

**The Constitution Unit**

**The British-Irish Agreement:  
Power-Sharing Plus**

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# The 1998 British-Irish Agreement: Power-Sharing Plus

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The new British-Irish Agreement is a major achievement, both for its negotiators and for the peoples of Ireland and Britain. But what kind of Agreement is it? It certainly 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 that, indeed too complex to fit within discussions of 'the third way'. The correct answer to the question for a student of political science is that it is a consociational agreement, i.e. a political arrangement that meets all of the criteria laid down by that doyen of political science, Arend Lijphart:

- (i) cross-community executive power-sharing;
- (ii) proportionality rules applied throughout the relevant governmental and public sectors;
- (iii) community self-government (or autonomy) and equality in cultural life; and
- (iv) veto rights for minorities<sup>2</sup>.

The Agreement is not just consociational, however; it departs from Lijphart's prescriptions in important respects that have practical implications for Northern Ireland and for regulating ethnic and national conflict elsewhere. To be formulaic: the Agreement is consociational but with elements of confederation and federation; it has imaginative elements of co-sovereignty built-in; and it promises a novel model of 'double protection'. Lastly, it is built on mutually conflicting perceptions of its likely long-run outcome that are equally hardheaded, but need not damage its eventual success. Let me justify this phrasing.

## Executive Power-Sharing

At the heart of any consociational arrangement is executive power sharing. The new Agreement will establish two semi-presidential figures in a devolved Northern Assembly: a First Minister and a Deputy First Minister. Once elected they will have presidential characteristics because it will be almost impossible to depose them - presidentialism means an executive that cannot be destroyed by an assembly except through impeachment.

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<sup>1</sup> This article focuses on the meaning of the political institutions established by the 1998 Agreement. Subsequent articles (with Chris McCrudden and John McGarry) will examine explanations of the making of the Agreement and (with Geoffrey Evans) public reactions towards the settlement. This text draws on a series of articles written with Dr. Christopher McCrudden and Prof. John McGarry for the Sunday Business Post (Dublin), April 19, 26 and May 3, 10, 17, 1998, and on public lectures presented by the author at LSE, Queen's Belfast, Edinburgh and Dartmouth in the Spring and Summer of 1998. It does not examine the issues of decommissioning, demilitarization or the release of prisoners, nor does it treat in any details rules for the exclusion of Ministers or Parties from the Executive. A United States Institute of Peace grant has facilitated the author's research. Thanks are especially owed to Katharine Adeney, Prof. John Coakley, Prof. Walker Connor, Prof. Conor Gearty, Prof. Robert Hazell, Prof. Donald Horowitz, Prof. David McCrone, Dr. Tom Nairn, Dr. Mads Qvortrup, members of the Constitutional Unit at UCL, and multiple Irish and British public officials, politicians and journalists who cannot be named here. The usual disclaimer applies.

<sup>2</sup> See inter alia Arend Lijphart, Democracy in Plural Societies, (New Haven, Yale University Press, 1977).

The First Minister and the Deputy First Minister are elected together by the parallel consent cross-community consent procedure - see Appendix One. This requires them to have the support of fifty per cent of registered Nationalists and Unionists as well as a majority of the Assembly. Critically, this rule gives very strong incentives to unionists and nationalists to nominate a candidate acceptable to at least a majority of the other bloc's members in the Assembly. So even if Gerry Adams in the future leads Sinn Fein into surpassing the SDLP in seats won in the Assembly, unionists will be able to bloc his nomination as Deputy Chief Minister. Likewise, nationalists can veto an unacceptable hard-line unionist.

In the first elections for these posts pro-Agreement unionists in the Ulster Unionist Party 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 Fein, which is also a reservedly pro-Agreement party, 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 Fein'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; 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 – thought it might make sense for the them jointly to run and be served by the existing Finance and Personnel Ministry<sup>3</sup>.

David Trimble and Seamus Mallon of the SDLP have successfully and carefully coordinated 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 dyarchy will critically depend upon the personal co-operation of the two holders of these posts. The *Northern Ireland Bill (1998)*, currently going through the Commons, has reinforced their interdependence by requiring that 'if either the First Minister or the deputy First Minister ceases to hold office, whether by resignation or otherwise, the other shall also cease to hold office' (Article 14 (6)).

