HUMAN RIGHTS, EQUALITY AND DEMOCRATIC RENEWAL IN NORTHERN IRELAND

Human Rights, Equality and Democratic Renewal in Northern Ireland

Edited by
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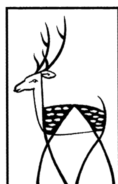

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This book is dedicated to all those killed in the conflict and to those who worked so hard to bring it to an end.

> *"The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all" (Good Friday Agreement 1998).*

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Preface

This book springs from my time in Belfast from 1997–2000 and from various interactions with the people that I met and worked with there in all spheres of public life. The work tries to bring together in one place a number of critical essays on a variety of aspects of politics and law in Northern Ireland. At the heart of this collection lies the Good Friday Agreement 1998 and all that it has brought in its wake. I had the great privilege to be around for the period of the negotiation and adoption of the Agreement. It will I believe come to be seen as a monumental event in Irish history, and despite the many problems it remains I think a marvellous achievement.

Growing up in Derry in the 1970s and 1980s brought the realities of the conflict into full view. The consequences of the "long war" were a dominant feature of day-to-day life. This never, however, extinguished the legacy of non-violent political struggle. The names associated with the civil rights movement were a recurring feature of my childhood years. Politics was debated with an intensity that seems to have gone out of fashion in our consensual times. It was impossible not to be politicised in one way or another (detachment is of course a political position) and the ideals of the civil rights movement inspired me and many others. The ideals held out the promise of emancipation as a realisable human achievement which we all had responsibility for working towards in dialogue with others. In this sense there is little particularly new about dialogical models of politics. The challenge, then as now, is to win the argument for solutions based upon dialogue and not force. Despite its flaws, the Good Friday Agreement 1998 may well come to be seen as the partial embodiment of that 1960s radicalism and the ideals it served. So now that we are in new times, and the only struggle worth talking about is the political one, it is perhaps worth reminding ourselves of the narratives and ideals that were buried in thirty years of conflict. These ideals have returned to become the common sense of the current political process. This collection of essays is advanced as a critical contribution to the ongoing dialogue about the transformation of Northern Ireland. All the contributors have, by thought and deed,

shown their commitment to progressive change. The essays speak for themselves in this regard.

There are too many people to thank individually, you know who you are. As ever Gerry Cross was a great source of friendship and support. Kieran McEvoy listened to my ramblings and during my time in Belfast I found his enthusiasm for scholarly ideas and his practical commitment to political struggle inspiring. I would like to thank all the contributors for delivering "product" and for putting up with an at times impatient editor. Editing a book, like everything else these days, is a process. I have learned this lesson well. Thanks to all at Hart Publishing and to Richard Hart for his enthusiasm for this project.

In particular, I would like to thank Lisa King for her insights on equality in practice and for reminding me of the formidable obstacles to real change. She does not simply "talk the talk". She lived this book too and many of the arguments were radically improved as a result of my ongoing conversations with her.

COLIN J HARVEY
September 2000

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1

Northern Ireland in Transition: An Introduction

COLIN J HARVEY

THE GOOD FRIDAY Agreement of 1998 (or Belfast Agreement) promises the people of Northern Ireland a fresh start underpinned by guarantees on human rights, equality and participation.[1] After three decades of violent conflict the Agreement holds out the potential for radical transformation and a transition to a new democratic polity. It contains commitments on: new democratic structures (North, South, British and Irish); criminal justice; policing; human rights (North and South); equality; prisoner releases; decommissioning, and victims. The Agreement is a relatively comprehensive document which addresses complex issues of public policy and ongoing interactions between Britain and Ireland. Given the history, what is remarkable is its explicit basis in the progressive political values of human rights, equality and democratic governance. The reality of life in Northern Ireland may be a long way from the ideal, but the normative basis for a new beginning is clearly established. The issue now, and for many years ahead, is to ensure that the promise of the Agreement is effectively delivered. As many of the contributions in this book suggest, this will be a significant challenge and the project has implications beyond Northern Ireland. It will, for example, require a re-think of orthodox understandings of constitutional law and politics in the United Kingdom. If developments in Northern Ireland are to be properly understood, a new paradigm of constitutional law is required which has both explanatory and critical

[1] *Agreement Reached in the Multi-Party Negotiations* (Cm 3883, 1998). The full text of the Agreement is printed in the Annex. The Agreement was translated into legislation in the form of the Northern Ireland Act 1998. For a useful link to the parliamentary stages of the legislation and all the legal preparations for devolution see http://www.nio.gov.uk/implemact.htm.

potential. The challenge is to recognise diversity while promoting cooperation and partnership in all the relations that currently exist within and between Britain and Ireland. As I argue, process-based models of law and democracy offer potentially the most attractive basis for analysing ongoing developments. What these conversational models encourage is more sophisticated thinking on new forms of decentred democratic relations, based upon models of rational discourse.[2] Fragmentation then becomes an opportunity to erode the patriarchal nature of traditional UK constitutional law, while maintaining a rich notion of law and democracy. Although the general trends in British constitutionalism are noted, the main focus of this collection is on Northern Ireland. The developments in the last decade merit such detailed and focused treatment.

This collection of essays, written by scholars who have all made a contribution in their own ways to the process of change, presents a critical perspective on how the transition is progressing and identifies key themes in the current law and politics of Northern Ireland. There are lessons, both good and bad, for Britain, Ireland and beyond in the recent history of Northern Ireland. On human rights and equality there are innovative new mechanisms that will, for example, be of interest to those in Ireland and Britain seeking to achieve progressive change. For public lawyers, the new constitutional order created in the wake of the Agreement cannot simply be fitted neatly into traditional notions of UK constitutional law. For example, I would argue that the Agreement has a constitutive force which should be given full recognition in legal and political life. To deny the legitimacy of the Agreement in law is to neglect its historic significance for Ireland, North and South. Such neglect is standard in British constitutionalism, but can no longer be justified. This should test the traditional understanding of the unitary nature of the United Kingdom. It represents a constitutional moment which must be accorded due weight by constitutional lawyers. There are distinct aspects of this new order which should encourage some rethinking of traditional positions. It is, of course, in the nature of tradition to perpetuate itself and simply absorb novelty. And this may well happen in this instance. British constitutionalism has a habit of absorbing change and moving on largely unaltered in its basics. It will be up to those seeking a new beginning, however, to ensure that this does not happen.

[2] See Jürgen Habermas "A Short Reply" (1999) 12 *Ratio Juris* 445, at 449–50.

Each of the chapters addresses the above themes in different ways. Colin J Harvey, in Chapter 2, examines the nature of constitutionalism in Northern Ireland and defends his position that the Agreement has a constitutive force in law and politics. He argues that events should be viewed in context. In particular, he highlights broader developments in constitutional law. He suggests that analysis of Northern Ireland should acknowledge the role of political violence and coercion in both its construction and for much of its history. As is noted, what has followed the Agreement demonstrates that democratic structures can be created through law which pay due regard to local contexts. Continuing with the theme of constitutionalism, Gordon Anthony and Andrew Evans explore the European Union (EU) dimension. Their argument is that the traditional understanding of UK constitutional law may cause problems for the new institutional arrangements in Northern Ireland. The chapter provides a detailed overview of Northern Ireland's role in EU policy formation with a call for a move "beyond orthodoxy" in UK constitutional law thinking.

While there are different understandings of the term, it is clear that the concept of equality underpins the Agreement. Christopher McCrudden offers, in Chapter 4, both an outline of how equality gained such an important place, as well as detailed treatment of developments since the Agreement. Considerable thought has been given in Northern Ireland to making paper commitments mean something in practice in this area. McCrudden has played a leading role in suggesting mechanisms to make equality meaningful in practice, as well as in law. As he shows, the political pressure led to creative thinking and eventually to the innovative provisions of the Northern Ireland Act 1998. The practical impact of the new equality schemes will be watched closely. As he states, at present we are mainly talking about promises. There is some way to go before these become a reality.

Equality stands alongside the human rights aspects of the Agreement. In Chapter 5 Colin J Harvey explores the role of the Northern Ireland Human Rights Commission. While it is too early to make a definitive assessment it is argued that it has a fundamental role to play in enriching political democracy. Harvey thus departs from rights-based thinking which leads only to the worship of judicial enforcement of rights. He is interested in all the mechanisms that can be effectively used to ensure that rights are protected within a flourishing deliberative democracy. Although much work has been done to rehabilitate the judiciary in recent years, he remains sceptical about their ability to take the lead in

promoting progressive law and politics. This is why national institutions for the protection of human rights are so important.

Stephen Livingstone examines the role of the judiciary and the legal profession during the conflict. He notes the lack of involvement of lawyers in public debates in this period. A variety of reasons are advanced for this, including the linkage made between professionalism and neutrality. He rejects the argument that the lack of involvement of lawyers was of no consequence and suggests that when they did speak out they were listened to by the judges. On the judiciary he is critical of the failure of the Northern Ireland courts, in the period prior to direct rule, to develop a constitutional jurisprudence which would challenge abuses of power. He concludes with an examination of three areas: anti-terrorism law and policy; judicial review; and anti-discrimination law and policy. Livingstone recognises that law is Janus-faced, it has both repressive and reforming dimensions. To understand the judicial role you have to acknowledge both. What is interesting is the way that the judges and legal profession are more likely to respond to criticism from "one of their own". This "discursive community" has its own systemic logic and will respond to argumentation framed by institutional actors within it. While it is never completely closed, it is a discursive community which seeks to perpetuate its own systemic logic. This is important, as the chapter by McEvoy also reveals, in understanding how change is achieved within this community in practice.

Livingstone ends with a call, rightly I think, to the judges to see the Agreement as part of a new constitutional order which requires the development of a distinctive constitutional jurisprudence. Whatever the arguments about the judicial role in a political democracy, the judges will have a part to play. It is essential that in discharging their responsibilities they pay due regard to the constitutive nature of the Agreement and the progressive values which underpin it.

John Jackson looks at the criminal justice system in Chapter 7. As he argues, this is an area that can truly be said to be undergoing a period of transition. As a member of the Criminal Justice Review he refrains from detailed critique of its recommendations, however, the chapter includes useful insights into the problems and prospects. In particular, Jackson notes the advantage of a review process that was able to take a global view of criminal justice and criticises reviews in England and Wales which have tended to take a piecemeal approach.

Policing is highly contested in Northern Ireland. Linda Moore and Mary O'Rawe examine in detail the proposals for a new beginning to

policing contained in the Patten Report. They argue that there are many truths surrounding the history and work of the RUC. Problems have, however, arisen when one truth is given particular priority, for example, when the organisation is described as a model police force, or the most professional force in the world. As they note, such inaccurate, and highly partial accounts, do little to advance the debate. Their chapter contains detailed treatment of the substantial problems facing police reform. This is based on their own comparative research on situations of conflict elsewhere. While not uncritical of the Patten Report, their principal argument is for swift and effective implementation.

After noting the successes in relation to state abuses, Kieran McEvoy looks at the influence which human rights and humanitarian interventions have had on the actions of the paramilitaries. McEvoy presents a fascinating insight (based on his extensive empirical research) into paramilitary activity in Northern Ireland. This chapter should make useful reading for those who prefer moral condemnation to rational argument. He is interested in what works in practice and how interventions have impacted on paramilitaries. The focus is the pragmatic one of achieving meaningful change for people in local communities and thus makes a refreshing change from some of the literature in this area. In drawing clear distinctions between republican and loyalist paramilitaries, he notes the sensitivity of republicans to interventions by respected human rights groups. For a movement concerned about international publicity criticism by organisations such as Amnesty International was not welcome. McEvoy shows that what tended to work was engagement with paramilitaries on the basis of sound contextual understanding in, to put it crudely, a language they could understand. Again this takes us back to the idea of a discursive community discussed above. Interventions must be based on a solid knowledge of the intricacies of the community. In the example he gives he argues that this sort of engagement made a real difference to the lives of affected individuals and groups. It was therefore more effective on the ground than some of the more high profile "interventions". If, however, the internal dynamics of the group is the determining factor it can prove extremely difficult to measure impact precisely. This raises the issue of whether in practice it is the internal dynamics which shifts in accordance with internal strategic imperatives rather than external influences. No discursive community is communicatively "closed", however, republicans had their own systemic logic which did prove remarkably resilient. An optimistic reading is that communication changed the

terms of the conversation within republicanism (particularly the Hume-Adams initiative). Dialogue has its own dynamics and cannot be reduced to purely internal or external strategic manipulation. As McEvoy notes, the period examined was one when republican paramilitaries were seeking, through political means, disengagement from their "policing" role and the "armed struggle". The interesting issue here is how the political language that made this disengagement possible was shaped. I would suggest that the language of political and legal compromise originated in the exhaustive work of the social democratic tradition in Ireland. As he notes, a rather vague "rights and equality" agenda has become a defining feature of modern Irish republicanism. Of course, prior to this late conversion to exclusively democratic means the extensive and destructive use of political violence was the defining characteristic. But he is correct to observe how the language of rights and equality has now been internalised in the republican movement.

The final contribution, by John Morison, examines the role of the voluntary sector in the democratic renewal of Northern Ireland. Morison draws upon the work of Michel Foucault to argue for the importance of the governmentality approach. He wants to downgrade the significance of the state and focus attention instead on the informal networks of the public sphere. He is explicitly critical of the nature of the Northern Ireland Assembly and looks to the community and voluntary sectors as sources of constitutional renewal. He notes the scale and wider role of this sector in Northern Ireland. Although sceptical about the new democratic structures, he is extremely critical of direct rule. He draws on previous collaborative work with his reference to "communicative constitutionalism". An interesting issue here, not taken up, is how this commitment to a dialogical model combines with the governmentality approach. "Communicative constitutionalism" has strong echoes of the recent resurgence of interest in deliberative democracy. However, Foucault, with his stress on highly localised forms of resistance, would have been sceptical about the grand claims made by some deliberative democrats. There is the additional issue of the institutionalisation of civil society. Arato, for example, argues that civil society must be securely institutionalised if it is to become a key site within a participatory politics.[3] The Civic Forum is, in the

[3] Andrew Arato *Civil Society, Constitution, and Legitimacy* (Oxford, Rowman & Littlefield Publishers Inc, 2000). See also J Cohen and A Arato *Civil Society and Political Theory* (Cambridge Mass, MIT Press, 1992); Iris Marion Young *Inclusion and Democracy* (Oxford, Oxford University Press, 2000) p. 194.

Northern Ireland context, an example of this institutionalisation. The point is that formal institutions matter and are an important part of shaping a deliberative democracy. Morison is correct however to place the emphasis on the informal public sphere as essential to the project of democratising democracy. The challenge is to embed a process of reflective interaction between the formal and informal public spheres.

The transition promised by the Agreement will take time. After thirty years of violent conflict, and a considerably longer period of instability, this is to be expected. It is, however, understandable that this can cause impatience. The main problem in the years ahead will be ensuring that the progressive elements of the Agreement are realised in practice. The forces of conservatism have a firm grip on public life in Northern Ireland. These forces can be found in unlikely places. This fact holds out the challenge of continuing struggle on the part of those committed to the new beginning. The law and politics of Northern Ireland will remain the site of continuing contestation. In the disagreements that will arise, and in ongoing political and legal conversations, it is essential that the constitutive force of the Agreement is accorded due recognition. British constitutionalism must accommodate the distinctive nature of the process of conflict resolution in Ireland, North and South. The transition is not simply another example of devolution and constitutional lawyers must come to acknowledge this fact. In Northern Ireland the growing literature on transitional justice may in fact be a more appropriate source of insight and a better starting point.

2

The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland

COLIN J HARVEY

AN ANALYSIS OF constitutionalism in Northern Ireland must pay due regard to the role of political violence and the responses to it. This goes beyond reflection upon the pure wilfulness of the original constitutional moment,[1] although in this case it is of fundamental significance.[2] Northern Ireland was born from political violence. Coercion

[1] Constitutionalism can be viewed as the ongoing attempt to bury the coercive and wilful legacy of its origins. It implies limits, even though the memory of the constitutive moment remains to haunt the present. This "constructivist" exercise in reconstruction frequently underplays (deliberately?) the fictitious nature of the constitutional traditions upon which it rests. The distrust shown by the framers of constitutions of "the people" perhaps relates to this basic fact.

[2] In relation to the use of force in the formation of Northern Ireland note the following comment, Harry Calvert *Constitutional Law in Northern Ireland: A Study in Regional Government* (London and Belfast, Steven and Sons Ltd and Northern Ireland Legal Quarterly Inc, 1968) p. 33: "Finally, it will be appreciated that should the issue [Westminster-inspired secession of Northern Ireland from the United Kingdom] ever arise, it is likely that considerations of legality will play but a small part in the determination of it. Unionist sentiment has on previous occasions consistently demonstrated that in its view there are higher considerations than legality". He was referring specifically to the threat of force from the Ulster Volunteer Force in the 1912–1914 period. An organisation which had A V Dicey on its side. See Kevin Boyle, Tom Hadden and Paddy Hillyard *Law and State: The Case of Northern Ireland* (London, Martin Robertson, 1975) p. 6: "The Northern Protestants had armed themselves to resist 'home rule' as early as 1912. When in 1920 and 1921 the predominantly Roman Catholic population of the southern counties of Ireland took up arms against the British and eventually gained their independence as the Irish Free State. . ., the Northern Protestants under the leadership of the Unionist Party opted for a measure of local autonomy within the United Kingdom as provided in the Government of Ireland Act 1920".

has been an ever present aspect of its troubled existence. It is a constitutional project which has consistently failed. The ghosts of its violent birth have continued to haunt the political process and have made compromise and consensus difficult to achieve. The constitutional settlement under examination in this chapter is a sophisticated attempt to lay the ghosts of coercion to rest. While the quest for legitimacy underpins the political process, one argument in this chapter is that it is the legitimacy of contested constitutionalism which has been secured. The status of Northern Ireland remains contested by the very nature of its normative base. The consent principle, so often presented as the guarantee of unionist hegemony, is in fact the deliberative basis for productive instability from a nationalist/republican perspective. It may be correct to term this a "constitutional settlement" but by the nature of the system it may only be for now. The basis of this settlement is, however, full acceptance by the participants that the only legitimate struggles in future will be political ones.

