognition

The Agreement is an act of recognition between states and national communities. The Republic of Ireland has recognized Northern Ireland's status as part of the United Kingdom, subject to the implementation of the Agreement. The United Kingdom has recognized the right of the people of Ireland to exercise their national self-determination, albeit conjointly and severally. It has confirmed that Northern Ireland has the right to secede, by majority consent, to unify with the Republic of Ireland. The Republic of Ireland has recognized unionists' British political identity. The United Kingdom has recognized Northern nationalists as a national minority, not simply as a cultural or religious minority, and as part of a possible future Irish national majority. The two states have recognized the paramilitaries that have organized cease-fires as political agencies. The Agreement has not required them to surrender to their respective authorities and has accepted the release of their prisoners on the assurance that their organizations will participate in ceasefires. The paramilitaries have, with some minor exceptions, recognized one another when it comes to ceasefires.

Unionists have recognized nationalists as nationalists, not simply as Catholics or as the minority. Nationalists have recognized Unionists as unionists, and not just as Protestants. Nationalists and unionists have recognized others who are neither nationalists nor unionists. This bounty of recognition in contemporary Northern Ireland would warm the cockles of Hegel's and Charles Taylor's hearts.²⁹ The identity dimension of the conflict that John Whyte emphasized is undoubtedly being addressed.

2. Balance of Power

The Agreement also rests on recognition of a balance of power. The Anglo-Irish Agreement of 1985 led to a new but ultimately productive stalemate. Republicans were left with no immediate prospect of significant electoral growth and their military capacity to sicken the British proved limited.

Loyalists re-organized in the late 1980s and by the early

29. For sophisticated discussions of recognition, see, for example, ERIK RINGMAR, *IDENTITY, INTEREST AND ACTION: A CULTURAL EXPLANATION OF SWEDEN'S INTERVENTION IN THE THIRTY YEARS WAR* (1996), and CHARLES TAYLOR, *MULTICULTURALISM AND THE POLITICS OF RECOGNITION* (1992).

1990s were able to raise the costs of sustaining violence within the republican constituency. Unionists discovered the limits of just saying no as British or bi-governmental initiatives were created over their heads. There was a military stalemate and a political stalemate, but there were also underground structural changes beneath the "frozen surface" that were noted by John Whyte in his last essay.³⁰ These changes included greater equality of opportunity and self-confidence among nationalists, as well as a shift in the demographic and a resulting shift in the electoral balance of power within the communities. Together these changes underlined the fact that any political settlement could not return nationalists to a subordinate status. The initiative of John Hume and Gerry Adams constructively responded to this new stalemate. Much work had to be done before their initiative bore fruit.

3. The Bargain

There is a bargain at the heart of the Agreement. Nationalists have endorsed it because it promises them political, legal, and economic equality now, plus institutions in which they have a strong stake, with the possibility of Irish unification later. The Agreement provides that Nationalists co-govern Northern Ireland, rather than their being governed by either unionists or the British government. Moreover, they get promises of further reforms to redress past legacies of direct and indirect discrimination. Republicans in Sinn Féin and the IRA can trade a long war that they could not win or lose for a long march through institutions in which they can reasonably claim that only their means have changed, not their end, the termination of partition.

Nationalist support for the Agreement is not difficult to comprehend. For Nationalists, it is a satisfactory bet either way. Why, then, did the UUP and the loyalist parties make this consociational pact with the nationalist devil? The charms and latent threats of Tony Blair and Bill Clinton, the diplomacy of George Mitchell, and the process of multi-party inclusive negotiations are not enough to account for David Trimble's decision to lead

30. John Whyte, *Dynamics of Political and Social Change in Northern Ireland*, in *NORTHERN IRELAND AND THE POLITICS OF RECONCILIATION* 103-16 (Dermot Keogh & Michael Hatzel eds., 1993).

his party where it was most reluctant to go, nor do these factors allow for his intelligence.

In this author's judgment, the unionists who supported the Agreement were concerned not so much with ending the IRA's long war. Rather, they were concerned with protecting and safeguarding the Union. Their calculi suggest that only by being generous now could they reconcile nationalists to the Union and protect themselves against possible seismic shifts in the balance of demographic power. Unionists would get a share in self-government now, avoid the prospect of a British Government making further deals over their heads with the Irish State, and have some prospect of persuading northern nationalists that a newly reconstructed Union offers a secure home for them. They made an Agreement to stave off something worse.

4. Ideas

Recognizing identities and interests are necessary but not sufficient conditions of a constitutional settlement. Ideas, however loosely understood or flexibly deployed, were also important in the making of the Agreement. Their development, dissemination, and impact is harder to trace, but that does not mean the task cannot be accomplished. Fresh language and policy learning were evident in the making of the Agreement. Policy obstinacy and recalcitrance within the highest echelons of the dying Major government and of the spread-eagled rainbow coalition in Dublin between 1995 and 1997 were also evident.