Unlike some presidents, and unlike most prime ministers, neither the First Minister nor the Deputy First Minister will formally appoint the 'Other Ministers' to the Executive Committee. Instead they will be allocated to parties in proportion to their strength in the Assembly, according to a mechanical rule, the d'Hondt rule (see Appendix 2). 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: a subtle form of what Lijphart calls 'grand coalition government'.

The d'Hondt rule means that parties get the right to nominate Ministers according to their respective strength in seats - no vote of confidence is required by the Assembly. It also means that parties get to choose, in order of their strength, their preferred ministries. An individual Minister can be deposed from office, by cross-community rules (see Appendix 1), but the party that held the relevant Ministry will be able to appoint his or her successor from amongst their 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.

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<sup>3</sup> The *Northern Ireland Bill (1998)* makes it plain that the top two Ministers can hold functional portfolios, Clause 15 (10).

There will be at least six 'Other Ministers', but there can be 'up to' ten. The number of ministries will be decided by cross-community consent, presumably after the First and Deputy First Ministers agree a proposal. The more Ministries there are in the Executive Committee then the more proportional the representation of parties on the Executive.

Ministers will enjoy executive powers under existing legislation, and can operate without collective responsibility - save where the Executive Committee and the Assembly have agreed a broad programme, and save where they are obliged to engage in cross-departmental activities. No method of reaching agreement within the Executive Committee is specified, but the programme has to enjoy cross-community support in the Assembly - in practice agreements within the Executive will minimally require majority support including the agreement of the First and Deputy First Ministers.

Lijphart's criterion of cross-community executive power sharing is clearly met in the Agreement, but there are special features of the new arrangements that go beyond previous consociational experiments. Ministers will take a 'Pledge of Office', not an 'Oath of Allegiance'. This cements the bi-nationalism that 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 preparing a programme of government, and to support and follow the decisions of the Executive Committee and the Assembly. The duties of office include a requirement to serve all the people equally, to promote equality and to prevent discrimination - which means, according to the doctrine of ministerial responsibility, that civil servants will be bound to run their departments consistent with these obligations. They also include a requirement that the 'relevant Ministers' serve in the North-South Ministerial Council, a duty that in conjunction with other clauses, will prevent parties opposed to this aspect of the Agreement from taking Ministerial office in good faith. The special skill of the Agreement's 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. Although the new Agreement has been wryly described by Seamus Mallon as 'Sunningdale for slow learners' this is not the only respect in which it departs from that ill-fated experiment.

### **Proportionality**

Consociational arrangements are built on principles of proportionality. The Agreement meets this test in three clear ways: on the executive (see Appendix 2); in the elections to the Assembly; and in public sector positions.

All future elections to the 108 member Assembly will be elected using a proportional representation system, the single transferable vote, STV, in six member constituencies – though the Assembly may choose to change from this system later. The Droop quota in each constituency is therefore 14.3 % of the vote, which squeezes the small parties, or, alternatively, encourages them to form electoral alliances<sup>4</sup>. 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 future to achieve better representation.

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<sup>4</sup> The Droop quota used in STV is  $(\text{Total Vote}/N+1) + 1$ , where N = Number of Assembly members to be elected.

This system of voting is not what Lijphart recommends for consociational systems - he is an advocate of party-list PR systems because he believes they help make party leaders more powerful and better able to sustain inter-ethnic consociational deals. However, STV has the great merit of encouraging 'vote-pooling'<sup>5</sup>: voters, can in principle, use their transfers to reward pro-Agreement candidates at the expense of anti-Agreement candidates. So, for example, some of the SDLP's and Sinn Fein's voters found it rational to reward David Trimble's Ulster Unionist Party by giving its candidates their lower-order preferences, and so helped them against Ian Paisley's DUP.

The STV system has also arguably helped encourage Sinn Fein to its current path: in the past it won few transfers from other parties' supporters. Since the early 1990s that is no longer true because SDLP voters have been rewarding Sinn Fein 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.

**Table One. The Shares of Blocs in the 1998 Assembly.** (\*Percentages do not add 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
<b>Total(s)</b>	<b>108</b>	<b>*100</b>	<b>*100</b>

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

Party	Seats Won	First Preference Vote (%)	Seats Won (%)
SDLP	24	22.0	22.2
Sinn Fein	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	18.5
UKUP	5	4.5	4.6
Other 'No' Unionists	3	3	2.8
Alliance	6	6.4	5.5
Womens Coalition	2	1.7	1.9
Others	-	1.3	-

Tables 1 and 2 report the outcome of the June 1998 elections to the first Assembly under the Agreement. The proportionality of the outcomes is evident, both with respect to blocs and with respect to parties. The deviations in seats won compared to the first preference vote primarily benefited the pro-

<sup>5</sup> Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley, University of California Press), pp. 628 ff.