The events of the last decade in Northern Ireland have resulted in significant legal and political change. This has taken place in the context of general constitutional change in the United Kingdom. The unitary conception of the constitution may remain even though some of its traditional elements are clearly being reconsidered and/or redescribed.[3] While it is possible to view developments in Northern Ireland as the result of purely internal dynamics, it makes more sense to acknowledge the broader constitutional and other trends which impact upon it. There have been many attempts to secure a negotiated constitutional settlement in Northern Ireland. This has largely been a history of failure. Until the most recent political process a settlement which could command widespread support in Ireland was unattainable. The Good Friday Agreement 1998, and the new structures that have been created, are of significance beyond Northern Ireland. One of the main arguments of this chapter is that the Agreement, and what has followed, demonstrates the strengths and weaknesses of tailoring democratic structures to local contexts. While the thinking which underpins the new order in Northern Ireland is not novel, it does illustrate that complex structures can be created to facilitate deliberative law and democracy.

[3] See Neil Walker "Beyond the Unitary Conception of the United Kingdom Constitution?" [2000] *Public Law* 384.

THE POLITICS OF LEGAL ANALYSIS

Constitutional law is constituted by the political and this is the major component in its ongoing development. In addition to the politics of new beginnings, the ongoing life of constitutional law is also shaped by politics. The constitutional lawyer must take a political position on legal analysis.[4] One of the aims in this chapter is to examine the new constitutional structures created and argue that a critical understanding of legality matters in Northern Ireland. In other work I have defended a critical tradition in legal scholarship which takes legality seriously.[5] Legal analysis is too often the subject of caricature. For example, legalism is on occasion used as an accusation in studies of Northern Ireland.[6] This is perfectly understandable and at times highly accurate. However, it pays scant regard to the advances made by the critical tradition in modern law and to the contribution of legal analysis to our understanding of social and political life. There is still potential in the concept of legality. But this must be a concept of legality without illusions. My argument is that a critical understanding of legality is essential for understanding this and other constitutional law contexts.[7] The critical legal tradition drawn upon here is firmly grounded in a conception of democratic law with a firm commitment to deliberative democracy. The primary right in this conception is the right to democratic governance and its corollary, the right to participate.[8] My

[4] See J A G Griffith "The Brave New World of Sir John Laws" (2000) 63 *MLR* 159, at 176, for a strong argument on the politics of law.

[5] Colin Harvey "The Politics of Legality" (1999) 50 *NILQ* 528; Colin Harvey "Governing After the Rights Revolution" in Colin Harvey, John Morison and Jo Shaw (eds) *Voices, Spaces, and Processes in Constitutionalism* (Oxford, Blackwell, 2000) p. 61; Colin Harvey "Complex Conversations: Legality, Politics and Constitutionalism in Northern Ireland" (2000) 3 *Contemporary Issues in Irish Law and Politics* 70.

[6] Brendan O'Leary "The Nature of the Agreement" (1999) 22 *Fordham International Law Journal* 1628.

[7] See Colin Harvey "Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context" (1999) 22 *Fordham International Law Journal* 1389.

[8] This right is increasingly recognised at the international level see Thomas M Franck "Democracy and the Democratic Entitlement" in Gregory H Fox and Brad R Roth (eds) *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000) p. 25: "Attention must . . . be paid to democracy as a right protected by international law and institutions. Democracy does not provide a guarantee against civil war. It merely provides the only known process by which a genuine social discourse can proceed among persons legitimately representing the spectrum of opinions and interests in a community or *polis*. Without it, there can be decisions. There can even be negotiation and discourse. But there can never be a genuine social convergence".

argument is that critical legal analysis can be an important tool in the service of democratic experimentalism.[9] Those who are understandably critical of legalism mistake partial and distorted forms of argumentation as definitive models. Attaching importance to the value of legality does not necessarily imply rigid adherence to mechanistic formalism and an overly technocratic approach. Critics of legalism are not afraid of extensive engagement with law when significant legislative change is proposed. In this sense there is a performative contradiction at work. Even if everything is up for grabs the contest will take place within the realm of legal argumentation. Engagement in legal argumentation must indicate some belief that the substantive content of the law matters even if this remains open to further dialogue. Against this there are reasons why one should have no illusions about legality. Law is rooted in political and social contexts which determine its content and effectiveness. Its effectiveness in promoting good governance depends on how legal discourse is deployed by actors in the public sphere. The coercive role of law is as important as the enabling. Its disciplining functions can be written off as a form of systemic oppression, but there is more to it than that. Political communities can opt for repressive law when, for example, they wish to eradicate racial discrimination or punish corporations for environmental damage. In other words, legal regulation can help create the conditions for the existence of a functioning democratic polity. The goal of critical legal scholarship should remain emancipation and thus the interest rests in the role that law can play in achieving this objective.[10] As argued here, law has emancipatory potential which can be realised through political engagement. I suggest that in practice the democratic state should remain an important focus for individuals and groups, both in its

[9] See Roberto Mangabeira Unger *What Should Legal Analysis Become?* (London, Verso, 1996) pp. 180–1: "An underlying theme in this book is that our problem is less that we have too many programs than that we have just one program: the only political program with authority in the modern world, the program of democratic experimentalism from the eighteenth century to the present day, the program that liberals share with socialists. Its central commitment is to lift the grid of social division and hierarchy weighing upon our practical, passionate, and cognitive dealings with one another".

[10] One should not of course underestimate the problems facing anyone wishing to develop a critical theory with practical intent. The experience of the Frankfurt School is instructive. The focus on domination and instrumental reason led Theodor Adorno and Max Horkheimer to a totalising critique of Western thought. Viewed in historical context this rejectionist, and cautious, scholarly approach was understandable, but one wonders about the consequences for social movements seeking practical change today. See Martin Jay *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923–1950* (Berkeley, University of California Press, 1973).

coercive and enabling guises.[11] This is an argument in support of the continuing importance of the formal public sphere.

The law and politics of institutional design in Northern Ireland are evidence that such experimentalism is possible. The complex arrangements are a sophisticated attempt to give due recognition to the bi-national nature of the conflict, while also encouraging a movement away from absolutist notions of sovereignty. This signals *inter alia* the influence of postnational thought on the developing process.[12] The settlement is founded on legal guarantees of human rights, equality and participation. Although the meaning of these terms differs, depending upon the specific context, there is a strong deliberative component in the constitutional model that has been adopted. One of the arguments advanced is that it is the deliberative component which will be of most interest in the years ahead. At the core of the Agreement is a concept of self-government with equality and participation at its heart. It is profoundly social democratic in both substance and design.

CONSTITUTIONALISM IN CONTEXT

Contestation, constitutionalism and coercion

An examination of constitutionalism must be rooted in a theory of democracy, for this is the only way to move coherently through the multiplicity of facts about political and legal life. I have defended the importance of deliberative democracy elsewhere, and this is the theoretical premise upon which much of the argument in this chapter is

[11] See Edward Broadbent "Social Democracy: Past and Future" (1999) Fall *Dissent* 45; Anthony Giddens *The Third Way: The Renewal of Social Democracy* (Cambridge, Polity Press, 1998) p. 48: "Markets cannot replace government in any of these areas, but neither can social movements or other kinds of non-governmental organization . . . no matter how significant they have become". See also Anthony Giddens *The Third Way and its Critics* (Cambridge, Polity Press, 2000) pp. 164–5: "The state continues to have a fundamental role to play in economic life as in other areas. It cannot replace either markets or civil society, but needs to intervene in each . . . Government must maintain a regulatory role in many contexts, but as far as possible it should become a facilitator, providing resources for citizens to assume responsibility for the consequences of what they do".

[12] See Joseph Ruane and Jennifer Todd "Irish Nationalism and the Conflict in Northern Ireland" in David Miller (ed) *Rethinking Northern Ireland* (London, Longman, 1998) p. 55, at 68.

based.[13] This critical perspective is not content with noting the establishment of the institutions of liberal constitutionalism. Rather the concern is with the promotion of the principles which underpin the concept of deliberative democracy, such as the right to participate. Central to this perspective is the view that the public sphere is not confined to the institutions of constitutional law and that the informal public sphere has a vital role in a democracy.

The problem which all theorists of constitutionalism face is the "wilfulness" of the process of constitution-building and its origins in coercion.[14] Constitutional moments can be far from democratic and the ghosts of coercion can return to haunt the present. As noted, Northern Ireland was born from violence and it has proven difficult to bury the memory of this. Viewed in context the partition of Ireland seems more an exercise in avoidance than polity formation. One could, for example, argue that Northern Ireland never "constituted" itself legitimately as a political entity. This takes us to the heart of what is meant by constitutionalism. There is much talk of constitutional settlements in Northern Ireland without reference to what precisely is meant by "constitution". Preuss talks of a constitution as an "operational framework" or as a state of being constituted.[15] He states: "What it can and in fortunate instances does do is create such institutional conditions as are suited to exert a beneficial pressure on society to rationalize and improve itself".[16]

A constitution thus can create the conditions for societal development and reflective political practice.[17] It is noteworthy that Preuss views this constitutive process as based on normative principles. He

[13] Cf. John S Dryzek *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford, Oxford University Press, 2000), he makes a distinction between deliberative and discursive democracy. His concern is that deliberative democracy should not lose its critical edge (p. 3): "I refer to this more critical strand of deliberative democracy as discursive democracy, which (contrary to much current usage, which tends to use 'deliberative' and 'discursive' interchangeably) I distinguish from a model confined to politics in the vicinity of liberal constitutionalism".

[14] See Ruti Teitel *Transitional Justice* (New York, Oxford University Press, 2000) p. 191, she notes that the central dilemma is "how to reconcile the concept of constitutionalism with revolution". She proposes an alternative "constructivist" paradigm in which transitional constitutionalism not only constitutes the political order but is constitutive of political change.

[15] Ulrich K Preuss *Constitutional Revolution: The Link Between Constitutionalism and Progress* (New Jersey, Humanities Press, 1995) p. 109.

[16] *Ibid.*

[17] See Thomas Paine *The Rights of Man* (Harmondsworth, Penguin Books Ltd, 1969) p. 207: "A constitution is not the act of a government, but of a people constituting a government; and government without a constitution is power without a right".

further argues: "A society is constituted when it must constantly confront itself in suitable institutional forms and in normatively directed processes of adjustment, resistance and self-correction".[18] This captures both the fact of the constitutive moment and the ongoing processes of dialogue which it must facilitate and encourage.[19] Jürgen Habermas argues: "A constitution can be thought of as a historical project that each generation of citizens continues to pursue".[20]

The dynamic and open-ended nature of constitutionalism explains the ongoing struggles for recognition and inclusion which take place in democratic societies. But to what extent is this ongoing process of dialogue based on consensual constitutionalism and how do we respond when is it actively used by anti-modern elements in society?[21] Modern trends in political theory, associated with the work of Habermas and Rawls, tend towards the consensual. However much pluralism is welcomed and celebrated, it is the achievement of consensus which underpins their work.[22] Habermas is particularly interested in the consensual nature of communicative action. This work is opposed by radical democratic theorists who prefer "agonistic" approaches to the political. The thinking can be traced to the work of Nietzsche and Arendt, but can also be found in Marx. Modern representatives of this school of thought include William Connolly and Chantal Mouffe.[23] Villa summarises their concerns as follows:

> "These theorists worry that modern democracies are hardly democratic at all; that the bureaucratic edifice of the state has usurped the space of the political, rendering citizens the passive recipients of policy decisions; and

[18] *Supra* n. 15.

[19] See Hannah Arendt *On Revolution* (London, Penguin Books, 1973) p. 145: "The word 'constitution' obviously is equivocal in that it means the act of constituting as well as the law or rules of government that are 'constituted', be these embodied in written documents or, as in the case of the British Constitution, implied in institutions, customs, and precedents".

[20] Jürgen Habermas *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff (eds) Cambridge Mass, The MIT Press, 1998) p. 203.

[21] See Ulrich Beck *The Reinvention of Politics: Rethinking Modernity and Global Social Order* (Cambridge, Polity Press, 1997) p. 42, as he notes "not just social movements outside the political institutions, but also social counter-movements inside the political system know how to use the spaces of reflexive democracy".

[22] See John Rawls "The Idea of an Overlapping Consensus" (1987) 7 *Oxford Journal of Legal Studies* 1.

[23] See William E Connolly *The Terms of Political Discourse* (3rd edn, Oxford, Blackwell, 1993); Chantal Mouffe "Carl Schmitt and the Paradox of Liberal Democracy" in David Dyzenhaus (ed) *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham and London, Duke University Press, 1998) p.159; Chantal Mouffe *The Return of the Political* (London, Verso, 1993).

> that liberal theory has contributed to this state of affairs by promoting a conception of politics which is essentially juridical/administrative, one which seeks ways of diminishing, if not eradicating, the contest and debate that is the lifeblood of a robust democratic politics".[24]

The attempt to eradicate contestation can have unanticipated consequences. In particular, fundamentalist positions can thrive in such an environment. The "agonistic" turn in political theory reminds us that conflict has an important place in democratic life and in the social development of constitutionalism. This theoretical position may appear out of place in Northern Ireland. Surely, one might suggest, continuing contestation is the last thing that is needed in Northern Ireland? This concern is misplaced, and here I think we have to be selective. Agonistic politics seriously underestimates the role of consensus and a politics of accommodation. However, it highlights the silences in the public sphere and assists attempts to fracture unreflective/false consensus. Arendt presents the most attractive view in this regard by stressing contestation based upon judgement and a sense of public-spiritedness.[25] The "agonistic turn" helps remind those interested in deliberative democracy of the importance of action and thus political struggle. The problems start when we place too much faith in purely expressive politics and reify the idea of conflict. Consensus and compromise must assume a central place in democratic life. At its most basic, certain levels of autonomy must be secured through legal and political practice in order to allow for inclusive dialogue to occur in the first place. Purely expressive politics neglects the importance of rational debate in the public sphere and the conditions which make this happen. There is also a tendency to see legalism as part of the problem. Careful examination would reveal that debates over legality are an important part of the continuing contest in the public sphere and that law can play a part in facilitating deliberative democracy. Law has a role in the retrieval of public space and in the development of the public sphere. In particular, law operationalises those procedural mechanisms which facilitate the democratic realisation of societal norms.[26]

[24] Dana R Villa *Politics, Philosophy and Terror: Essays on the Thought of Hannah Arendt* (Princeton, Princeton University Press, 1999) p. 108.

[25] *Ibid*. p. 124.

[26] See Seyla Benhabib "Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jürgen Habermas" in Craig Calhoun (ed) *Habermas and the Public Sphere* (Cambridge Mass, The MIT Press, 1992) p. 73, at 87: "Public space is not understood *agonistically* as a space for competition for acclaim and immortality among a political elite; it is viewed democratically as the creation of procedures whereby those

Continuing dialogue does not mean non-stop conflict. I think Habermas has demonstrated the consensual underpinnings of communicative action and the fact that the search for this consensus is embedded within our own discursive practices. When someone, for example, criticises an agreement because it is based on a false consensus she must have some idea what a fair consensus would look like.

Dryzek has expressed some concern that deliberative democracy is losing its critical edge.[27] This has led him to defend what he terms discursive democracy. He draws a sharp distinction between discursive and deliberative democracy. One of the problems he correctly identifies is that critical theory has been compromised by an ever closer association with liberal theory. On renewing its critical bite he states: "One way to do this is to ground deliberative democracy in a strong critical theory of communicative action, and to re-emphasize oppositional civil society and public spheres as sources of democratic critique and renewal".[28] I would agree with this argument, and that is why the "agonistic" turn provides some useful thoughts on how this might be achieved. I am, however, not convinced that there is a meaningful distinction to be made between deliberative and discursive democracy.

Learning from history

We are in an age of reflexive law and politics. Learning processes are therefore central to a modern understanding of constitutionalism.[29] Devolution is not new in the Northern Ireland context. The failure of the original devolutionary model was one of the reasons for the disturbances in Northern Ireland which eventually led to the imposition of direct rule in 1972.[30] Although the conflict of the last three decades has focused attention on Northern Ireland, there have been problems since

affected by general social norms and collective political decisions can have a say in their formulation, stipulation and adoption . . . [T]here may be as many publics as there are controversial general debates about the validity of norms".

[27] Dryzek *supra* n. 13.

[28] Dryzek *supra* n. 13 at p. 4.

[29] See Andrew Arato *Civil Society, Constitution, and Legitimacy* (Oxford, Rowman & Littlefield Publishers Inc, 2000) p. 254: "Many of the projects of constitution making of the last twenty years have been characterized by increasing reflexivity. All major efforts indicate learning from the repeated failure of revolutionary democratic constitution making and the need to satisfy the demands of democracy and legality in a new way".