The crafters of the ideas were many and varied, including politicians, public officials, and many unofficial advisors. Defining the sources of the conflict in national terms, rather than as issuing from religious extremism or terrorism, was vital. Without this shift, the Anglo-Irish Agreement, the Framework Documents, and the Agreement itself would not have been possible. The end of the Cold War and political change in South Africa and the Middle East registered in and effected the region. The traditional explanations of the causes of the conflict had increasingly ceased to move the local participants. Many were open to compromises and political institutions that would mark a shift from the limitations of either London's or Dublin's conceptions of good governance.

The beauty of the Agreement as a bargain is that both na-

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

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

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

VII. *THE SHORT-TERM POLITICS OF THE TRANSITION: A COUNSEL ON THE GAMES OF UNLIKELY PARTNERS AND THE TEMPTATIONS OF LEGALISM*

Before the optimistic picture can materialize, much work remains to be done. The Agreement's political entrenchment requires that some short-term advantage-maximizing and game-

playing temptations be avoided. At the heart of this Agreement lie four internal political forces—the SDLP, the UUP, Sinn Féin, and the PUP/UDP.³¹ The SDLP and the UUP comprise the historically moderate nationalists, while Sinn Féin and the PUP/UDP are the more moderate republicans and loyalists. Maintaining the Agreement requires that these political forces evolve as informal coalition partners while preserving their bases. Considerations of brevity oblige this author to focus on just two of these constellations.

The UUP is the most likely short-term maximizer and game-player. The party split most under the impact of the making of the Agreement. It lost votes to the “No” Unionists, and it has lost some further dissenters that were elected on its platform. The temptation of its leaders is to renegotiate the Agreement in the course of its implementation. That way they can hope to refortify the party and draw off support from the soft-“No” camp amongst unionists.

The UUP would have preferred an Agreement that was largely internal to Northern Ireland. It also would have preferred an Agreement that provided for their co-governing Northern Ireland with the SDLP. It would strongly prefer to govern Northern Ireland without the formal participation of Sinn Féin. Consequently, the UUP’s most tempting game plan is to use the decommissioning issue to split what their supporters see as a pan-nationalist bloc. If they achieve decommissioning, then they assume that they will split the republican base of Sinn Féin, and they can live with that. If they do not achieve decommissioning, they may think that they can sabotage the more radical agenda of the Agreement if they can retain British support on the issue of decommissioning. The temptation of the UUP is towards post-Agreement negotiation, motivated by an opportunism aggravated by perceived political weakness. The signs of this game will be a phony legalism, an adversarial and petty-minded interpretation of the Agreement, postponement and prevarication, and brinkmanship. These signs may appear familiar.

31. In the new dispensation there are now eight minorities. Five support the Agreement: nationalists, republicans, yes unionists, yes loyalists, and others. Three are against the Agreement: no unionists, no loyalists, and no republicans. The latter are in objective alliance.

The other constellation is republican. Republicans may be tempted to engage in game-playing of a different kind. They can and may insist on the full letter of the Agreement to sustain their constituency and their long-term political strategy, even if this insistence creates great difficulties for the UUP and the SDLP, their informal partners. They may think that they have an each way bet. If the UUP delivers on the Agreement, well and good. If the UUP does not deliver, then Sinn Féin will position itself to ensure that unionists are blamed for its non-implementation.

For hard-liners, non-implementation of the Agreement may provide a pretext for a return to war. In contrast, softer-liners will argue that any return to violence could only be sanctioned if governmental or loyalist forces were responsible. Many softer-liners would argue that Sinn Féin would have more to gain electorally both within Northern Ireland and the Republic through remaining a wholly constitutional opposition to a defunct Agreement. Sinn Féin may ironically be tempted by hard legalism, extracting the full letter of its contract with the UUP at the risk of damaging the informal political coalition that made the Agreement.

CONCLUSION

Three things must happen in order for this consociational and con/federal Agreement to survive. Immediate, daily, vigorous, and continuing British and Irish oversight is required to encourage the Agreement’s fulsome implementation before the looming prospect of a constitutional time bomb in a Dublin court. The governments must use all their available tools, from rhetorical appeals to politicians’ salaries and expenses in order to reach this end.

The Agreement also requires an immediate end to the Northern Ireland Office’s new meta-administrative principle that any disagreement over the meaning of the Agreement and its accompanying legislation must be subject to cross-community consent procedures, an incredible invitation to legalism on the part of parties tempted to re-negotiate the Agreement continually. The Agreement also requires greater recognition among the informal coalition partners, especially within the UUP and Sinn Féin, that they may benefit more in the long run from not

seeking maximum short-term advantage from one another's difficulties and from not over-hyping their own. They should reflect on the fact that a Northern Assembly election is not required before 2002.