Agreement parties – whose candidates accrued support through the transfers of lower order preferences. The UUP was the principal beneficiary of lower order preferences taking its seat share (25.9%) significantly above its first-preference vote-share (21.3%). 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 amongst the pro-Agreement candidates, thought 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.

The proportionality rules combined with accommodative incentives do not stop with the electoral system. The Agreement envisages a representative police force. It will be the task of the Independent Commission on policing, headed by former Hong Kong Governor Christopher Patten, to ensure the creation of a police service or services that are representative of Northern Ireland. The RUC's mono-national culture or its monopoly on policing services is ending.

The Agreement is also 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.

### **Communal Autonomy and Equality**

Consociational settlements avoid compulsory integration of peoples; instead they seek to manage differences equally and justly. 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. It also makes new provisions for the educational use, protection and public use of the Irish language - along the lines used for Welsh in the UK.

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

Moreover, the Agreement does not neglect the non-national dimensions of local politics. All aspects of unjustified social equalities, as well as inequalities between the national communities, are recognised 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, i.e. other dimensions that differentiate groups and individuals in Northern Ireland: religion, race, ethnic affiliation, gender etc.

Equality issues are not left exclusively to the local parties to manage and negotiate, which might be a recipe for stalemate. Instead the UK 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; and with respect to their gender, race, disabilities, age, marital status and sexual orientation. This commitment entails what Dr. Christopher McCrudden labels 'mainstreaming equality'. The UK Government is also likely to establish a Human Rights Commission tasked with an extended and enhanced role, including monitoring, the power to instigate litigation, and drafting a tailor-made Bill of Rights for Northern Ireland.

### **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 political appeals to both the UK and Irish Governments.

The Assembly has cross-community procedures (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 conceivably have been used by hard-line unionist opponents of the Agreement to wreck its initiation and development. This possibility remains, but is somewhat diminished because the parallel consent rule requires a lower level of unionist consent than was required for the election of the First and Deputy First Ministers (see Appendix One).

In the courts, disaffected nationalists, unionist and others will have means to redress breaches of their human and collective rights. What has not been addressed directly and immediately, however, 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', and it will be a vital part of embedding the settlement that the judiciary reflects the different communities in the North and is committed to the human 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 they will be able to express their voices and ensure that the new 'Rights culture' does not exclude them.

### **With confederal and federal elements**

The Agreement is not only internally consociational: it is also confederalising, and federalising. This is what marks it out as novel in the international environment.

Confederations exist when sovereign jurisdictions voluntarily delegate powers and functions to bodies that can exercise power across all jurisdictions. The Agreement creates two confederal relationships.

#### *(i) The all-Ireland confederal relationship.*

The first is all-Ireland in nature: the North-South Ministerial Council. 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 programme of work to establish the Council. The Assembly and the Council are interdependent. If the Assembly does not create the Council it will in effect destroy itself. The North-South Ministerial Council is the means by which nationalists hope to persuade unionists of the attractions of Irish unification; and will in any case satisfactorily link northern nationalists to their preferred nation-state. Consistent with the Agreement the Irish Government has

changed its constitution to ensure that the North-South Ministerial Council will be able to exercise island-wide jurisdiction in those functional activities where unionists are willing to co-operate.

The North-South Ministerial Council will function much like the Council of Ministers model in the European Union, with ministers having considerable discretion to reach decisions, but remaining ultimately accountable to their respective legislatures. The Council will meet in plenary format twice a year, and in smaller groups to discuss specific sectors (say, agriculture or education) on a 'regular and frequent basis'. Provision is also made for the Council to meet to discuss matters that cut across sectors, and to resolve disagreements. In addition, the Agreement provides for cross-border or all-island 'implementation' bodies - which means the same as 'executive'. These will be responsible for implementing decisions taken in at least six, as yet unspecified, areas. These will be decided during a transitional period between the Assembly elections and October 31, and are currently under discussion. The Agreement provides an Annex that lists 12 possible areas for implementation, ranging from agriculture to education and tourism.