[30] For analysis of direct rule phase one see Brigid Hadfield *The Constitution of Northern Ireland* (Belfast, SLS Legal Publications, 1989) pp. 100–1.

the formation of the "state". As noted, the process of state formation buried the seeds of conflict (not necessarily violent) by neglecting a substantial legitimacy deficit.[31] The minority nationalist/republican community were effectively sealed within a state where their minority status was assured. In the governing constitutional context it was foreseeable that this community would become constructed as the "enemy within".[32] The new Government also viewed itself as under threat from the administration in the South of Ireland.[33] While there were continuing problems, it was not until the late 1960s that the practical implications of the compromises of the 1920s became readily apparent. This portrayal of events injects a level of historical inevitability that is perhaps misplaced. It is hard to deny that the circumstances which surrounded the creation of Northern Ireland were hardly encouraging. The distinction between constitutionalism and violence was blurred in this context. Given the history of coercion, the legitimacy of the arrangements concluded in the 1920s has been consistently questioned. With the passage of time it is perhaps easier to try to avoid this issue, and following the referenda on the Agreement, is possibly now less relevant. However, the fact remains that the original constitutive moment lacked the principled elements of a newly constituted political community.[34]

The Government of Ireland Act 1920 proposed the establishment of Parliaments in Dublin and Belfast with powers of local self-government.[35] The Act effectively legislated for partition along the six county border.[36] The option of a unified all-Ireland Parliament was never taken. The Act established a bicameral legislature with a fifty-two-

[31] Colin Harvey "Democracy in Transition: Mainstreaming Human Rights and Equality in Northern Ireland" (1999) 4 *Journal of Civil Liberties* 307, at 308.

[32] See Fionnuala Ní Aoláin *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (2000, Belfast, Blackstaff); Colm Campbell *Emergency Law in Ireland 1918–1925* (Oxford, Clarendon Press, 1994).

[33] Kieran McEvoy and Ciaran White "Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship" (1998) 61 *MLR* 341, at 343.

[34] See Shane O'Neill "Pluralist Justice and its Limits: The Case of Northern Ireland" (1994) 42 *Political Studies* 363, in a detailed critique of Walzer's communitarianism he argues that justice in Northern Ireland will arise only when participants develop a critically-reflexive stance towards their identities.

[35] J J Lee *Ireland 1912–1985: Politics and Society* (Cambridge, Cambridge University Press, 1989) p. 43. See Claire Palley "The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution" (1972) *Anglo-American Law Review* 368, at 383–406.

[36] Government of Ireland Act 1920, s. 1(2): the counties of Antrim, Armagh, Derry, Down, Fermanagh and Tyrone. Northern Ireland Act 1998, s. 2, repeals the Government of Ireland Act 1920.

member House of Commons and a twenty-six-member Senate.[37] The Act provided for excepted, reserved and transferred matters. The method of dividing legislative powers has remained and can be found in the Northern Ireland Act 1998. The UK Parliament remained supreme, but due to the quick emergence of a constitutional convention governing the relationship between Westminster and Stormont, was "freed from legislative and executive responsibility over [Northern Ireland] and hence from the need to find time at Westminster to deal with and discuss Northern Ireland matters".[38] Representation at Westminster was reduced to thirteen seats.[39] This devolution scheme remained in place until events in 1968 began to call into question the "state" in Northern Ireland. The problems with the model are well-known. McCrudden argues that the settlement was not designed with local conditions in mind and reflected British experience and practice.[40] The British model of constitutionalism was thus imposed inappropriately in this local context. As McCrudden notes, the British constitutional experience failed Northern Ireland.[41] The failures of this constitutional order led to a serious breakdown of the system in the late 1960s. It is speculation, but one wonders how a differently constituted legal and political order might have fared.

The courts and the legal profession are dealt with in another contribution to this book.[42] The surprising fact is that in the period until the mid-1960s the courts were not used to challenge government action in controversial cases.[43] Palley argues:

> "The probable causes for this failure are a combination of the unavailability of legal aid until 1965, some unadventurousness by the local legal profession, an unawareness of the opportunities court machinery creates for manipulation of the political process, and a general tendency on the part of the political opposition to dismiss the courts as manifestations of the unionist establishment and as therefore unlikely to deliver judgments adverse to the interests of that establishment [footnotes omitted]".[44]

[37] Hadfield *supra* n. 30 at p. 49.

[38] Brigid Hadfield "Committees of the House of Commons and Northern Ireland Affairs" (1981) 32 *NILQ* 199, at 201.

[39] Hadfield *supra* n. 30 at p. 59.

[40] Christopher McCrudden "Northern Ireland and the British Constitution" in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (3rd edn, Oxford, Oxford University Press, 1994) p. 323.

[41] McCrudden *supra* n. 40 pp. 331–2.

[42] See Chapter 6.

[43] Palley *supra* n. 35 at p. 390.

[44] *Ibid*.

While some of the reasons for scepticism remained, those engaged in various forms of political struggle only became attuned to the potential of legal process much later.

The civil rights movement of the 1960s highlighted the discriminatory nature of the system and gave voice to demands for human rights protection and equality.[45] It was the reaction to these calls for reform which was ultimately to bring an end to the traditional order in Northern Ireland. Some attempts were made to recognise the grievances of the nationalist/republican community, for example, in the conclusions of the report of the Cameron Commission 1969.[46] The devolutionary scheme of the 1920s ended in chaos with the suspension of government under the Northern Ireland (Temporary Provisions) Act 1972.[47] The period from 1972 onwards was marked by various attempts to reinvigorate constitutionalism in Northern Ireland within the context of direct rule from Westminster.[48] In response to increased political violence there was a steady "securitisation" of society, with resulting state abuse of human rights.[49] These human rights violations have been a continuing source of controversy.[50] The security response was an inappropriate one given the nature of the conflict and did little if anything to assist the attempts to establish a stable political order. In

[45] *Disturbances in Northern Ireland: Report of the Commission appointed by the Governor of Northern Ireland (*Cmnd 532, 1969), para. 12 after referring to the Campaign for Social Justice and the Northern Ireland Civil Rights Association it states: "These organisations concern themselves with immediate social reforms, such as appointments to jobs and housing discrimination by unionists, support for universal adult franchise in local government elections and fairer electoral boundaries in local government. These are not concerned, as organisations, with altering the constitutional structure of Northern Ireland, and in this sense represent a quite new development amongst Catholic activists".

[46] *Ibid*. para. 127: "The weight and extent of the evidence which was presented to us concerned with social and economic grievances or abuses of political power was such that we are compelled to conclude that they had substantial foundation in fact and were in a very real sense an immediate and operative cause of the demonstrations and consequent disorders after 5th October 1968".

[47] R F Foster *Modern Ireland 1600–1972* (London, Penguin Books, 1988) p. 587.

[48] For an early example see *Northern Ireland Constitutional Proposals* (Cmnd 5259, 1973). From the beginning the British Government refused to impose a "rigidly defined and detailed scheme" (para. 13). The report stated: "There cannot be a 'government settlement', only a 'community settlement', and its full achievement will be a matter of years". Note that Chapter 4 of the Report is headed "A Charter of Human Rights".

[49] Note Boyle, Hadden and Hillyard *supra* n. 2 at p. 181: "But if there is a lesson to be learned from the five years of conflict from 1969 to 1974 it is that the choice of a security response to a crisis of intercommunal relations is likely to impede the restoration of stability".

[50] See, e.g., Amnesty International *Political Killings in Northern Ireland* (London, Amnesty International, 1994).

this context the emphasis was on the promotion of consensual constitutionalism between the parties, in a context arguably ill-suited to such a proceduralist orientation.[51] This was not aided by the attempts of successive British Governments to portray their role as essentially neutral. Serious constitutional thought on Northern Ireland did, however, shift away from majoritarian democracy towards consociationalism.

The effort to secure a settlement had varying levels of success. The Northern Ireland Assembly Act 1973 made provision for elections to a new unicameral Assembly of seventy-eight members elected on the basis of proportional representation.[52] The Northern Ireland Constitution Act 1973 contained detailed provisions on the powers of the Assembly. The Act also included anti-discrimination provisions confined to direct discrimination only.[53] The Sunningdale Agreement, concluded in December 1973 made provision for an Irish dimension with the proposed Council of Ireland.[54] On 1 January 1974 legislative responsibility was devolved to the Northern Ireland Assembly. The power-sharing Assembly was brought down by the Ulster Workers' Council strike in 1974, thus heralding the beginning of an extended period of direct rule.[55] During this period efforts were made to make the system more accountable and responsive. It was however generally regarded as inadequate and left a large democratic deficit in Northern Ireland.[56]

The attempts to reintroduce power-sharing were largely unsuccessful. The Northern Ireland Act 1982 was aimed at securing "rolling devolution" and in this regard failed.[57] Pending devolution the aim of the legislation was to subject direct rule to local scrutiny and thus inject a Northern Irish element into the process.[58] The Assembly which did

[51] Cf. McCrudden *supra* n. 40.

[52] Hadfield *supra* n. 30 at p. 104.

[53] See Northern Ireland Constitution Act 1973, ss. 17(1) and 19. The Act also established the Standing Advisory Commission on Human Rights to advise "the Secretary of State on the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the ground of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground" (s. 20(1)(a)).

[54] Hadfield *supra* n. 30 at pp. 112–13.

[55] See Northern Ireland Act 1974.

[56] See Brigid Hadfield "The Northern Ireland Constitution" in Brigid Hadfield (ed) *Northern Ireland Politics and the Constitution* (Buckingham, Open University Press, 1992) pp. 1–12, at 6, she describes the consequences of direct rule as "at best disquieting and at worst deplorable".

[57] See C O'Leary, S Elliott and R Wilford *The Northern Ireland Assembly 1982–1986* (London, Hurst, 1988); Conor Gearty "The Northern Ireland Act 1982" [1982] *Public Law* 518.

[58] Gearty *ibid*. at p. 523: "If worked properly by the politicians, this new scheme would most probably improve direct rule".

function was boycotted by the SDLP and Sinn Féin, thus ensuring that it did not have cross-community support. It was dissolved in June 1986. Hadfield argues that it fulfilled a worthwhile function and did make direct rule more accountable.[59] There were, however, serious problems with this form of devolution.[60]

The 1980s were also to see increased focus on the Irish dimension. This was given formal expression in the Anglo-Irish Agreement 1985.[61] The Agreement established an Intergovernmental Conference to deal with political, security and related matters, legal matters including the administration of justice, and the promotion of cross-border cooperation. The Agreement attracted fierce opposition from the unionist community. It did however give formal recognition to the bi-national nature of the conflict and thus the importance of an Irish dimension to any constitutional settlement in Northern Ireland.

The UK and international dimensions

Northern Ireland does not exist in a vacuum, its problems are not unique, and it is not immune to wider national and international developments. The changing trends in British constitutionalism have also played a significant part. The election of a Labour Government in May 1997 was undoubtedly a factor in the success of the process. The new Government had a substantial majority in the House of Commons and thus was not reliant on the votes of unionist MPs. The Government could be confident of securing the passage of its legislative measures through Parliament. This was combined with a willingness to be pragmatic in the search for a settlement, evident in the work of the new Secretary of State for Northern Ireland, Majorie (Mo) Mowlam. As a democratic socialist political party it was comfortable with the progressive language of human rights and equality. The enactment of the Human Rights Act 1998 is an example of the willingness to legislate

[59] Hadfield *supra* n. 30 at p. 167.

[60] See P D H Smith "The Northern Ireland Assembly 1982–1986: The Failure of an Experiment" (1987) *Parliamentary Affairs* 482, at 499: "The Assembly did not succeed in its appointed task and it is difficult to avoid the conclusion that, even in 1982, the chances of promoting reconciliation via the debating chamber were slight".

[61] Tom Hadden and Kevin Boyle *The Anglo-Irish Agreement: Commentary, Text and Official View* (Dublin and London, Edwin Highel Ltd and Sweet and Maxwell Ltd, 1989); Brigid Hadfield "Anglo-Irish Agreement 1985—Blue Print or Green Print?" (1986) 37 *NILQ* 1.

positively for human rights protection. The decentralisation of power was also part of the constitutional reform agenda and thus devolution to Scotland, Wales and Northern Ireland was actively pursued. In Northern Ireland there was nothing new about the attempt to secure devolution, but now it could also be presented as part of a process of constitutional change in the United Kingdom generally. Constitutional reform in the United Kingdom did rule some options out. Reintegration, a position argued for by some unionists, no longer made sense in the new era of decentralisation.

The international dimension must be accorded due weight, although it can prove difficult to assess in precise terms.[62] The role of the USA was significant, a fact demonstrated by increasing resort by political actors to this audience. It is yet to be seen how Northern Ireland will fare in relation to some of the less desirable aspects of globalisation and American hegemony.[63]

Postnational thinking in the European Union was also important in shaping the discourses which made compromise possible. The human rights movement in Northern Ireland in particular saw the significance of using international networks to lend weight to arguments for change. Although part of general trends in transnational communication, it required political action to bring this about. No matter how insular Northern Ireland may appear at times, it exists within an expanding network of transnational institutions and processes. One challenge for the future will be to assess precisely the impact of these networks.

A CONSTITUTIONAL SETTLEMENT

Talking about peace

Many of the ideas which were to form the basis for the settlement in 1998 were around for some time. What had altered by this point was the ideology of some of the dominant political actors. As Todd notes,

[62] See Michael Cox "Northern Ireland: The War that came in from the Cold" (1998) 9 *Irish Studies in International Affairs* 73; Joseph Ruane and Jennifer Todd *The Dynamics of Conflict in Northern Ireland* (Cambridge, Cambridge University Press, 1996) pp. 266–9.

[63] While openness to American influence has been a key aspect of the political process, resistance will also be important in the future, see Fredric Jameson "Globalization and Political Strategy" (2000) *New Left Review (*July/August) 49.

this is particularly true of nationalist/republican ideology.[64] Devolution has been the preference of some of the main political parties for a considerable period.[65] In the 1990s substantially more progress was made in securing a settlement which moved in this direction.

The dominant principle of the talks process of the 1990s was "inclusivity".[66] The idea here was, at some point and under specified conditions, to bring all political parties together to reach a negotiated settlement. This would be a deliberative process with clear structuring rules. It is evident that channels of public and private communication with all groups, including paramilitaries, had existed for some time. There were also important discussions between the political parties. John Hume, the leader of the SDLP, initiated a dialogue with Gerry Adams, the President of Sinn Féin, in January 1988. Todd is correct to note the fundamental role of John Hume in crafting the political language that made compromise possible.[67] The purpose of this, and subsequent talks, was to persuade the republican movement of the illegitimacy of continuing armed struggle. In April 1993 they issued a joint statement on their interpretation of the right to national self-determination and in September 1993 adopted a report which contained proposals for further discussion. The Hume-Adams agreement was a significant development. A response came from the British and Irish Governments in the form of the Downing Street Declaration 1993. The Declaration committed the Governments to working towards a new political agreement founded on the principle of consent, to encompass arrangements in Northern Ireland, the whole of Ireland, and between Britain and Ireland.[68] The three-stranded approach, agreed in the early 1990s, was thus given explicit recognition in the document. On self-determination the British Government agreed that it was for the people of Ireland, by agreement between the two parts, to exercise their right of self-determination on the basis of consent, freely and concurrently given to bring about a united Ireland if they wished.[69] The Irish Government accepted that the right of self-determination could only be

[64] See Jennifer Todd "Nationalism, Republicanism and the Good Friday Agreement" in Joseph Ruane and Jennifer Todd (eds) *After the Good Friday Agreement: Analysing Political Change in Northern Ireland* (Dublin, University College Dublin Press, 1999) p. 49.

[65] Hadfield *supra* n. 30 at p. 229.

[66] Paul Bew, Henry Patterson and Paul Teague *Between War and Peace: The Political Future of Northern Ireland* (London, Lawrence and Wishart, 1997) p. 203.

[67] *Supra* n. 64 at p. 53.

[68] Downing Street Declaration 1993, para. 2.

[69] *Ibid*. para. 4.

achieved subject to the consent of a majority of people in Northern Ireland.[70] In the result of an overall settlement the Irish Government agreed to bring forward proposals for a change in the Constitution of Ireland that reflected the principle of consent.[71] The two Governments also committed themselves to give institutional recognition to the links between the people of Britain and Ireland as part of the "totality of relationships".[72] In August 1994 the PIRA declared a cease-fire and the Combined Loyalist Military Command followed in October. This was another major contributing factor to the eventual settlement.

The next major step in the process was the publication of the Framework Document in February 1995. This contained the following documents: "A Framework for Accountable Government in Northern Ireland"; and "A New Framework for Agreement". The documents contained detailed proposals on a new structure of governance. In particular, these provided for: a single unicameral Assembly of ninety members elected by proportional representation; a separate panel of three elected in Northern Ireland to supplement the work of the Assembly; a committee system constituted in line with party strength to oversee departmental activity; a system of detailed checks and balances; mechanisms to ensure compliance with the United Kingdom's EU and international obligations; establishment of a North/South body with consultative, harmonising and executive powers; and a standing Intergovernmental Conference to acknowledge the importance of East/West relationships. On the protection of human rights, the document recognised the consensus that existed on the significance of rights protection in Ireland as a whole. It encouraged representatives from the North and South of Ireland to adopt a Charter or Covenant which would endorse and reflect protections for everyone living on the island of Ireland. This was an important development and many of the ideas were to find their way into the final Agreement.