The benefits of these requirements will be demonstrated if two crises are resolved. One is the present crisis linking decommissioning and executive formation. The other is the widely anticipated future crisis over police reform. If they are not resolved, we will have a constitutional and policy mess that will require all the patience and national and religious ecumenism of another John Whyte to interpret. I hope that this will not be necessary, not least because there will never be another John Whyte.

*APPENDIX ONE: HOW WILL THE ASSEMBLY AND ITS
CROSS-COMMUNITY VOTING RULES WORK?*

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

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

The Assembly through majority rule passes "normal laws," though there is provision for a minority, of thirty of the 108 Assembly members, to trigger special procedures. But "key decisions," that is the passage of controversial legislation, including the budget, automatically have these special procedures that require "cross-community" support. Two rules have been designed.

The first is "parallel consent." This requires, among those present and voting, both an overall majority of Assembly members and a majority of both unionist and nationalist members to

endorse a proposal. Table Two, which records the numbers in each bloc returned in the June 1998 election, suggests that parallel consent with all members present, will require the support of twenty-two nationalists and twenty-nine unionists, as well as an overall majority in the Assembly.

The second rule is that of "weighted majority." This requires, among those present and voting, support from sixty percent of members, i.e., sixty-five members when all members vote, or sixty-four excluding the Speaker. It also requires the support of forty percent of nationalist members and forty percent of unionist members. The data in Table Two suggest that at least seventeen nationalists must consent under this procedure, and at least twenty-four unionists. It also suggests that all nationalists (42) and the minimum necessary number of unionists (24) have the necessary combined support in the Assembly as a whole for any measure passed in this way (65). The same figures strongly suggest that in the first new Assembly moderate pro-Agreement unionists are vulnerable to pressure from anti-Agreement unionists. They could even refuse to be part of a predominantly nationalist super-majority necessary to work the parallel consent rule. But there is fat built into the Assembly. The bottom line is that David Trimble can survive and deliver a workable portion of the new cross-community majority even with six dissidents in his own party—providing he can be certain of the support of the PUP (which is likely), and providing that he can live with support from Sinn Féin (which is evidently much more uncomfortable for him).

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

The Assembly will have committees scrutinizing each of the departments headed by Ministers. Committee Chairs and Deputy Chairs will also be allocated according to the d'Hondt rule

(see Appendix Two). Each committee will have to approve any proposed new law within its jurisdiction tabled by Ministers, and indeed the committee can initiate legislative proposals. In consequence, a committee dominated by other parties may block the legislative initiatives of a dynamic Minister, and it may initiate legislation not to that Minister's liking—though the success of such proposals are subject to the possibility of cross-community special procedures!

APPENDIX TWO: THE MYSTERIOUS WORK OF VIKTOR D'HONDT IN BELFAST

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

In Table Three, ten Ministries are allocated. The numbers in square brackets in the M columns indicate the order in which parties win Ministries of their choice, whereas S is the number of seats each party has during each stage of the allocation.

In this scenario, unionists are entitled to five Ministries (3 UUP and 2 DUP), while nationalists are entitled to five (3 SDLP and 2 SF). If, by contrast, the First Minister and Deputy First Minister decide that there should only be six Ministries, then unionists would have three (2 UUP, 1 DUP) and nationalists would have three (2 SDLP and 1 SF). If they opted for seven, the UUP's current negotiating preference, then there would be four unionist Ministries and three for the nationalists.

What happens if the DUP does not take its Ministries because it will not accept the obligations of office? If there are to

be ten Ministries, then the UUP would win one more Ministry and the Alliance would win a Ministry. Nationalists would keep the same number of Ministries as before, but would improve their position in the pecking order. For example, their choice of ministries would be improved. If, by contrast, there are to be six Ministries, then unionists would have three Ministries (all UUP), whereas Nationalists would have three (2 SDLP and 1 SF) but with an improved pecking order.

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

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

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

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

BLOC	SEATS WON	FIRST PREFERENCE VOTE (%)	SEATS WON (%)
Nationalists	42	39.8	38.8
"Yes" Unionists	30	25.0	27.7
"No" Unionists	28	25.5	25.9
Others	8	9.4	7.4
Total(s)	108	*100	*100

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

PARTY	SEATS WON	FIRST PREFERENCE VOTE (%)	SEATS WON (%)
SDLP	24	22.0	22.2
Sinn Féin	18	17.7	16.6
Other Nationalists	-	.1	-
UUP	28	21.0	25.9
PUP	2	2.5	1.8
UDP	-	1.2	-
Other "Yes" Unionists	-	0.3	-
DUP	20	18.0	18.5
UKUP	5	4.5	4.6
Other "No" Unionists	3	3.0	2.8
Alliance	6	6.4	5.5
Women's Coalition	2	1.7	1.9
Others	-	1.3	-

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

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

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

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