There is no provision for a North-South joint parliamentary forum, as there was in the Sunningdale Agreement of 1973, but the Northern Assembly and the Irish *Oireachtas*<sup>6</sup> are asked 'to consider' developing such a forum.

Nationalists wanted the North-South Institutions to be established by legislation from Westminster and the *Oireachtas*. Unionists preferred that they be established by the Northern Ireland Assembly and its counterpart in Dublin. This was one serious obstacle to agreement, and the document produced on Good Friday 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, currently being processed. During the transitional period it will be for the Northern Ireland executive and the Republic's government to decide, by agreement, how cooperation should take place, and in what areas the North-South institutions should cooperate. Once this body of work is agreed, the Northern Ireland Assembly will be unable to change it, unless both communities there consent.

One concern of nationalists was 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 compromise and a tightly written bargain. Consociation and confederalism go together: the Assembly and the Council are 'mutually interdependent' and 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<sup>7</sup>.

The question of what scope and powers these North-South institutions will have naturally remains somewhat open-ended. Some of this is to be decided by the Northern Ireland executive and the Republic's government during the transition. The Agreement does, however, envisage a meaningful

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<sup>6</sup> The collective name in Gaelic for the two chambers of the Irish Parliament, *Dail Eireann* and *Seanad Eireann*.

<sup>7</sup> The Agreement does not mention what happens if both institutions, and therefore the Agreement itself, collapses. Effectively, however, 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 parity of esteem, reductions in the employment gap between Catholics and Protestants, and the reform of policing; and eventually shift towards direct co-sovereignty over the region. Unionists opposed to the Agreement would do well to bear this in mind.

role for the Council. It states 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 cross-border or all-island implementation bodies. These matters are unspecified but presumably they could include the usually-mentioned subjects, including agriculture, transport, tourism, and education. The Agreement also requires the Council to consider the implementation of EU policies and programmes as well as proposals under way at the EU, and makes provisions for the Council's views to be 'taken into account' at relevant EU meetings. In addition, the signatories to the Agreement have promised to work 'in good faith' to bring the North/South Council into being. They are required to use 'best endeavours' to reach agreement and to make 'determined efforts' to overcome disagreements over areas where there is a 'mutual cross-border and all-island benefit'. Once North-South cooperation is agreed, any future unionist majority in the Assembly cannot block it - any scaling back of the Council's powers would require the consent of both nationalists and unionists<sup>8</sup>.

Socio-political facts will support the new constitutional confederalism. As the Republic's Celtic Tiger continues to expand, Northern Ireland's Ministers of whatever background should see increasing benefits from North-South cooperation. As the European Union continues to integrate, there will also be pressure for both parts of Ireland to cooperate, given their shared peripheral geographical position, and similar interests in functional activities such as agriculture and tourism<sup>9</sup>.

*(ii) The British-Irish confederal relationship.*

The second confederal relationship affects all the islands of Britain and Ireland: the new British-Irish Council. Under its auspices the sovereign Governments, all the devolved governments of the UK, and all the neighbouring insular dependent territories of the UK can meet, agree to delegate functions, and, may agree common policies. This proposal meets unionists' concerns for reciprocity in linkages - and provides a mechanism through which they may in future be linked to the UK although 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 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 or North-South Council

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<sup>8</sup> The possibility of a Unionist Minister refusing to serve on the Council will appear to some as very real, given that Unionist parties which oppose the Agreement, especially the DUP, will be eligible for ministerial portfolios in Northern Ireland. However, this is ruled out in practice: Participation in the North-South Council has been made an 'essential' responsibility attaching to 'relevant' posts in the two Administrations ('relevant' means, 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 Council might take a seat on it with a view to wrecking it. *But* Ministers are required to establish the North-South Institutions in 'good faith' and to use 'best endeavours' to reach agreement. This means it is unlikely that potential wreckers, like Ian Paisley or Peter Robinson, would be able to take part in the North-South Council, even if they wanted to. In any case, it is unlikely that Messrs. Paisley and Robinson will want into, or be allowed to stay in, the Northern Ireland Executive. This is because 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.

<sup>9</sup> Northern Ireland could, in principle, even go into EMU with the Republic, if Britain itself remained outside - providing there was agreement in the Assembly, and the Secretary of State and the Westminster Parliament assented.

cannot survive without the other, it makes no equivalent statement concerning the British-Irish Council.