In order to overcome problems with the process a "twin-track" initiative was launched in November 1995. The aim was to try to make progress with all-party talks in parallel with decommissioning. In order to address the issue of decommissioning of paramilitary arms the Government established an International Body on Decommissioning. It issued its first report in January 1996. The report included six principles of democracy and non-violence which were drafted to address

[70] *Ibid*. para. 5.
[71] *Ibid*. para. 7.
[72] *Ibid*. para. 9.

the problems resulting from the reasonable concerns of both sides. The issue of decommissioning continued to impact on the process. In particular, it caused problems in relation to devolution. However, the lack of agreement on decommissioning impeded progress throughout the process.

In June 1996 multi-party talks commenced in accordance with rules formulated by the two Governments and after elections. The aim was to begin substantive negotiations around the "three-stranded approach" with the ambition of securing a settlement.[73]

Securing the Good Friday Agreement

On entering the talks all the political parties committed themselves to the Mitchell Principles of democracy and non-violence. These were set out in the report of the International Body on Decommissioning. The rules of procedure for the talks were agreed in July 1996 and amended in September 1997.[74] Substantive negotiations were held up again by the decommissioning issue, and it was not until September 1997 that substantive negotiations began on the three strands. In January 1998 the two Governments advanced a series of "Propositions on Heads of Agreement" intended to give added focus to the ongoing talks. In the same month they circulated proposals on Strands Two and Three, after meeting with the participants in London. The talks intensified, with significant levels of involvement from the British and Irish Governments, until the Agreement was concluded on 10 April 1998.

The three-stranded approach proved to be a useful device. In fact it structures significant sections of the Good Friday Agreement 1998.[75] The Agreement was concluded on 10 April 1998. In the referenda which followed on 22 May 1998 it secured a 71.12 per cent "yes" vote in Northern Ireland and a 94.4 per cent "yes" vote in the Republic of

[73] There were eight key political parties at the talks: the Alliance Party; the Northern Ireland Women's Coalition; the Progressive Unionist Party; Sinn Féin; the Social Democratic and Labour Party; the Ulster Democratic Party; the Democratic Unionist Party; and the Ulster Unionist Party. Sinn Féin was admitted in September 1997 because of a renewed PIRA cease-fire. The DUP left in July 1997 and did not return to the talks. There were a number of other brief exclusions during the process.

[74] The three independent Chairpersons at the talks were: Senator George Mitchell; General John de Chastelain; and Harri Holkeri.

[75] (Cm 3883, 1998). See Brigid Hadfield "The Belfast Agreement, Sovereignty and the State of the Union" [1998] *Public Law* 599.

Ireland.[76] It was translated into law in the form of the Northern Ireland Act 1998 where it is clearly stated that the purpose is to implement the Agreement. Both its content, and the popular endorsement, give it a level of legitimacy not secured for any previous settlement. While the process of drafting the text was largely confined to the political parties, and the British and Irish Governments, people in the North and South of Ireland were given the option of accepting or rejecting it. The legitimacy of the arrangement stems not simply from the popular endorsement it received but also its substantive provisions. What is important is not only that a majority of people on the island of Ireland supported the deal, but that the content reflects a recognition of local conditions and is based on normative principles of good governance.

Much of the content of the Agreement borrows from old ideas and themes. What mattered here was the changing relationship between participants and the movement made by key political actors. The Agreement is structured as follows: Declaration of Support; Constitutional Issues; Strand One; Strand Two; Strand Three; Rights, Safeguards and Equality of Opportunity; Decommissioning; Security; Policing and Justice; Prisoners; Validation, Implementation and Review. There is an emphasis on new beginnings and a fresh start. For example, the Declaration of Support states:

> "The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all".

Elsewhere in the Declaration the participants pledge to work in good faith to ensure the success of the new arrangements. On Constitutional Issues the participants endorsed the commitment of the British and Irish Governments to a new British-Irish Agreement which would replace the Anglo-Irish Agreement. The Agreement sets out principles which should be recognised. Key to this is what is termed the consent principle. This means that the constitutional status of Northern Ireland is dependent on the wishes of the majority of people there. Any change to the status of Northern Ireland is thus tied to the consent of a majority

[76] See Michael O'Neill "'Appointment with History': The Referenda on the Stormont Peace Agreement, May 1998" (1999) 22 *West European Politics* 160; Sydney Elliott, "The Referendum and Assembly Elections in Northern Ireland" (1999) 14 *Irish Political Studies* 138.

of its people. This has traditionally attracted criticism from those who question the legitimacy of the "state in Northern Ireland". The border was created in order to ensure unionist hegemony and this fact has been used to question the ethical basis of the consent principle. The position, while based on historical facts, reflects a questionable view of the rigidity of community identification. A modern "republican" analysis, borrowing from deliberative democratic thinking, might lend rather more weight to this deliberative component of the constitution of Northern Ireland. By basing the constitutional position of Northern Ireland on the principle of consent the United Kingdom is clearly opening the door to a future alteration in this status. The aim of bringing about a united Ireland is recognised as legitimate, where this right of self-determination is based on the consent of the people of Ireland freely and concurrently given. Again, the right is tied to the consent of the majority in Northern Ireland. Where the right of self-determination is carried out in accordance with the Agreement there is a binding obligation on both Governments to introduce legislation to give effect to this wish. Whatever choice is made the Agreement commits the Government exercising jurisdiction to "rigorous impartiality" and "full respect for, and equality of, civil, political, social and cultural rights". The choice of individuals in Northern Ireland to be identified as either Irish or British is also to be respected. The Annexes to this section include draft clauses for incorporation in British legislation and draft legislation for the Irish Government with respect to amendment of the Irish Constitution. In relation to the Irish Government the Agreement contains new Articles to be included in the Constitution.

The other strands of the Agreement are discussed in more detail below. This section on Constitutional Issues provides a framework for the rest of the Agreement by establishing the mechanisms which define the constitutional status of Northern Ireland. By giving express recognition to both British and Irish citizenship it respects the bi-national nature of the problem. The Agreement does not go as far as, for example, a joint sovereignty solution might go in recognising this. In constitutional law terms Northern Ireland remains, for now, a part of the United Kingdom.[77] And as I have noted this is a system undergoing change. There is a certain level of instability built into this relationship

[77] Northern Ireland Act 1998, s.1(1): "It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1".

precisely because this is subject to the consent principle.[78] This principle can be portrayed as a form of solid guarantee of the constitutional status of Northern Ireland. But this is a misreading. The current political preferences need not be perpetuated into the future and one can foresee a time when the constitutional status of Northern Ireland will be re-opened. In other words, the constitutional status of Northern Ireland remains open to contestation, but this is a conflict confined in the future to something approaching the force of the better argument. For example, at some future date significant sections of the unionist community may decide that their interests are served best within an all-Ireland constitutional system. My point here is that the contest over the status of Northern Ireland has not ended. It is the way that the contest will be conducted that has fundamentally altered. While one option may be to hope that the status issue dissolves into the mists of post-nationalism, there is little evidence to suggest that it will fade away.

Argument over the legitimacy of the "state" in Northern Ireland aside for a moment, what is significant in the legal recognition of the consent principle is the strong deliberative component. A proportion of the population of the United Kingdom is given the opportunity to opt out if it wishes. For those interested in the unification of Ireland the struggle becomes an essentially political contest to secure this through agreement. In addition, to state baldly that Northern Ireland is, in constitutional law terms, just like any other part of the United Kingdom is another misreading of the Agreement. Irish people in Northern Ireland are accorded rights which attach to their identity and ethos which go beyond that extended elsewhere in the United Kingdom. There are substantial bi-national elements to the Agreement which move us beyond traditional thinking about constitutional law and practice. This is linked to the constitutive nature of the Agreement. It is not evident that this is fully understood, for example, in the treatment of the Irish population in Northern Ireland. The devolutionary scheme in Northern Ireland is recognition of past failings and is based on explicit normative principles and constraints which govern devolution. Most significantly it is distinct, as it is part of a constitutional settlement which followed a long period of violent conflict. To try to fit this neatly into the

[78] *Ibid*. s. 1(2): "But if the wish expressed by a majority in such a poll is that Northern Ireland shall cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland". See also *ibid*. Sch 1.

traditional mould is questionable. In terms of deliberative democratic thought, the Agreement is a new constitutive act with a normative status which confronts traditional UK constitutional law directly.

REACHING AGREEMENT

The theatre of the absurd: decommissioning and devolution

The idea of devolution is not new in Northern Ireland. The "state" which emerged in the 1920s was a devolved administration. It is the nature of devolution, and in particular the structuring rules, which have altered over time. Strand One of the Agreement contains detailed provisions on Democratic Structures in Northern Ireland which are examined in this section. On a number of occasions it appeared as if devolution might not take place. The principal problem was the linkage made between the decommissioning of paramilitary arms and devolution of power. The Agreement provided for transitional arrangements to ensure that several organisational matters were effectively dealt with.[79] The Assembly could thus operate in shadow form but the necessary devolution order could only be laid before Parliament if the Secretary of State believed that "sufficient progress [had] been made in implementing the Belfast Agreement".[80] It was with the implementation of the Agreement that problems arose.

The establishment of the International Body has already been mentioned. The Agreement contains a section on decommissioning which states:

> "All participants reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years from endorsement in referendums North and South of the agreement and in the context of the implementation of the overall settlement".

The interpretation of this section has been exhaustively debated. It appears that the use of "vague language" was an attempt to keep Sinn

[79] Strand One para. 35.
[80] Northern Ireland Act 1998, s. 3.

Féin in the talks.[81] The matter was complicated by a letter from Tony Blair to David Trimble confirming the unionist interpretation of this paragraph.[82] This letter is thought to have been influential in the UUP's acceptance of the Agreement. The two years which followed the adoption of the Agreement saw several attempts to devolve power in an acceptable and stable way. The Omagh bomb attack on 15 August 1998 by republicans, which killed twenty-nine people, was a grim reminder that the physical force tradition had not gone away.

On 25 June 1998 Assembly elections were held by proportional representation from the existing eighteen Westminster constituencies and 108 members returned.[83] On 1 July 1998 the Assembly met for the first time in shadow form. David Trimble (UUP) and Séamus Mallon (SDLP) were jointly elected as First and Deputy First Minister designate (FM-DFM). The shadow Assembly made progress on a number of important areas during this phase. Significant aspects of the Agreement were translated into law in the form of the Northern Ireland Act 1998. The problem with devolution was finding an appropriate time to make the Devolution Order. A first devolution deadline was set for 10 March 1999 but was not met. The talks continued between the UUP and Sinn Féin without success. The two Governments issued a Declaration (the Hillsborough Declaration) on 1 April 1999 which was presented to the political parties as the best way forward towards implementation. The Declaration stated that: "[T]here is agreement among all parties that decommissioning is not a precondition but is an obligation deriving from their commitment in the Agreement".

The document proposed that on a date to be established nominations would be made of Ministers to take up office. On a date proposed by the Independent Commission, but not later than one month after nomination, a collective act of reconciliation would take place. This would see

[81] Paul Bew and Gordon Gillespie *Northern Ireland: A Chronology of the Troubles 1968–1999* (Dublin, Gill and Macmillan, 1999) p. 358.

[82] *Ibid.*: "I understand [that] your problem with Paragraph 25 of Strand I is that it requires decisions on those who should be excluded or removed from office in the Northern Ireland Executive to be taken on a cross-community basis. This letter is to let you know that if, during the course of the first six months of the Shadow Assembly or the Assembly itself, these provisions have been shown to be ineffective, we will support changes to those provisions to enable them to be made properly effective in preventing such people from holding office. Furthermore, I confirm that in our view the effect of the decommissioning section of the Agreement, with decommissioning schemes coming into effect in June, is that the process of decommissioning should begin straight away".

[83] The elected representatives are known as Members of the Legislative Assembly (MLA). See Northern Ireland (Elections) Act 1998.

paramilitary arms put beyond use on a voluntary basis. The Commission would report on progress within one month of nominations and if progress had not been made then the nominations would not be confirmed by the Assembly. The Declaration was unsuccessful and the talks continued. The result was the imposition of a further deadline of 30 June 1999 as a date for agreement on the terms which would lead to the devolution of power. The aim of the British Government was to have devolution in Northern Ireland, Scotland and Wales at roughly the same time.[84] Again this failed and the result was another document. The "Way Forward Document" was circulated to the political parties after five days of talks at the end of June and the beginning of July. The document contained proposals to bring about devolution by running the D'Hondt mechanism for executive formation on 15 July 1999. The ambition was for the Independent Commission to report in September and December 1999 and in May 2000 on progress. The document contained reference to a "fail-safe" mechanism and much effort was made to ensure that this passed through its parliamentary stages expeditiously. This initiative again ended in failure, as the UUP did not engage in the process of executive formation when the Assembly met on 15 July 1999. In line with last minute alterations to the Assembly's standing orders the executive was not validly constituted.

A "tightly focused" review process[85] began on 6 September 1999 and ended on 19 November 1999, again chaired by Senator George Mitchell. After this review the Secretary of State announced that he would convene a meeting of the Assembly on 29 November 1999. The Assembly met and nominated ten Ministers, as well as Chairpersons, Deputy Chairpersons and members of the ten Departmental Committees. Powers were devolved to the Northern Ireland Assembly on 2 December 1999. Devolution was not to last and on 11 February 2000 it was suspended by the Secretary of State.[86] The reasoning behind

[84] Power was devolved to the Scottish Parliament and the Welsh Assembly on 1 July 1999.

[85] The mandate was as follows: "The review will take as its starting point the three principles agreed by all pro-Agreement parties on 25 June: an inclusive Executive; decommissioning of all paramilitary arms by May 2000; decommissioning to be carried out in a manner determined by the International Commission on Decommissioning; and will determine how to overcome the difficulties which exist in the practical implementation of those principles. This will be its only focus".

[86] Northern Ireland Act 2000. The Act provides for the making of a "Restoration Order" by the Secretary of State. It provides for the automatic re-appointment of Ministers and Chairpersons and Deputy Chairpersons of Committees to their previous positions after the making of the Restoration Order.

the suspension given by the British Government was the protection of the Agreement. In particular, its aim was the political survival of the First Minister, David Trimble in the light of the lack of progress at the time on decommissioning. The decision to suspend devolution was criticised by the SDLP and Sinn Féin.[87] Various attempts were again made following this to reach an agreement on the issue.

On 5 May 2000 the British and Irish Governments issued a statement which provided that "subject to a positive response to this statement the British government will bring forward the necessary order to enable the Assembly and Executive to be restored by May 22, 2000". The statement went on to call on paramilitary organisations to "put their arms completely and verifiably beyond use" and made positive reference to the continuing role of the Independent International Commission on Decommissioning. On 6 May 2000 the two Governments sent a letter to all the political parties in Northern Ireland setting out proposals necessary to secure full implementation of the Good Friday Agreement. This included a commitment by the Irish Government to establish the Irish Human Rights Commission in July 2000 as well a detailed commitment on security, policing, justice and prisoners. On the same day the PIRA issued a statement which committed the organisation to initiating a process "that will completely and verifiably put IRA arms beyond use". The organisation agreed to resume contact with the Commission on Decommissioning and allow a number of arms dumps to be inspected by agreed third parties. These third parties would report back to the Commission and regularly re-inspect the dumps. In the afternoon of 6 May 2000, in a Joint Statement by the Taoiseach and the Prime Minister, it was announced that Martii Ahtisaari[88] and Cyril Ramaphosa[89] would be the "agreed third parties". This succeeded in securing the restoration of devolved power.

Does the Agreement have a nature?

Northern Ireland has generated a massive literature and many interpretations and solutions have been proposed.[90] One issue worth

[87] *The Irish Times,* 14 February 2000.

[88] Chairperson of the International Crisis Group and the former President of Finland.

[89] A board member of the International Crisis Group and former Secretary-General of the African National Congress.

[90] See generally John Whyte *Interpreting Northern Ireland* (Oxford, Clarendon Press, 1990).

examining is which of the proposed solutions does the Agreement most closely resemble. In other words, does the Agreement have a nature? It is therefore time to step back from the detail of the process and the Agreement. What is the nature of the Agreement? What sort of conception of democracy does it represent? These are questions which demand some response. It is well established that any empirical work in law and politics has a theoretical basis. Criticising theory makes no sense, as any selection of relevant legal or political facts will be based on some theoretical premises. Routine rejection of theory by legal scholars or practitioners is an exercise in deception and concealment. Even pragmatism comes in a variety of guises. This is moving away from the main issue, but a defence of the importance of theory to legal analysis is needed in the Northern Ireland context.

At the most general level the Agreement is an attempt to transform a violent conflict into an exclusively political conflict. The aim is not to eradicate conflict entirely. In human history conflict is the norm and not the exception.[91] People disagree about almost every aspect of social, political and cultural life. Northern Ireland is thus no exception to this general rule. The Agreement is an example of a mechanism aimed at giving practical recognition to a well-established violent conflict in Northern Ireland. The end result is a settlement with substantial similarities to previous proposals. The main difference rests not in the substance of the settlement but in the fact that those engaged in political violence ended their campaigns and became, on the whole, participants in the political process. The solution is a long way from Irish unity and a substantial distance from reintegration. In constitutional law Northern Ireland remains part of the United Kingdom. On one reading the complex mechanisms created are an attempt to blur absolutist notions of sovereignty and thus make this basic fact more palatable to the nationalist/republican community. This is a rather misleading reading of the sudden taste for postnationalism in official circles in Northern Ireland. While it is correct to recognise that it is the republican movement which has travelled the furthest down the road of political compromise, as I argue here Northern Ireland remains contested terrain. The focus should be on the deliberative aspects of the settlement. My argument is that contrary to what is often said, the

[91] See Claire Palley "Constitutional Devices in Multi-Racial and Multi-Religious Societies" (1968) 19 *NILQ* 377, at 380: "Throughout recorded history conflict has been the natural condition of mankind, the only difference between various epochs being that dominating groups have justified their aggression by reference to differing criteria".

status of Northern Ireland remains contested by the nature of the normative principles upon which it is based.