The Agreement also has subtle federalist dimensions and possibilities if we accept that a federation exists when there are at least two separate tiers of government over the same territory and when neither can unilaterally alter the constitutional capacities of the other.

### *Federalising Within the UK*

Take the UK first. The Agreement spells the end of unitary Unionism, already dented by the formation of a Scottish Parliament and Welsh Assembly. But does the Agreement simply fall within the formula of 'devolution within a decentralised unitary state'? Arguably not.

The Agreement is a treaty between states and is based on Irish national-self-determination as well as British constitutional convention. The UK officially acknowledges in the Agreement that Northern Ireland has the right to secede into the Republic, on the basis of a local referendum, and it recognises, in a treaty, the authority of Irish national self-determination throughout the island of Ireland, and the Agreement's institutions have been brought into being by the will of the people of Ireland, North and South. In international law I therefore maintain that the UK's relationship to Northern Ireland is federal: Westminster cannot, except through breaking its treaty obligations, and except through denying Irish national self-determination, exercise power in any manner in Northern Ireland that is inconsistent with the Agreement.

This federalising possibility will, of course, be enhanced if the UK and Northern Irish courts come to treat Northern Ireland's relationships to Westminster as akin to those of the former Dominions - which had a federal character - as they did in the period of the Stormont Parliament (1921-1972). Moreover, the nature of devolution or federation is not closed: the UK has, crucially, created an open-ended mechanism for Northern Ireland to expand its autonomy from the rest of the UK, albeit with the consent of the Secretary of State, and the approval of Westminster. Maximum feasible autonomy while remaining within the Union is feasible provided there is agreement to that within the Northern Assembly. Of course, legalist Diceyians will insist that Westminster's ultimate sovereignty in Northern Ireland remains intact. But if the Agreement beds down the political development of a federal relationship between the UK and Northern Ireland is assured for the medium-term whatever might be said in the dry recesses of the Constitution's ancient regime.

### *Federalising Across Ireland*

The Agreement also opens federalist avenues in the Republic of Ireland, hitherto one of the most centralised states in Europe. The North-South Ministerial Council will be seen by nationalists, North and South, as a potential federalist first step. Irish unification is by no means excluded by this Agreement; it is simply definitively subject to majority consent in both jurisdictions.

Indeed Irish unification cannot be precluded because of present demographic trends<sup>10</sup>. But the nature of the eventual unification envisaged in the re-drafted Irish Constitution is different. It no longer has anything resembling the programme of assimilation suggested by the very appropriate title of the extreme hard-line republicans that the peace process has left on the beach, 'the 32 County Sovereignty' group.

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<sup>10</sup> See John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images* (Oxford: Basil Blackwell, 1995), ch. 10.

The Republic, I maintain, is bound by the Agreement to commence to structure its laws, and protection of rights, to prepare for the possibility of a federal Ireland. The Agreement for the first time recognises Northern Ireland as a legal entity within the Irish Constitution: its eventual absorption or elimination as a political unit is therefore no longer a programmatic feature of *Bunreacht na hEireann*<sup>11</sup>. Moreover, the Agreement envisages the subjection of both jurisdictions in Ireland to the same regime for the protection of individual and group rights – a situation perfectly compatible with a subsequent formal federation.

Forecasting the long run is always problematic but it seems likely that if Northern nationalists acquired local majority support within Northern Ireland it would not necessarily be in their interests to promote the region's immediate administrative and legal assimilation into the Republic. They may find that they have an interest in preserving Northern Ireland as a political entity within a federated Ireland – after all they would be a local majority.

Lastly, it should be recalled that if these confederalising and federalising possibilities across Ireland and the UK unfold, they will do so within a European Union which has its own confederal relationships and ambitious federalists. There will be no obvious contradictions that will arise from this extra layer of con/federalising federalising.

### **Double Protection and Co-Sovereignty**

Yet the subtlest part of the Agreement one that goes well beyond consociational thinking, is its 'double protection model' - laced with elements of co-sovereignty. The Agreement promises to entrench the identical protection of rights, collective and individual, on both sides of the present border. In effect it promises protection to Northern nationalists now on the same terms that will be given to Ulster unionists should they ever become a minority in a unified, albeit federal Ireland.