What we have is democratic governance tailored to the particular needs of a divided society. Given Northern Ireland's past it was likely that the conflict between the two main political communities would dominate any settlement. This has proved to be the case. Although the Agreement is not always consistent on this, there is a strong commitment to express recognition of the identity and ethos of "both communities". The criticism of this approach is that it legitimises and thus perpetuates existing divisions. Rather than transcending difference the model legitimises it. It is said to be deficient in other, connected, areas also. For example, the politics of gender, and thus differences within "communal blocks", can be seriously downplayed.

O'Leary has provided a decisive answer to the question posed. He argues that it is a consociational agreement.[92]

> "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 [footnotes omitted]".[93]

He recognises that it is not only a consociational agreement and that it has important external dimensions.[94] Much of his argument is convincing, but he is prone to use the word legalism rather too often as an accusation. What he presumably means to criticise is orthodox legal positivism, which does not pay due regard to law's role as a tool in the service of democratic experimentalism. It is beyond the bounds of this chapter to defend fully a theory of legality which would meet O'Leary's criticisms. Suffice to say that there are values embedded in legalism which radicals and conservatives alike would not wish to lose.

The concept of democracy which the Agreement resembles is that of consociational democracy, as O'Leary argues. But this is far from the only element. For example, in the longer term the deliberative

[92] See Brendan O'Leary "The Nature of the Agreement" (1999) 22 *Fordham International Law Journal* 1628. Cf. Rick Wilford "Designing the Northern Ireland Assembly" (2000) 53 *Parliamentary Affairs* 577; Rick Wilford "The Good Friday Agreement Revisited" (2000) 3 *Contemporary Issues in Irish Law and Politics* 1.

[93] *Ibid*. p. 1630.

[94] *Ibid*. p. 1631.

component may be the one that has the lasting impact.[95] In particular, the stress on the right to participate is of fundamental significance. I would argue that the Agreement is informed by a conception of deliberative democracy and that the focus on participation is evidence of this.

THE NORTHERN IRELAND SETTLEMENT

The approach taken here is first to outline the provisions of the Agreement in relation to the new government structures. While the Agreement's legal status is a matter for debate, the legal framework that has emerged is intended to give legal life to its provisions. It has a foundational status. But like all processes of constitution-building it has a dual aspect. There is first the foundational moment, and secondly, the continuing process of interpretation and application. Given the concept of constitutionalism I have defended here, one of the intriguing issues is the extent to which the constitutive moment itself should be "up for grabs" and subject to renegotiation and thus possible outright rejection.

I argue in this chapter that the Agreement has a constitutive status. While it has been translated into law in the Northern Ireland Act 1998, I deliberately refer principally in this section to the Agreement. The aim is to reinforce the argument that the Agreement underpins all consideration of the new constitutional structures in Northern Ireland.

Executive authority

The Agreement is clear on the fact that the prime source of authority on all devolved responsibilities rests with the Northern Ireland Assembly.[96] The Agreement provides that "executive authority [is] to be discharged on behalf of the Assembly by the First Minister and Deputy First Minister and up to ten Ministers with Departmental Responsibilities".[97] The Office of the First Minister and Deputy First

[95] On the position prior to the Agreement see John Morison and Stephen Livingstone *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (London, Sweet and Maxwell, 1995).

[96] Strand One para. 4.

[97] Strand One para. 14; Northern Ireland Act 1998, Part III. Contrast the Agreement with the Northern Ireland Act 1998, s. 23(1): "The executive power in Northern Ireland

Minister (OFM-DFM), a Department of the Northern Ireland executive, is thus central to the new governmental structures. Two junior Ministers have been appointed to assist the FM-DFM.[98] The First Minister and Deputy First Minister and the ten Ministers form the Executive Committee.[99] The former are elected jointly by the Assembly on a cross-community basis[100] and the latter positions are allocated to the political parties on the basis of the d'Hondt system.[101] The Executive Committee is a key feature of the new governmental structures. It provides a forum for discussion of important issues and is involved in prioritising executive and legislative proposals and in recommending common positions.[102] The Executive Committee is responsible for agreeing a Programme for Government which is subject to the approval of the Assembly and following scrutiny in the Assembly Committees.[103] It had its first meeting following the restoration of devolution on 1 June 2000. An Agenda for Government was soon adopted and in October 2000 the first draft Programme for Government was published.

Ministers and departments

There are effectively eleven Departments.[104] The number of Departments, the Implementation Bodies and the Matters for Co-operation were agreed on 18 December 1998. It is for the FM-DFM to determine the number of Ministerial Offices and the functions to be

shall continue to be vested in Her Majesty". Detailed provision for the practical operation of the Assembly can be found in the Standing Orders.

98 See Northern Ireland Act 1998, s. 19: they are Denis Haughey (SDLP) and Dermot Nesbitt (UUP).

99 Strand One para. 17; Northern Ireland Act 1998, s. 20.

100 Strand One para. 15 and para. 5(d); Northern Ireland Act 1998, s. 16. The voting mechanism is parallel consent: "a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting".

101 Strand One para. 16. This is a system that allocates places proportionally according to the strength of the political party.

102 Strand One para. 19.

103 Strand One para. 20.

104 Northern Ireland Act 1998, ss. 17–18; Departments (Northern Ireland) Order 1999, SI 1999/283. The Departments are: Office of the First Minister and Deputy First Minister; Agriculture and Rural Development; Culture, Arts and Leisure; Education; Enterprise, Trade and Investment; Environment; Finance and Personnel; Health, Social Services and Public Safety; Higher and Further Education, Training and Development; Regional Development; Social Development.

exercised by the office holders.[105] The Ministers are allocated according to the d'Hondt formula. The Agreement states that all Ministers should liaise regularly with their Committee.[106] The power of Ministers is limited in similar ways to the general restrictions on legislative competence.[107] A Minister does not have the power to do any act which "aids or incites another person to discriminate against a person or class of person on that ground".[108] As a condition of appointment all Ministers are required to affirm a Pledge of Office.[109] This Pledge of Office includes the obligation:

> "(c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination".[110]

There is, in addition to this, a Ministerial Code of Conduct.[111] This includes an obligation to "operate in a way conducive to promoting good community relations and equality of treatment".[112] Ministers have full executive authority in their respective areas but this is authority within the Programme for Government agreed by the Executive Committee and endorsed by the Assembly as a whole.[113] There is a mechanism for the removal of a Minister from Office:

> "if (s)he loses the confidence of the Assembly, voting on a cross-community basis, for failure to meet his or her responsibilities including, inter alia, those set out in the Pledge of Office".[114]

Exclusion is the most extreme form of sanction. Nevertheless it is an option and there is provision for the exclusion of Ministers or junior Ministers for twelve months.[115] A Minister could be excluded for a failure to observe terms of her or his Pledge of Office, thus giving the

[105] Northern Ireland Act 1998, s. 17(1).
[106] Strand One para. 22.
[107] Northern Ireland Act 1998, s. 24.
[108] *Ibid*. s. 24 (1)(d).
[109] Strand One para. 23 and Annex A.
[110] Annex A. See Northern Ireland Act 1998, s. 18(8): "A Northern Ireland Minister shall not take up office until he has affirmed the terms of the pledge of office".
[111] Annex A.
[112] *Ibid*.
[113] Strand One para. 24.
[114] Strand One para. 25.
[115] Northern Ireland Act 1998, s. 30(1).

Pledge added significance.[116] The Assembly has the power to extend a period of exclusion or to bring it to an end.[117]

Committees

For each of the new Departments there is an Assembly Committee.[118] The Chair and Deputy Chair of the Committees are allocated proportionately, again using the d'Hondt mechanism.[119] The aim is to ensure that membership of the Committees is allocated according to party strengths.[120] The Committees have four broad roles: scrutiny; policy development; consultation; and in relation to the initiation of legislation.[121] Their specific powers include: consideration and advice on Departmental budgets and plans; approval of secondary legislation; the power to call persons and papers; and to initiate enquiries and make reports.[122] In addition to the Departmental Committees there are other Standing Committees such as the Committee of the Centre, the Audit Committee and the Committee on Standards and Privileges.[123] The Committee of the Centre was established to examine and report on the work of the OFM-DFM in several areas including: Economic Policy Unit; Equality Unit; Civic Forum; Victims; Women's Issues; and Freedom of Information.[124]

Legislative powers

Even following devolution the Westminster Parliament retains the legal authority to legislate for Northern Ireland. In traditional UK constitutional law terms this remains the position. However, constitutional

[116] It is not only Ministers who can be excluded. Provision is made for the exclusion of a political party because: "it is not committed to non-violence and exclusively peaceful and democratic means . . . or . . . because it is not committed to such of its members as are or might become Ministers or junior Ministers observing the other terms of the pledge of office".

[117] Northern Ireland Act 1998, s. 30(3) and (4).

[118] Strand One para. 8; Northern Ireland Act 1998, s. 29.

[119] Strand One para. 8.

[120] *Ibid.*

[121] Strand One para. 9.

[122] *Ibid.*

[123] Also Committee on Procedures, Business Committee and Public Accounts Committee.

[124] The first meeting of the Committee of the Centre took place on 26 January 2000.

conventions can emerge quite quickly to govern the relationship between Westminster and the Northern Ireland Assembly. For example, as Palley notes in relation to the Government of Ireland Act 1920:

> "[S]oon after powers had been conferred on the Parliament of Northern Ireland, constitutional conventions developed as to the exercise of Westminster's concurrent powers. It became convention that Parliament at Westminster would not legislate in respect of transferred powers . . . without the consent of the Government of Northern Ireland".[125]

It is likely that similar constitutional conventions will develop in relation to the current devolutionary scheme also.

The Assembly has the authority to pass primary legislation for Northern Ireland in the devolved areas.[126] The laws of the Assembly are to be known as Acts[127] and to become law they must be passed by the Assembly and receive Royal Assent.[128] This legislative power is subject to a number of controls, including human rights protections.[129] Issues are divided into: excepted matters;[130] reserved matters;[131] and transferred matters.[132] Excepted matters are non-devolved issues, while reserved matters are those which may at some future time be devolved. Transferred matters are those which are within the jurisdiction of the Assembly. The Secretary of State has the power, with the consent of the Assembly, to make a reserved matter a transferred one and *vice versa*.[133]

The Agreement clearly envisages disputes over legislative competence being decided by the courts.[134] But detail is lacking. The Northern Ireland Act 1998 is clearer on this issue. For example, where a court or tribunal decides that a provision of an Act is not within the legislative competence of the Assembly it may make an order which removes or limits the retrospective effect of the decision or suspends its

[125] See Palley *supra* n. 35 at p. 385.

[126] Strand One para. 26; Northern Ireland Act 1998, Part II.

[127] Northern Ireland Act 1998, s. 5(1).

[128] *Ibid*. s. 5(2).

[129] Strand One para. 26(a).

[130] Northern Ireland Act 1998, Sch 2. This includes: tax; nationality, immigration and asylum; elections; and the appointment and removal of judges.

[131] *Ibid*. Sch 3. This includes: criminal law; consumer safety in relation to goods; civil defence; and human genetics.

[132] *Ibid*. s. 4(1).

[133] *Ibid*. s. 4(2) and (3).

[134] Strand One para. 28: "Disputes over legislative competence will be decided by the Courts".

effect until the defect is corrected.[135] The court or tribunal must take into account the extent to which third parties would be adversely effected by the decision.[136] If it is considering making such an order it must give notice to the Attorney General.[137] Other rules apply where the matter is a "devolution issue".[138] Where there is a choice as to permissible interpretations on the issue of competence, there is an interpretative obligation to read an Act of the Assembly "in a way which makes it within that competence or, as the case may be, does not make it invalid by reason of that section".[139]

The final court of appeal on a devolution issue is the Judicial Committee of the Privy Council.[140] It is clear from all the devolution schemes that this body may have an important role to play in resolving issues that arise. The term devolution issue is defined in Schedule 10. It means:

> "(a) a question whether any provision of an Act of the Assembly is within the legislative competence of the Assembly;
> (b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24;
> (c) a question whether a Minister or Northern Ireland department has failed to comply with any of the Convention rights, any obligation under Community law or any order under section 27 so far as relation to such an obligation; or
> (d) any question arising under this Act about excepted or reserved matters".[141]

There is detailed provision for dealing with proceedings in Northern Ireland, England, Wales and Scotland in relation to a devolution issue.[142] The position within Northern Ireland is of relevance here. The courts in Northern Ireland are empowered to refer any devolution issue which does arise to the Court of Appeal in Northern Ireland.[143] The Court of Appeal in Northern Ireland is entitled to refer a devolution issue to the Judicial Committee,[144] but not in cases where a reference

135 Northern Ireland Act 1998, s. 81(1) and (2).
136 *Ibid*. s. 81(3).
137 *Ibid*. s. 81(4)(a).
138 *Ibid*. s. 81(4)(b).
139 *Ibid*. s. 83(2).
140 *Ibid*. s. 82 and Sch 10.
141 *Ibid*. Sch 10 para. 1.
142 *Ibid*. Sch 10 Parts II, III and IV.
143 *Ibid*. Sch 10 para. 7.
144 *Ibid*. Sch 10 para. 9.

has been made to it from a court or tribunal in Northern Ireland. In such cases an appeal may lie to the Judicial Committee, but only with the leave of this court or the Court of Appeal in Northern Ireland.[145] There is provision for direct references to the Judicial Committee. For example, the FM-DFM acting jointly may require a court or tribunal to refer any devolution issue which is not the subject of proceedings to the Judicial Committee.[146]

Given the stress throughout the Agreement on self-government and participation it is surprising to find such reliance on the courts to resolve questions over devolution issues and legislative competence. It may be a convenient way to reach a decision on a controversial matter, but it sits uneasily with the participatory nature of the Agreement.[147] This objection applies irrespective of the composition of the judiciary and even after a process of judicial reform. The objection targets the appropriateness of giving this institution such an enhanced role in political life. The politics of human rights has done much to infuse the judiciary with a new sense of legitimacy in recent years. Despite the wave of euphoria that has greeted the Human Rights Act 1998 there is still good reason to question uncritical faith in judicial activism. The real issue remains whether we are promoting the core value of self-government and thus the human right to participate in the decisions that shape our social existence. Should we really be giving the last word on this to the Judicial Committee?[148] The argument can be made for a new constitutional court, but careful attention would need to be paid

[145] Northern Ireland Act 1998, Sch 10 paras 7, 8 and 10.

[146] *Ibid*. Sch 10 para. 34.

[147] See Colin Harvey "Questions about the Culture of the Legal System in the North" *Irish News*, 10 January 2000. Although referring generally to the development of the British constitution, the following is of interest in this context also, K D Ewing "The Politics of the British Constitution" [2000] *Public Law* 405, at 437: "For much of the century the courts have been one of the major forces of conservatism, above all concerned in a one dimensional way with national safety, public order and political stability. It is only in the latter part of the century that the courts have shown sympathy for and commitment to the values underlying the liberal constitution".

[148] See A W Bradley and K D Ewing *Constitutional and Administrative Law* (12th edn, London and New York, Longman, 1997) p. 371 in discussing its role prior to the devolutionary schemes they state: "The Committee's role is now of special significance in relation to those constitutions which include protection for fundamental human rights, but the degree of protection which the Committee has given in this role has been very uneven. In particular, the Committee has fluctuated between adopting a strict and legalistic approach to fundamental rights provisions and a broader, more purposive approach that recognises the constitution as a living instrument. Not surprisingly, the resulting case-law on issues such as freedom of expression and the death penalty is not wholly satisfactory".

to its composition, accountability and precise role and how it would facilitate the new participatory structures that have been created.

Human rights, equality and the politics of voting

Although the Assembly is the prime source of authority on all devolved matters this power is not unlimited and there are important safeguards. These safeguards must be viewed in the context of the continuing role of the Westminster Parliament. The reasoning behind the safeguards is clearly spelt out in the Agreement.

> "There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected".[149]

The safeguards are not there solely to protect individual human rights, they are also there to ensure participation. Human rights protection is one aspect of this, but not the only one. The basic safeguards listed in the Agreement are: (1) the allocation of Committee Chairs; (2) Ministers and Committee membership in proportion to party strengths; (3) the human rights components including the European Convention on Human Rights, any Bill of Rights for Northern Ireland which supplements it and the creation of the Human Rights Commission; (4) the proofing of key decisions to ensure compliance with the European Convention and any Bill of Rights; (5) cross-community voting, rules involving parallel consent and weighted majorities; (6) and the creation of the Equality Commission.[150] These safeguards are not exhaustive.

In order to build-in safeguards the enabling Act ties the legislative competence of the Assembly to *inter alia* compatibility with "Convention rights"[151] and Community law.[152] The Assembly has no competence to do anything which "discriminates against any person or class of persons on the ground of religious belief or political opinion".[153] The Minister in charge of a Bill must make a statement of legislative competence.[154] There is also a role here for the Presiding

[149] Strand One para. 5.

[150] Strand One para. 5(a)–(e).

[151] Northern Ireland Act 1998, s. 6(2)(c). This has the same meaning as in the Human Rights Act 1998, see Northern Ireland Act 1998, s. 98(1).

[152] *Ibid*. s. 6(2)(d).

[153] *Ibid*. s. 6(2)(e).

[154] *Ibid*. s. 9.

Officer to ensure that any Bill introduced is within the legislative competence of the Assembly.[155] The Attorney General for Northern Ireland may refer the issue of legislative competence to the Judicial Committee for a decision.[156] In addition, there are what are termed "entrenched enactments".[157] These include the Human Rights Act 1998 and various provisions of the Northern Ireland Act 1998.[158] Detailed provision is made in the Act for what the standing orders must contain,[159] for example, that the Presiding Officer send a copy of each Bill to the Northern Ireland Human Rights Commission.[160]

Within the OFM-DFM there is a Community Relations, Human Rights and Victims Division, a Human Rights Unit and an Equality Unit. It has already been noted that the Committee of the Centre will have an important role in scrutinising this work. The main function of the Human Rights Unit is not legal advice but information provision to Government on the Human Rights Act 1998 and in the development of a culture of rights and responsibilities. In relation to the Human Rights Act 1998 the Directorate (as it then was) took its lead from the Home Office Human Rights Task Force. In future the new Unit will monitor departmental performance, raise awareness of human rights issues and liaise with other human rights organisations, in particular, the Northern Ireland Human Rights Commission. It has the additional role of providing advice and support for the Northern Ireland Assembly in relation to the United Kingdom's responsibilities arising under other international instruments. There is a separate Human Rights Unit within the Northern Ireland Office (NIO).

What is notable is that human rights and equality considerations are structuring the way that work is being done within public administration in Northern Ireland. This is a considerable change from the past. These norms are now structuring the way that institutions are being organised and how they do their business. This is a beginning only, and the results of all this restructuring must await detailed examination.

[155] Northern Ireland Act 1998, s. 10.

[156] *Ibid*. s. 11.

[157] *Ibid*. s. 7. These "shall not be modified by an Act of the Assembly or subordinate legislation made, confirmed or approved by a Minister or Northern Ireland Department".

[158] *Ibid*. s. 7(1)(b) and (c).

[159] *Ibid*. s. 41(1) and (2), providing that the proceedings of the Assembly shall be regulated by standing orders and that they cannot be made, amended or repealed without cross-community support. See Northern Ireland Assembly Standing Orders (as at 3 February 2000).

[160] Northern Ireland Act 1998, s. 13(4)(a).

Relations with other bodies

The Assembly exists within an increasingly complex set of constitutional arrangements. These are based not only on primary and secondary legislation but also what has been called "concordatry".[161] It is important to be clear about the practical operation of the new relations and their legal and non-legal underpinnings.

The response to external relationships is one of the duties of the FM-DFM.[162] This response must include cross-community involvement.[163] Provision is made in the Agreement to ensure effective coordination between the Assembly and the Government of the United Kingdom on the effective input of Ministers to national policy-making.[164] The Secretary of State for Northern Ireland retains an important role.[165] He or she: is responsible for NIO matters which are not devolved; will lay before the Westminster Parliament any Assembly legislation on reserved matters; represent Northern Ireland interests in the UK Cabinet; and has the right to attend the Assembly at its invitation.[166] She or he has the power to direct that action be taken in relation to the act of a Minister or Department, if it would be "incompatible with international obligations, with the interests of defence or national security or with the protection of public safety or public order".[167] A power also exists to direct that action be taken if required for the purposes of giving effect to these matters.[168]

The power of the Westminster Parliament to enact legislation for Northern Ireland remains, as the Agreement states, "unaffected".[169] For example, it will continue to legislate for non-devolved issues[170] and to scrutinise the responsibilities of the Secretary of State.[171] In strict constitutional law terms the Westminster Parliament remains supreme,

[161] Richard Rawlings "Concordats of the Constitution" (2000) 116 *LQR* 257, at 258: "[It] constitutes one of the main pillars of the new devolutionary architecture of the United Kingdom".

[162] Strand One para. 18.

[163] Strand One para. 30.

[164] Strand One para. 31.

[165] Strand One para. 32.

[166] Strand One para. 32 (a)–(d).

[167] Northern Ireland Act 1998, s. 26(1).

[168] *Ibid*. s. 26(2).

[169] Strand One para. 33; Northern Ireland Act 1998, s. 5(6).

[170] Strand One para. 33(a).

[171] Strand One para. 33(d).

even after devolution, and has the authority to legislate for the devolved administrations. Constitutional conventions may emerge quickly to govern this relationship, particularly on the issue of legislating for transferred matters. The principles which underpin the relationship, in the devolved context, can be found in the Memorandum of Understanding and the concordats.[172] The emphasis is on cooperation, communication and partnership. While the legal position leans heavily towards Westminster, the documents reflect a less patriarchal approach to devolution.[173] These documents were agreed between the UK Government, the Scottish Ministers and the Cabinet of the National Assembly of Wales on 1 October 1999. Provision is made for a new Joint Ministerial Committee consisting of: Ministers of the UK Government; Scottish Ministers; members of the Cabinet of the National Assembly of Wales; and Ministers of the Northern Ireland Executive. The Executive Committee of the Northern Ireland Assembly has considered and agreed to them with one addition. The documents are not legally binding in nature and the overall purpose is to ensure that cooperation takes place on, for example, formulating a single UK policy approach to the EU.

The informal public sphere has played an important part in political and social life in Northern Ireland. The community and voluntary sectors continue to make a substantial contribution to developing a culture of civility.[174] This role is recognised in the Agreement with the proposal for the establishment of a Civic Forum.[175] This is a consultative mechanism on social, economic and cultural issues.[176] The OFMDFM is responsible for the provision of administrative support to this body and drew up the guidelines for the selection of representatives.[177] It includes representatives of the business, trade union and voluntary sectors.[178]

[172] (Cm 4444, 1999). This contains: Memorandum of Understanding; Supplementary Agreement on the establishment of a Joint Ministerial Committee; Concordat on Co-ordination of EU policy issues; Concordat on Financial Assistance and Industry; Concordat on Industrial Relations; and a Concordat on Statistics.

[173] Rawlings *supra* n. 161 at p. 262.

[174] See Chapter 10.

[175] Strand One para. 34.

[176] *Ibid*.; Northern Ireland Act 1998, s. 56. It has sixty members.

[177] *Ibid*.

[178] *Ibid*.

ALL-ISLAND STRUCTURES: NORTH-SOUTH RELATIONS AND THE AGREEMENT

Analysis of all-Ireland structures here is on the basis of my previous argument about the contested nature of the constitutional status of Northern Ireland. The consent principle, often assumed to bring certainty with it, in practice carries the seeds of healthy democratic instability. The inclusion of an "Irish dimension" was essential to securing the support of the nationalist/republican community for the Agreement. The unionist community has consistently resisted this. The Agreement, however, contains a clear "Irish dimension". Strand Two of the Agreement deals with North-South relations in the form of a new North/South Ministerial Council. The negotiations on Strand Two proved problematic and caused severe problems in the final stages of the process.[179] George Mitchell has expressed concern about the working methods of the British and Irish Governments in relation to this section of the Agreement.[180]

The Agreement provides for the establishment of a North/South Ministerial Council to bring together those with executive responsibility to "develop consultation, co-operation and action within the island of Ireland . . . on matters of mutual interest within the competence of the Administrations, North and South".[181] The Annex to Strand Two lists twelve areas for North/South cooperation and others may be considered by the Council.[182] Participation in the Ministerial Council is one of the essential responsibilities attaching to Ministerial office.[183] It is for the FM-DFM, acting jointly, to make nominations to attend the Council.[184] They are also responsible for ensuring cross-community attendance at Council meetings: "It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other."[185]

[179] See George Mitchell *Making Peace* (London, William Heineman, 1999) pp. 161–76.

[180] Mitchell *ibid*.

[181] Strand Two para. 2; *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland Establishing a North/South Ministerial Council* (Cm 4294, 1999).

[182] On 18 December 1998 the following areas were identified for cooperation: transport; agriculture; education; health; environment; and tourism.

[183] Agreement *supra* n. 181; Northern Ireland Act 1998, s. 52(2).

[184] *Ibid*. s. 52.

[185] Strand Two para. 13.

It is to meet in plenary session twice a year[186] and in sectoral formats on a more regular basis.[187] The Council is, for example, to use its best endeavours to reach agreement on common policies "in areas where there is a mutual cross-border and all-island benefit".[188] Each side involved in the Council is accountable to the Assembly and the Oireachtas respectively.[189] The Agreement provides for the establishment of implementation bodies.[190] There are six such bodies[191] and their task is to implement, on a cross-border and all-island basis, policies agreed in the Council.[192] The Council is supported by a joint Secretariat which is staffed by civil servants from the Northern Ireland Civil Service and the Irish Civil Service.[193] Consideration is to be given to a joint parliamentary forum for discussion of matters of mutual interest and concern,[194] as well as a joint consultative forum made up of the social partners and individuals with expertise in social, cultural, economic and other issues.[195]

The inaugural plenary meeting of the Council took place in Armagh on 13 December 1999. At this meeting a Memorandum of Procedure was adopted relating to the practical operation of the Council. The Council agreed that it should meet in sectoral formats in relation to the Implementation Bodies and the Matters for Co-operation.

THE BRITISH-IRISH DIMENSION

While the North/South dimension was of particular concern to the nationalist/republican community, the East/West dimension might be

[186] Strand Two para. 3(i).

[187] Strand Two para. 3(ii).

[188] Strand Two para. 3(iii).

[189] Strand Two para. 6.

[190] Northern Ireland Act 1998, s. 55.

[191] In the areas of inland waterways, food safety, trade and business development, special European Union programmes, language, and aquaculture and marine matters. The bodies are: Waterways Ireland; The Food Safety Promotion Board; The Trade and Business Development Body; The Special EU Programmes Body; The North-South Language Body; The Foyle, Carlingford and Irish Lights Commission. See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland Establishing the Implementation Bodies* (Cm 4293, 1999).

[192] Strand Two para. 11; Northern/South Co-operation (Implementation Bodies) Order 1999, SI 1999/859.

[193] Strand Two para. 16.

[194] Strand Two para. 18.

[195] Strand Two para. 19.

thought to have been the focus of the unionist community. This is a simplification. For many in the unionist community the only relation that matters is the continuance of Northern Ireland as part of the United Kingdom and thus the supremacy of the Westminster Parliament.

The legal basis for this dimension rests on bilateral agreements between Ireland and the United Kingdom. As with the other elements this originates in practice in the Agreement. Strand Three of the Agreement addresses the British-Irish dimension. It provides for the establishment of a British-Irish Council "to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands".[196] It is made up of representatives of the British and Irish Governments, the devolved institutions in Northern Ireland, Scotland and Wales with representatives of the Isle of Man and the Channel Islands.[197] The Council will meet at summit level twice a year and in sectoral formats on a more regular basis.[198] The aim is to encourage discussion and to reach agreement on matters of mutual interest.[199] The Council may adopt common policies or common actions and it is open to two or more members of the Council to develop bilateral or multilateral arrangements.[200] These arrangements do not require the approval of the Council and may operate independently of it.[201] The Council held its inaugural summit on 17 December 1999. At this meeting the Council agreed a Memorandum on Working Procedures, adopted a list of issues for early discussion and decided which administrations would take the lead on sectoral areas.

There is to be a new British-Irish Intergovernmental Conference which will effectively subsume the institutions created by the Anglo-Irish Agreement 1985.[202] The aim is to bring the British and Irish Governments together on matters of mutual interest and to promote cooperation.[203] The Agreement provides for regular meetings of the

[196] Strand Three "British-Irish Council" para. 1; *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland Establishing a British-Irish Council* (Cm 4296, 1999).

[197] Strand Three "British-Irish Council" para. 2.

[198] Strand Three "British-Irish Council" para. 3.

[199] Strand Three "British-Irish Council" para. 5.

[200] Strand Three "British-Irish Council" para. 10.

[201] Strand Three "British-Irish Council" para. 10.

[202] Strand Three "British-Irish Intergovernmental Conference" para. 1; *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland Establishing a British-Irish Intergovernmental Conference* (Cm 4295, 1999).

[203] Strand Three "British-Irish Intergovernmental Conference" para. 2.

Conference in relation to non-devolved matters and the Irish Government is permitted to put forward views.[204] The Conference will facilitate cooperation on security matters and deal in particular with rights, justice, prisons and policing in Northern Ireland.[205] There is recognition that these issues may be devolved to Northern Ireland and will thus not be of further concern to the Conference.[206] The Conference will keep the operation of the British-Irish Agreement under review and publish a report three years after the Agreement enters into force.[207] This report is to include the views of the Northern Ireland Assembly.[208]

CONCLUSION

Violence and coercion have scarred law and politics in Northern Ireland since its inception. To ignore this is to miss the fundamental significance of the Good Friday Agreement. The people of Ireland were presented with a chance to give expression to their democratic will. The message they sent was clear. The support for the Agreement represents a firm commitment to a dialogical form of open-ended democracy. Northern Ireland is contested terrain, but the days of insularity and exceptionalism are gone. It must now add its own voice to the ongoing conversation about legal and political life in Ireland, the United Kingdom and beyond.

The argument advanced here is that the Agreement, and what has followed, reflects a commitment to the primary value of self-government. It is the right to participate, and the practical eradication of the factors impeding this, which underpins the Agreement. The conception of democracy is therefore a strongly deliberative one. Those who crafted the Agreement have shown how democratic structures can be created which ensure inclusion. The Agreement demonstrates that democratic processes can be moulded to fit local contexts and promote self-government. There are a number of "weak links". The first is the continuing influence that traditional constitutional law thinking in the United Kingdom exerts over the new arrangements. I argue in this

[204] Strand Three "British-Irish Intergovernmental Conference" para. 5.
[205] Strand Three "British-Irish Intergovernmental Conference" para. 6.
[206] *Ibid.*
[207] Strand Three "British-Irish Intergovernmental Conference" para. 9.
[208] *Ibid.*

chapter that Northern Ireland cannot be neatly fitted into orthodox versions of UK constitutional law. In particular, the Agreement has a constitutive force which requires express recognition. The second is the broad and ill-defined role given to the courts. It is not to the courts, even if substantial reform takes place, that those genuinely interested in deliberative democracy should be looking. The other main difficulty is that much is off the agenda for the Assembly. While this respects the need for specific protection and constitutional realities it can appear as the familiar condescension of Westminster-style governance.

The Agreement and what has followed opens the way for the reinvigoration of the public sphere in Northern Ireland. While the informal public sphere was already operational, the creation of local structures creates a local focus. The challenge will now be to replenish the resources of argumentation in the public sphere and combat the impoverishment of political discourse. As I have argued, the constitution is both a constitutive act and a basis for continuing dialogue. Contestation must be at the heart of the new polity in Northern Ireland. We must begin to accept that in a democracy worth the name everything must remain "up for grabs".[209] The constitutional vision that the courts, among others, must promote is one that keeps a critical dialogue going. A healthy public sphere (formal and informal) is at the heart of this new constitutional order.

[209] See Jeremy Waldron *Law and Disagreement* (Oxford, Clarendon Press, 1999) pp. 302–6.

3

Northern Ireland, Devolution and the European Union

GORDON ANTHONY and ANDREW EVANS

INTRODUCTION

THE BELFAST AGREEMENT of 1998 is, as other contributions to this collection have made clear, widely understood to have put in place in Northern Ireland the beginnings of an all-inclusive, democratic form of government.[1] This understanding stems from the fact that the Belfast Agreement and related legislation address various contentious issues that have destabilised political relationships within Northern Ireland and between the United Kingdom and Ireland more generally. There are, for example, provisions in the Agreement dealing with the formation of a Northern Ireland Assembly headed by a multi-party executive; the creation of a North/South Ministerial Council; the creation of cross-border implementation bodies; the creation of a British-Irish Council; equality; policing; prisoner releases, and the decommissioning of terrorist weapons.[2] Although the process of implementing these provisions has proved problematic, there nevertheless exists an expectation that their collective implementation will further the equal protection and representation of competing political interests. Thus, while notions of democracy and legitimacy previously were contested in the context of Northern Ireland, the Belfast Agreement is now argued to have progressed legal and political discourse beyond its

[1] See Chapter 2. For a cautionary analysis, however, see D Kennedy "Dash for Agreement: Temporary Accommodation or Lasting Settlement?" (1999) 22 *Fordham International Law Journal* 1440.

[2] See further J Morison and G Anthony "An Agreed Peace? The Institutions of Democratic Governance in the Belfast Agreement 1998 and the Northern Ireland Act 1998" (1999) 11 *ERPL* 1313.

more familiar confines.[3] In particular, the creation of the North/South Ministerial Council and the British-Irish Council seems to have the potential to foster new political relationships which will depart from core constitutional understandings of the balance of power within the United Kingdom.[4]

Little attention, however, has been paid to the significance of the European Union for the creation of new institutional relationships within and without Northern Ireland. Although it has long been recognised that European integration has exerted some influence on institutional relationships within the United Kingdom[5], the devolution of power to Northern Ireland now raises many more specific questions about the role which Northern Ireland institutions should, and can, play in EU policy-making.[6] Consideration of these questions is essential to understanding how far the institutions established pursuant to the Belfast Agreement will, in practice, enjoy policy-making power and influence. Many of the areas of competence devolved to the Northern Ireland Assembly fall broadly within the competence of the EU institutions,[7] and there likewise exists overlap between the responsibilities of the cross-border implementation bodies and various EU policy areas.[8] The central question about the Northern Ireland institutions, therefore, is whether they will play an active role in EU policy formation or whether they will serve merely to implement decisions taken by other institutional actors. If the institutions perform an active role, it might be expected that Northern Ireland will start to enjoy effective and rep-

[3] See, e.g., C Harvey "Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context" (1999) 22 *Fordham International Law Journal* 1389.