Communities are therefore protected whether they are majorities or minorities, and whether the sovereignty lies with the UK or the Republic - whence the expression 'double' protection. The two states not only promise reciprocity for local protection of present and future minorities, but have also created two separate intergovernmental devices to protect those communities. One is the successor to the Anglo-Irish Agreement, the inter-governmental conference that guarantees the Republic's government access to policy formulation on all matters not yet devolved to the Northern Assembly or the North-South Ministerial Council; the other is the British and Irish Council. The Republic's government would find it politically impossible not to offer the British government reciprocal access in the same forums if unionists become part of a unified Ireland – though this is not a prediction that the UK Government would want this arrangement.

It is important to note what has not happened between the two sovereign Governments. Unionists have argued that they have removed the 1985 Anglo-Irish Agreement, which gave the Irish government say over Northern Ireland affairs, in return for conceding a North-South Council. This claim is, at the very least, exaggerated. Under the new Agreement, the Irish government will retain a say in those Northern Irish matters that have not been devolved to the Northern Assembly. 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 these matters, and this conference will continue to be serviced

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<sup>11</sup> Constitution of Ireland (Dublin: Government Stationery Office, 1937, as amended).

by a standing secretariat. The 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 is also provision for representatives of the Northern administration to be involved in the intergovernmental conference - a welcome democratisation. The Anglo-Irish Agreement anticipated that the remit of the intergovernmental conference would shrink to non-devolved matters in the event of a Northern Ireland power-sharing administration being formed, and that Northern ministers would play a role in the conference<sup>12</sup>. It is more accurate to claim, therefore, that the intentions of the Anglo-Irish Agreement have been fulfilled, than it is to say that it has been removed. Transcendence involves incorporation of what went before: the new Agreement transcends the Anglo-Irish Agreement in precisely this way.

### **The Agreement on Uncertainty and A Prognosis**

Most inter-ethnic peace accords share two features: the institutions that they establish are restricted to a single state, and they normally represent the victory of one side and the defeat of another. The 1998 Belfast Agreement, or the Good Friday Agreement as it is variously known, is different. Its institutions address the 'totality' of relationships between nationalists and unionists in Northern Ireland, between Northern Ireland and the Republic, and between Ireland and Britain. It is neither a victory for nationalists, nor for unionists; both can maintain their central aspirations and their core identities. No paramilitaries that abide by the Agreement have to engage in formal surrender to those they opposed in war.

The Agreement is an immensely subtle construction, a very detailed bargain. Naturally people ask: is it a pack of cards, vulnerable to the slightest pressures, vulnerable to the play of either Orange or Green cards by hard-line loyalists or republicans? These are not foolish concerns, far from it, as the fracas at Drumcree 4 suggests. However, there are reasons to be cheerful about the robustness of these institutions.

The first is that the parties who made this Agreement did so because of hardheaded calculations. Nationalists have endorsed this Agreement because it gives them equality now with the possibility of Irish unification later. They get to co-govern Northern Ireland - rather than being simply governed by either unionists or the British government. Moreover, they get this share of government with promises of further reforms to redress past legacies of direct and indirect discrimination. Republicans in Sinn Fein and the IRA can trade a long war that they could not win, and could not lose, for a long march through institutions in which they can reasonably claim that only their means have changed, not their end: the termination of partition.

Why though did the UUP and the loyalist parties make this consociational plus bargain, this pact with the nationalist devil? The charms and latent threats of Tony Blair, the diplomacy of George Mitchell, and the process of multi-party inclusive negotiations are not enough to account for David Trimble's decision to lead his party where it was most reluctant to go, nor do these factors allow for his intelligence. Unionists who signed the Agreement were concerned not so much to end the IRA's long war but rather to protect and safeguard the Union. Their calculus suggests that they can only reconcile nationalists to the Union, especially against seismic shifts in the balance of demographic power, by being generous now. Unionists get a share in self-government now, avoid the prospect of a British

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<sup>12</sup> See Brendan O'Leary and John McGarry, The Politics of Antagonism: Understanding Northern Ireland (London: Athlone, 1996 2<sup>nd</sup> edition), chs. 6-7

Government making further deals over their heads with the Irish State, and have some prospect of persuading northern nationalists that the new reconstructed Union offers a secure home for them.