[4] See V Bogdanor "The British-Irish Council and Devolution" (1999) 34 *Government and Opposition* 287.

[5] See, e.g., A Scott, J Peterson and D Millar "Subsidiarity: a Europe of the Regions v. The British Constitution" (1994) 32 *JCMS* 47.

[6] This issue has already received considerable attention in the Scottish context. See, e.g., T St John Bates "Devolution and the European Union" in T St John Bates (ed.) *Devolution to Scotland: The Legal Aspects* (Edinburgh, T&T Clark, 1997) p. 63; A Cygan "Scotland's Parliament and European Affairs: Some Lessons from Germany" (1999) 24 *ELRev* 483; and G Clark "Scottish Devolution and the European Union" [1999] *PL* 504.

[7] See, e.g., Arts. 32–38 (ex Arts. 37–46) EC relative to the Agriculture Ministry; Art. 137 (ex Art. 118) EC relative to the Social Development and Higher Education, Training and Employment Ministries; and Art. 174 (ex 130r) EC relative to the Environment Ministry.

[8] The North/South Implementation Bodies are: Waterways Ireland; the Food Safety Promotion Board; the Trade and Business Development Body; the Special European Union Programmes Body; the Foyle, Carlingford and Irish Lights Commission; and the North/South Language Body.

resentative government. Equally, however, if the institutions perform only a limited role relative to EU policy formation, the significance of Northern Ireland's new institutions might be expected to be largely symbolic. Indeed, under this latter scenario, the understanding that the implementation of the Belfast Agreement will lead to representative government in Northern Ireland may, in real terms, come to be seen as misguided and unduly optimistic.[9]

In the following pages this chapter explores more fully the legal framework for Northern Ireland participation in EU policy-making. It does so by reference to the imagery of multi-level governance. Multi-level governance incorporates an understanding that it is possible for different tiers of government to interact in a non-hierarchical manner which maximises opportunities for regional and sub-national participation in the policy-making process.[10] This chapter suggests that, although there now exists the potential for non-hierarchical interaction which engages the Northern Ireland Assembly, the realisation of a form of multilevel governance presently may be constrained by core constitutional understandings in the United Kingdom *and* in the European Union.[11] Specifically, it is argued that the centralising tendency of the UK constitutional tradition, coupled with EU law's understanding of Member State sovereignty as the basis for the Union, may act as a brake on the Northern Ireland institutions' participation in EU policy formation. Interaction of the kind envisaged in multi-level

[9] It might be noted that the Northern Ireland Assembly does not have a European Ministry. Rather, the responsibility for European Affairs is divided within the Office of the First and Deputy First Ministers (a full listing of the Northern Ireland Ministries is available at http://www.ni-assembly.gov.uk/ministers.htm).

[10] "Political arenas are interconnected rather than nested. While national arenas remain important for the formation of state executive preferences, the multi-level model rejects the view that sub-national actors are nested exclusively within them. Instead, sub-national actors operate in both national and supranational arenas, creating transnational associations in the process. States do not monopolise links between domestic and European actors, but are one among a variety of actors contesting decisions that are made at a variety of levels": G Marks, L Hooghe and K Blank "European Integration from the 1980s: State-Centric v. Multiple-Level Governance" (1996) 34 *JCMS* 341, 346. See further, A Benz and B Eberlein "The Europeanization of Regional Policies: Patterns of Multi-level Governance" (1999) *JEPP* 329.

[11] It should be noted that this chapter is written very much from the perspective of UK law. It does not purport to forward any authoritative points about multi-level governance from the perspective of other legal orders. For contributions from the perspective of other national orders see, e.g., C Jeffrey "Towards a 'Third Level' in Europe? The German Länder in the European Union" (1996) 44 *Political Studies* 253 and E Bomberg and J Peterson "European Union Decision Making: The Role of Sub-national Authorities" (1998) 46 *Political Studies* 219.

governance literature requires that sub-national actors and institutions are able to influence developments at the EU level through the occasional by-passing of pre-existing State structures and preferences. This chapter argues, however, that opportunities for the Northern Ireland institutions to by-pass State structures may be limited. The core constitutional understanding which underpins devolution, for example, is that the Northern Ireland institutions are subordinate bodies which are without sovereign powers.[12] Similarly, while the European Union seeks to maximise regional involvement in the policy-making process, EU law does not require Member States to recast their "internal" understandings of the sovereign basis of the State by way of accommodating regional preferences.[13] Rather, the question of regional representation at the EU level is solely a matter for the internal law of the Member States.[14] Consequently, while there is the imperative of maximising Northern Ireland's participation at the EU level, it may be that orthodox constitutional understandings will frustrate the potential for interaction which inheres in the "new" institutional dynamic of the Belfast Agreement.

The chapter begins, by exploring more closely some of the "internal" tensions that may arise as a result of the coexistence of the Belfast Agreement's new institutional relationships and orthodox understandings of the institutional balance of the United Kingdom. Here, the chapter considers on the one hand how far there exists within the

[12] e.g., Northern Ireland Act 1998, s. 6, provides that primary Acts of the Northern Ireland Assembly may be quashed on the grounds that they are *ultra vires* the Assembly's competence. "(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly. (2) A provision is outside that competence if any of the following paragraphs apply—(a) it would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland; (b) it deals with an excepted matter and is not ancillary to other provisions . . . dealing with reserved or transferred matters; it is incompatible with any of the Convention rights; it is incompatible with Community law; it discriminates against any person or class of person on the ground of religious belief or political opinion". See further *ibid. s.* 24. With regard to the position in Scotland and Wales, see the Scotland Act 1998, ss 29, 57, and the Government of Wales Act 1998, s. 107.

[13] A Evans "Regionalist Challenges to the EU Decision-Making System" (2000) 6 *EPL*, 377.

[14] A feature which would support "State-centric" views of the EU process. The seminal statement of State-centric (liberal intergovernmental) approaches to European integration can be found in A Moravcsik "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach" (1993) 31 *JCMS* 473 and *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998). For criticism of the State-centric (or liberal intergovernmental) approach see Marks *et al*, *supra* n. 10.

general framework for devolution to Northern Ireland, Scotland and Wales a clear understanding that the collective interests of the United Kingdom should be afforded primacy over any divergent regional interests.[15] On the other hand, the chapter also considers how far there exist within the Belfast Agreement opportunities for the Northern Ireland Assembly to develop the kind of institutional role that may contradict strict observance of the political conventions associated with devolution. These opportunities, which are most apparent in relation to the British-Irish Council and the North/South Ministerial Council, may allow the Northern Ireland Assembly to perform a more active EU policy-making role than that envisaged by conventional UK constitutional understandings. The point which will be made in this context, therefore, is, that while UK constitutional orthodoxy limits the autonomy of the Northern Ireland institutions, some aspects of the Belfast Agreement do not. Thus, the chapter argues that it will be through emphasising the significance of the British-Irish Council and North/South Ministerial Council that the Northern Ireland institutions may come to enjoy a greater degree of influence at the EU level.

The remainder of the chapter then considers the EU law approach to the role of regional institutions in EU policy-making. Here, the chapter focuses on the principle of "subsidiarity", opportunities for "regional" institutions to participate in EU Council decision-making, and on the importance to the EU process of the EU's Committee of the Regions. Although these features of the EU decision-making process are seen as important relative to developing a system of non-hierarchical institutional interaction, the chapter argues that EU law will, in its present form, remain unable to guarantee proper regional representation at the EU level. This argument is developed primarily by reference to the fact that EU law adopts a "neutral" position relative to the internal constitutional arrangements of the Member States. This neutrality, which is apparent both on the face of the EC Treaty and in the jurisprudence of the European Court of Justice, is argued not only to prevent the EU identifying regions for its own purposes but also from engaging properly in a process of dialogue with regional actors. The chapter concludes, therefore, by considering whether EU law and UK law could develop in a manner that would accommodate more fully the concerns and interests of sub-national institutions.

[15] See, e.g., the Common Annex to the *Concordat on Co-ordination of European Union Policy Issues* (Cm. 4444, 1999).

THE BELFAST AGREEMENT, UK CONSTITUTIONALISM AND EU POLICY-MAKING

The limiting influence of orthodoxy

The centralising tendency of the UK constitutional tradition is, at source, attributable to domestic public law's historical emphasis on the doctrine of the sovereignty of the Westminster Parliament.[16] This doctrine, at its most basic, holds that the Westminster Parliament is free to make or unmake any law whatsoever.[17] Although the core elements of the doctrine have been subjected to much criticism in recent years,[18] the logic of the doctrine clearly has informed the programme of constitutional reform that has included the devolution of power to Northern Ireland.[19] The legality of primary Acts of the Northern Ireland Assembly, for example, can be challenged on the grounds that they transgress the boundaries of power devolved by the sovereign Westminster Parliament.[20] Likewise, and of more immediate importance in the given context, section 26(2) of the Northern Ireland Act 1998 provides that the UK Parliament may legislate when this is deemed necessary to ensure that the United Kingdom's international obligations are met in respect of Northern Ireland.[21] In other words,

[16] An understanding most famously associated with the writings of A V Dicey. See *An Introduction to the Study of the Law of the Constitution* (10th edn, London, Macmillan, 1959).

[17] For a judicial statement to this effect see, e.g., *Madzimbamuto v. Lardner-Burke* [1969] 1 AC 645, 723 (per Lord Reid). For more recent academic commentary to the same effect see, e.g., C Forsyth "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 *CLJ* 122.

[18] See, e.g., in relation to the process of European integration, M Hunt *Using Human Rights Law in English Courts* (Oxford, Hart Publishing, 1997) chs 1–3. And for doubts about its explanatory force relative to the process of devolution, at least insofar as relates to Scotland, see V Bogdanor "Devolution: The Constitutional Aspects" in J Beatson, C Forsyth and I Hare (eds) *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford, Hart Publishing, 1998) p. 9.

[19] Other initiatives contained in New Labour's programme of reform have included the incorporation in domestic law of (most of) the ECHR; the re-introduction of an elected authority for London; the introduction of freedom of information legislation; and House of Lords reform. See further R Brazier "New Labour, New Constitution" (1998) 49 *NILQ* 1. For a critical account see J Morison, 'The Case Against Constitutional Reform?' (1998) 25 *JLS* 510.

[20] See *supra* n.12.

[21] And see further para. 33(b) of Strand One of the Belfast Agreement. "The Westminster Parliament (whose power to make legislation for Northern Ireland would remain unaffected) will . . . legislate as necessary to ensure that the United Kingdom's international obligations are met in respect of Northern Ireland".

the Northern Ireland Act provides that the UK Parliament may, in accordance with the demands of EU policy-making, override the Northern Ireland Assembly, thereby occasionally negating the devolution of powers envisaged by the Belfast Agreement. The absence of fuller autonomy for the Northern Ireland Assembly, therefore, can be seen to inhere in the text of the very Act that purports to establish and empower local institutions.[22]

The limiting influence of orthodoxy is also apparent at the political level. Here, there exists a Concordat which seeks to ensure that the Westminster Government and the Northern Ireland Assembly (the Concordat also deals with the Westminster Government's relations with the Scottish and Welsh institutions) adopt a unified UK approach to the formulation and implementation of EU policies.[23] Although it is unclear whether the Concordat will enjoy legal force,[24] it is evident that it will enjoy strong political force.[25] The Concordat does, for example, emphasise the imperative of inter-institutional confidentiality during the formulation of EU policy preferences, and it also emphasises the need to give full effect to the outcome of any negotiations finalised on behalf of the UK Government at the EU level. This emphasis on confidentiality has been criticised by Richard Rawlings who considers that it may limit the bargaining power of sub-national institutions when there exist competing interests.[26] More significantly, Rawlings also considers that adherence to a single policy line might lead to central

[22] The argument that it is too easy for the UK Government to prorogue Northern Ireland's local institutions is addressed at greater length in Chapter 10.

[23] The terms of these Concordats were presaged in part by para. 31 of Strand One of the Belfast Agreement: "terms will be agreed between appropriate [NI] Assembly representatives and the Government of the UK to ensure effective coordination and input by Ministers to national policy-making, including on EU issues". It should be noted that, at the time of writing, the terms of the Concordat were still being debated by the Northern Ireland Assembly. Nevertheless, it is assumed that the Concordat will be similar in content to those agreed between the Westminster Government and the Scottish Parliament and Welsh Assembly. See the Common Annex to the *Concordat on Co-ordination of European Union Policy Issues* (Cm. 4444, 1999).

[24] See further Richard Rawlings "Concordats of the Constitution" (2000) 116 *LQR* 257.

[25] It should be noted that the Concordat(s) on European Union Policy Issues form only one part of a much larger Memorandum of Understanding which seeks to structure relations between the Westminster Government and the devolved authorities (Cm. 4444, 1999)). There are other Concordats dealing e.g. with financial assistance to industry; international relations; and government statistics, and the Memorandum also makes provision for a Joint Ministerial Council which will meet to consider issues of mutual concern.

[26] *Supra* n. 24 pp. 272–4.

domination in the representation of "UK" interests. Consequently, while the official function of the Concordat is to ensure that regional Ministers are engaged in the formulation of the United Kingdom's collective policy preferences, Rawlings considers that regional input may, in effect, be minimal: "the devolved administrations have only indirect access to the UK cabinet system of government. The EU concordat stands for a relationship of give and take: it is the devolved administrations that stand to be taken for granted".[27]

At one level, of course, the Concordat's emphasis on a uniform sense of purpose and duty is eminently reasonable. The United Kingdom is, from the perspective of the EU, one state with one set of responsibilities, and a disjointed approach to the implementation of EU policies may not only frustrate the Union's objectives, but also create legal difficulties for the UK Government.[28] Cast in terms of the need for a form of multi-level governance, however, the Concordat clearly has the potential to militate against effective representation of Northern Ireland interests at the EU level. Literature on the "coupling" of decision-making arenas,[29] for example, emphasises the need for one decision-making arena to be sensitive to the needs and concerns of other decision-making arenas.[30] Although it might be argued that the Concordat is, on its face, couched in the language of coupling, the related constitutional framework for devolution is not. The result in practice, therefore, may be for UK participation in EU policy making to remain highly centralised, with the corresponding role of the Northern Ireland Assembly being reduced to one of implementing EU enactments adopted by other actors not immediately representative of Northern Irish concerns.

[27] *Ibid*. p. 273.

[28] e.g., if the Northern Ireland Assembly failed to introduce legislation to give effect to a Community Directive in a policy area coming within its competence, this might lead the European Commission to initiate Art. 226 EC enforcement proceedings against the UK Government (although the UK Government might be able to pre-empt such action by invoking the Northern Ireland Act 1998, s. 26(2). It should also be noted that the UK Government has already sought to absolve itself of financial responsibility for breaches of EU law by the devolved institutions: see para. 20 of the Memorandum of Understanding (Cm. 4444, 1999)).

[29] A Benz and B Eberlein *supra* n. 10.

[30] According to the literature, each arena enjoys "semi-autonomy", and decision-making in one arena sets the context for decision-making in other arenas. The emphasis in the relationship between the arenas, therefore, is on information exchange and negotiation. See further *ibid*. p. 11. Cf. I J Sand "The Changing Preconditions of Law and Politics: Multilevel Governance and Mutually Interdependent, Reflexive and Competing Institutions in the EU and the EEA" *Arena Working Papers* 97/29.

The Belfast Agreement and the straining of orthodoxy

The institutional understandings attributable to orthodoxy may appear to be complicated, however, by the creation of the British-Irish Council (BIC) and the North/South Ministerial Council (N/SMC). These bodies, which were established primarily for purposes of accommodating the competing political aspirations of the unionist and nationalist communities in Northern Ireland, clearly have the potential to engender new institutional relationships within and without the United Kingdom.[31] The BIC, which is not a formal decision-making body, will provide a discussion forum that brings together representatives of the UK Government, the Irish Government, the devolved institutions, the Isle of Man and the Channel Islands. Similarly, the N/SMC conjoins members of the Northern Ireland Assembly and the Irish Government for purposes of identifying and developing policy preferences in areas of mutual concern.[32] Indeed, under the terms of the Belfast Agreement, the N/SMC is obliged to use "best endeavours to reach agreement on the adoption of common policies, in areas where there is mutual cross-border and all-island benefit, and which are within the competence of both Administrations, North and South, making determined efforts to overcome any disagreements".[33]

The suggestion that the workings of these institutions could strain orthodox understandings of how UK policy on the EU should be developed is, at this stage, largely speculative. The BIC, for example, has not, at the time of writing, been convened, and the workings of the N/SMC are at an early stage. Nevertheless, it is arguable that there is within these institutions at least the opportunity for the Northern Ireland Assembly to further its EU preferences in a manner that might

[31] On the function of these bodies see further Chapter 2. And see also Morison and Anthony *supra* n. 2 at pp. 1325–30.