The beauty of the Agreement is that both nationalists and unionists have sound reasons for believing that they are right about the long term. They cannot be certain they are right, and so they are willing to make this elaborate settlement now. But is it in Yeats's phrase 'a terrible beauty'? Will the Agreement wither and die once it has become apparent who is right about the long term?

That possibility cannot be excluded, but that is why the Agreement's architecture repays careful inspection. It is not any old consociational model, like that of Lebanon, vulnerable to the slightest demographic transformation. There are incentives for each bloc to accommodate the other precisely in order to make its vision of the future more likely, i.e. both have reasons to act creatively on the basis of self-fulfilling prophecies. The treat of the double protection model is that it eases the pain for whoever gets it wrong about the future. The confederalising and federalising 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 bi-national super-majority. The Assembly and its Executive Committee can work, and become mechanisms for accommodating the diverse peoples of the North. There will be difficulties in agreeing a budget and a broad programme of government, and the die-hards or the kill-hards will be hoping to capitalise on them. Managing the twilight of the second Protestant ascendancy in Irish history, and the re-rustication of militant republicanism, are not going to be easy tasks, but the Agreement has already managed to deliver many impossibilities before its first birthday.

## **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 will be 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 UK.

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 they increase the number of moderate unionists in the Assembly, but with the attendant risk that they may lose the support of some Catholic voters. If they choose to be 'Other' they may, by contrast, weaken their power in critical votes in the Assembly, and run the risk of losing the support of some Protestant voters. In this Assembly they have determined that they are 'Other', though they are free to change their classifications in future.

The Assembly through majority rule may pass 'normal laws', though there is provision for a minority, of 30 Assembly members, to trigger special procedures. But 'key decisions', that is the passage of controversial legislation, including the budget, automatically have these special procedures that require 'cross-community' support.

Two rules have been designed. The first is 'parallel consent'. This requires, amongst those present and voting, both an overall majority of Assembly members and a majority of both unionist and nationalist members to endorse a proposal. Table 2, which records the numbers in each bloc returned in the June 1998 election, suggests that parallel consent with all members present, will require the support of 22 nationalists, and 29 unionists, as well as an overall majority in the Assembly.

The second rule is that of 'weighted majority'. This requires, amongst those present and voting, support from 60% of members, i.e. 65 members when all members vote, or 64 excluding the Speaker. It also requires the support of 40% of nationalist members and 40% of unionist members. The data in Table 2 suggest that at least 17 nationalists must consent under this procedure, and at least 24 unionists. It also suggests that all nationalists (42) and the minimum necessary number of unionists (24) have more than the necessary 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 will be 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 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 Fein (which will be more uncomfortable for him).

The cross-community rules are vital but not entirely predictable in their consequences. The Agreement implies that the parallel consent procedure must be attempted first, and then the weighted majority

procedure can be followed. That, however, will have to be clarified when the transitional Assembly decides its rules of procedure - by cross-community consent! The operation of the cross-community rules will depend on how parties register, but also on how disciplined parties are within the Assembly whence the widespread fears that have been expressed about the discipline and unity of the UUP

The Assembly will have committees scrutinising each of the departments headed by Ministers. Committee Chairs and Deputy Chairs will also be allocated according to the d'Hondt rule (see Appendix 2). 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 indeed initiate legislation not to that Minister's liking - though the success of such proposals would be subject to the possibility of cross-community special procedures!

**Insert 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 2 (above) and assuming all parties are willing and entitled to take their seats. The party with the largest number of seats, the UUP, would get the first Ministry, and then its seat share would then be divided by 2 seat-share. We then look for the next largest number of seats, held by the SDLP, and they get the second Ministry. In Table 3 below 10 Ministries are allocated. The numbers in square brackets in the M columns indicate the order in which parties win Ministries of their choice, whereas S is the number of seats each party has during each stage of the allocation.

**Table 3. 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

In this scenario unionists are entitled to five Ministries (3 UUP and 2 DUP) and nationalists get five (3 SDLP and 2 SF). If, by contrast, the First Minister and Deputy First Minister 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).

What happens if the DUP does not take its Ministries because it will not accept the obligations of office? The results are shown below in Table 4. If there are to be ten Ministries then the UUP would win one more Ministry and the Alliance would win a Ministry. Nationalists would keep the same number of Ministries as before but improve their position in the 'pecking order' i.e. choice of ministries. 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'.

**Table 4. The Allocation of Ministries (with a DUP boycott or exclusion)**

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

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

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

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