[32] The Annex to Strand Two of the Agreement suggested that areas of mutual concern might include: agriculture (animal and plant health); education (teacher qualifications and exchanges); transport (strategic transport planning); environment (environmental protection, pollution, water quality, and waste management); waterways (inland waterways); social security/social welfare (entitlements of cross-border workers and fraud control); tourism (promotion, marketing, research, and product development); relevant EU programmes (SPPR, INTERREG, Leader II and their successors); inland fisheries; aquaculture and marine matters; health (accident and emergency services and other related cross-border issues); and urban and rural development.

[33] Strand Two, N/SMC, para. 5 (ii). Agreed policies are to be implemented by the cross-border implementation bodies envisaged under Strand Two of the Agreement.

contradict the essential demands of the Concordat. In relation to the BIC, for example, the Belfast Agreement expressly permits "two or more members to develop bilateral or multilateral arrangements between them . . . These arrangements will not require the prior approval of the BIC as a whole and will operate independently of it".[34] Given that the BIC may discuss "approaches to EU issues",[35] it is conceivable that the Northern Ireland Assembly and other members will begin to develop a more intense relationship around EU issues which are of particular interest to them. Under these circumstances, the difficulty facing orthodoxy would be whether it should seek to override "informal" arrangements that have been agreed within the framework of an institution established jointly by two sovereign governments. In particular, it may be difficult to reconcile confidentiality requirements in the Concordat with the debate anticipated in the BIC.

The potential which the N/SMC offers for the straining of orthodoxy is even more striking. According to paragraph 17 of Strand Two of the Belfast Agreement, the N/SMC is to "consider the EU dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements [are] to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings".[36] Although the Agreement does not specify what force the views of the N/SMC will have, or indeed who will represent those views, it seems that the Northern Ireland Assembly will enjoy opportunities to seek to influence the Irish Government in its dealings with the EU. This is highly significant insofar as it allows the Northern Ireland Assembly to further its own EU policy preferences within the framework of its relations with another sovereign State. The nature of those preferences may, of course, occasionally be different from those "agreed" on behalf of the United Kingdom within the framework of the Concordat. But that does not mean that the pursuit of those preferences necessarily should be seen as politically disingenuous. On the contrary, the pursuit of those preferences might better be said to be indicative of the Northern Ireland Assembly's willingness to capitalise on its unique constitutional and political position. The Belfast

[34] Belfast Agreement, Strand Three, BIC, para. 10.

[35] *Ibid*. para. 5.

[36] Paragraph 3(iii) of Strand Two further states that the Council is to meet "in an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement". The first sectoral meeting on Special EU Programmes was held in Dublin on 16 June 2000.

Agreement has put in place institutional relationships that reflect the unique political dynamics of Northern Ireland. More significantly, these institutional relationships seemingly offer the Northern Ireland Assembly the opportunity to step outside restrictive state structures by way of influencing developments at the EU level. It remains to be seen, therefore, whether the Northern Ireland Assembly will emphasise its position as an institution of the United Kingdom or as an institution that enjoys various legally founded relationships which go far beyond those associated with UK constitutional orthodoxy.

REGIONALISM, EU CONSTITUTIONALISM AND EU POLICY-MAKING

The understanding that "orthodoxy" can limit regional representation is, somewhat surprisingly, also informative in relation to EU law. Although the Maastricht Treaty introduced reforms that reflected the demands of regionalism, it is arguable that EU law remains ill-equipped fully to accommodate the concerns and preferences of regional institutions.[37] The Maastricht reforms included introduction of the "subsidiarity" principle, amendment of rules regarding the composition of the Council of the Union,[38] and establishment of the Committee of the Regions. Closer inspection of the wider constitutional context of these reforms, however, reveals that the opportunities they afford sub-national actors may be limited. The reforms were introduced into a constitutional order that emphasises the primacy of relations between the EU and the Member States.[39] This point of emphasis, which stems from an (arguable) understanding of the EU as a "delegate" of the Member States,[40] has meant that EU law does not

[37] M P Chiti "Regionalismo comunitario e regionalismo interno: due modelli da ricomporre" (1992) *Rivista Italiano di Diritto Pubblico Comunitario* 33, 35.

[38] This is the name given to what used to be called the "Council of Ministers". See Declaration 93/591 (OJ 1993 L281/18) concerning the name to be given to the Council following the entry into force of the Maastricht Treaty.

[39] e.g., the ECJ, in its seminal judgment in *Flamino Costa v. ENEL*, stated that the EU institutions benefited from the "transfer of powers from the [Member] States": Case 6/64 [1964] ECR 585, 593. See also Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

[40] G Majone "Europe's 'Democratic Deficit': the Question of Standards" (1998) *ELJ* 5. The primary importance of the Member States can also be seen in the fact that they enjoy the ultimate power of decision relative to the process of EC Treaty amendment: see Art. 48 TEU. At a more general level, however, it should be noted that the question of whether the EU ultimately is driven by its own dynamics or by intergovernmental

concern itself with the internal constitutional arrangements of Member States, but rather works with Member States however defined from within. Consequently, while it might be expected that the Maastricht reforms would benefit regional and sub-national interests, the "neutrality" of EU law relative to domestic constitutional matters means that this may not always be so. In particular, the fact that EU law does not interfere with the internal constitutional arrangements of the United Kingdom seemingly means that the limiting influence of UK constitutional orthodoxy can enjoy legitimacy under EU law.

Subsidiarity

The subsidiarity principle is embodied in both Article 1 of the Maastricht Treaty and Article 5 of the EC Treaty.[41] The principle, which has had different meanings in different contexts,[42] essentially seeks to prevent an over-centralisation of power at the level of the EU institutions. According to Article 1 TEU, decisions should be "taken as closely as possible to the citizen". Article 5 of the EC Treaty states: "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".[43]

In terms of the need for effective sub-national institutional participation in the EU decision-making process, these provisions might be argued to pull in different directions. On the one hand, the wording of

considerations has long occupied a central position in academic debate. See, most famously, the contrasting accounts of liberal intergovernmentalists (e.g., Moravcsik *supra* n.14) and neo-functionalists, e.g., E Haas *The Uniting of Europe: Political, Economic and Social Forces, 1950–57* (London, Stevens, 1958); L Lindberg *The Political Dynamics of European Economic Integration* (Stanford University Press, 1963); and J Tranholm-Mikkelsen "Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC" (1991) 20 *Millennium* 1.

[41] See also the Protocol on the application of the principles of subsidiarity and proportionality.

[42] See N Emiliou "Subsidiarity: An Effective Barrier Against the 'Enterprises of Ambition'?" (1992) 17 *ELRev* 383.

[43] *Cf* the distinction between substantive and procedural subsidiarity in A Scott *et al supra* n. 5. See also K Neunreither "Subsidiarity as a Guiding Principle for European Community Activities" (1993) *Government and Opposition* 206.

Article 1 TEU seemingly lends itself to an understanding that the existence of "autonomous regional bodies endowed with sufficient powers and resources"[44] is a condition for achievement of EU objectives.[45] On the other hand, however, the wording of Article 5 EC might be said to strengthen the existing nexus between EU and Member State constitutional law, thereby preserving Member State freedom to centralise or decentralise as preferred.[46] Article 5 EC adopts a more narrow approach to subsidiarity by referring only to relations between the European Community and the Member States. This formulation falls short of previous formulations that urged that the subsidiarity principle be applied generally in relations between EU, national and regional institutions.[47] These latter formulations, which are often associated with the demands of the German *Länder*, apparently have been rejected by the EU on the grounds that "it is not for the Community to interfere in the distribution of powers between the central, regional or local authorities in the Member States".[48] By emphasising the internal sovereignty of the Member States, therefore, EU law seems determined to "respect the national identities of its Member States",[49] even though such an approach could, in relation to centralised constitutions, frustrate regional and sub-national interests.

Council of the Union

EU law's inability to guarantee effective sub-national participation in the EU decision-making process can also be seen in relation to the workings of the Council of the Union. Article 203 EC provides that the Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member

[44] European Parliament Resolution of 18 November 1993 (OJ 1993 C329/279) on the Participation and Representation of the Regions in the Process of European Integration: the Committee of the Regions, para. E of the Preamble.

[45] See Arts. 158–162 EC.

[46] V Bogdanor *Devolution in the United Kingdom* (Oxford, Oxford University Press, 1999) pp. 277–8.

[47] See, e.g., Resolution of 18 November 1993 (OJ 1993 C329/279) on the Participation and Representation of the Regions in the Process of European Integration: the Committee of the Regions, para. 4.

[48] Commission Reply by Mr Delors to WQ E–3099/93 (OJ 1994 C289/27) by Víctor Arbeloa Muru. *Cf* the approach of the CFI in Case T–465/93 *Consorzio Gruppo di Azione Locale Murgia Messapica* v. *EC Commission* [1994] ECR II–361.

[49] See Art. 6(3) TEU. See further U Everling "Reflections on the Structure of the European Union" (1992) *CMLRev*. 1053, 1071.

State. Although, in theory, this provision permits a regional Minister to represent a Member State in the Council, such representation is, in practice, problematic. From the perspective of the UK Government, for example, regional representation may be problematic, given that a Northern Ireland Minister may not be responsible to an institution representative of his Member State as a whole.[50] But the problem of representation is exacerbated by EU law's failure to oblige the UK Government to address from within the issue of representation. Once again, the neutrality of EU law can be seen in the fact that, while Article 203 EC conceives of a Member State being formally represented by one member on the Council, it does not make any suggestions as to how that member is to be chosen.[51] The result of this neutrality is that Member States may maintain highly centralised arrangements for the internal distribution of power. Such arrangements may deny regional Ministers the power of formal representation in the Council, or they may limit more generally the role of regional institutions within a national delegation in the Council. Either way, there exists under Article 203 EC the potential for regional interests to be denied full representation.

The practical consequences of EU law's reliance on internal constitutional arrangements may be illustrated by reference to the "localisation" principle in Sweden and the "speciality" principle in France. According to the former principle, regional institutions may only deal with matters which pertain to their region and which do not fall within the competence of the state, another regional institution or any other

[50] It is uncertain whether the problem of accountability could be solved through holding the United Kingdom's central institutions responsible for the conduct of a Northern Ireland Minister as a Council member. It has already been envisaged, e.g., that a Scottish Minister may speak for the United Kingdom in the Council with the "UK lead Minister" retaining overall responsibility for the negotiations: see *Scotland's Parliament* (Cm 3658, 1997) p. 17. But such a solution doubtless would highlight rather than resolve the further problem that, as a representative of the United Kingdom, a Northern Ireland Minister might be prevented from expressing Northern Ireland interests divergent from those pursued by the central institutions of the United Kingdom: see V Bogdanor *Devolution in the United Kingdom* (Oxford, Oxford University Press, 1999) p. 280.

[51] The European Parliament has called on Member States which have regions with exclusive legislative competence under their national constitutional law to facilitate the participation of regional representatives in Council consideration in matters falling within their competence: see Resolution of 18 November 1993, *supra* n. 47, para. I of the Preamble. It should also be noted that, in practice, regional ministers from Austria, Belgium, Germany, and Spain have participated in the Council. See M Westlake *The Council of the European Union* (London, Cartermill, 1995) p. 57. However, they participate as "common representatives putting forward collective sub-national positions". See V Bogdanor *supra* n. 46 at p. 280.

institution.[52] According to the latter principle, regional institutions may only deal with matters which pertain specifically to the region rather than being of national interest.[53] The limitations represented by these principles may be reinforced by the tendency of some Member States to treat "European matters" as foreign policy matters[54] and to adopt "realist"[55] conclusions as to the need for national positions in EU decision-making to be unified.[56] In Sweden, for example, municipalities may not interfere with state "foreign policy"[57] or undertake commitments that are binding on the state (unless they have been specifically authorised to do so).[58] Under such circumstances, therefore, members of regional institutions may be excluded by national law from participating in national delegations in the Council of the Union.[59] Consequently, while the traditional distinction between domestic and international may be eroded as a result of EU membership, the neutrality of EU law entails that it need not be fundamentally undermined.[60]

[52] Art. 2(1) of the *Kommunallag* (SFS 1991:900).

[53] R Letteron "Les Aides des collectivités territoriales aux services publics" (1993) *AJDA* 437.

[54] M Keating "Europeanism and Regionalism" in B Jones and M Keating (eds) *The European Union and the Regions* (Oxford, Oxford University Press, 1995) pp. 1 and 12.

[55] See, e.g., J M Grieco *Cooperation among Nations* (Ithaca, NY, Cornell University Press, 1990).

[56] See, e.g., the Common Annex to the *Concordat on Co-ordination of European Union Policy Issues* (Cm. 4444, 1999) as considered above. See also H C Jones *The National Assembly for Wales and the European Union* (Welsh Office, Cardiff, 1998) p. 14. According to F Snyder "Ideologies of Competition in European Community Law" (1989) 52 *MLR* 149, 172, different, conflicting and often contradictory interests may be expressed as "unified" national interests in the Council of the Union.

[57] *Kommunal medverkan i internationella frågor*, Ds C 1986:10. *Cf* the significance for German regions of the importance attached to "imperative reasons of foreign and integration policy" in *Bayerische Staatsregierung* v. *Bundesregierung* [1990] 1 CMLR 649, 651.

[58] Prop. 1977/78:44 *om godkännande av överenskommelse mellan Danmark, Finland, Norge och Sverige om kommunalt samarbete över nordiska riksgränser*.

[59] Indeed, it has been argued that the neutrality of EU law has also served to prejudice the role of established regional institutions where a Member State is negotiating at the EU level, i.e. the process of EU negotiations may lead to a process of "recentralisation": see, e.g., J Biancarelli "La Communauté européenne et les collectivités locales: une double dialectique complexe" (1991) *Revue Française d'Administration Publique* 515, 526. See also M V Agostini "The Role of the Italian Regions in Formulating Community Policy" (1990) *The International Spectator* 87. On the position in the United Kingdom see Bogdanor *supra* n. 46 at p. 278.

[60] P G Cerny "Globalization and other Stories: the Search for a New Paradigm for International Relations" (1996) *International Journal* 617, 624.

The Committee of the Regions

The Committee of the Regions, perhaps more so than any other of the reforms effected by the Maastricht Treaty, may be thought to offer the Northern Ireland Assembly the opportunity to participate directly in EU policy-making. The Committee was established by Article 263 of the EC Treaty and, under Article 265 of the same Treaty, it is to be consulted by the Council or Commission in relation to decisions taken in the fields of education,[61] culture,[62] public health,[63] guidelines for trans-European networks,[64] and cohesion[65] (the Committee, which may also be consulted by the European Parliament, is further to be consulted in all other cases where the Council or Commission considers consultation appropriate). At the same time, the Committee may take the initiative and issue an opinion in cases where it considers such action appropriate. It is thus described as "an institution through which regional and local bodies can officially be involved in drawing up and implementing Community policies"[66] and "included in the legislative process".[67] Indeed, according to the Committee itself, its establishment "enables regional and local bodies to participate, via the Committee of the Regions, in the decision-making process of the European Union".[68]

However, centralised representation of regional institutions in such a body may not necessarily constitute an adequate basis for regional participation in EU policy-making. At a practical level, the Committee of the Regions has argued that it should be included in various other committees that are consulted by the Commission. Regional representatives are often excluded from day-to-day EU policy-making,[69] hence the value of such consultation is understood to be that it would ensure

[61] Article 149 EC.

[62] Article 151 EC.

[63] Article 152 EC.

[64] Article 156 EC.

[65] Articles 159, 161 and 162 EC.

[66] Preamble to Declaration 94/209 (OJ 1994 L103/28) winding up the Consultative Council of Regional and Local Authorities.

[67] European Parliament Resolution of 18 November 1993, *supra* n. 47, recital G in the Preamble.

[68] Opinion of 17 May 1994 (OJ 1994 C217/10) on the Draft Notice from the Commission Laying Down Guidelines for Operational Programmes which Member States are Invited to Establish in the Framework of a Community Initiative Concerning Urban Areas, para. 4 of the Preamble.

[69] e.g., with regard to the use of EU funds. See J Scott *Development Dilemmas in the European Community* (Buckingham, Open University Press, 1995) p. 34.

that the views of individual regions affected by EU policies would be more readily "heard".[70] But beyond such practical considerations, there exists the much more fundamental problem that regional institutions may not even be guaranteed representation in the Committee of the Regions. In particular, the requirement proposed by the Commission that membership of the Committee should be limited to those holding elective office at regional or local level[71] was excluded from the final version of the EU Treaty.[72] The reason for the exclusion of the requirement was, according to the Commission, that "the Member States have very different institutional structures which are exclusively within their purview".[73] The result of this respect for state sovereignty, however, is that the "autonomy" of members of the Committee in relation to the central institutions of their Member State may be uncertain.[74] Once again, therefore, the neutrality of EU law seems to have the potential to frustrate Northern Ireland's fuller participation in the EU decision-making process.

Possible future reforms

The fact that the institutional reforms effected by Maastricht have failed fully to guarantee regional and sub-national participation in the policy-making process raises the question of how EU law may be reformed in future. The dilemma facing the EU is essentially one of finding the most appropriate point of institutional balance between the need for representative government and the need for effective government. Regional participation in each and every decision taken in areas of regional concern would likely "overload" the institutional process to such an extent that effective decision-making would become

[70] Opinion of 17 May 1994 (OJ 1994 C217/26) on the Proposal for a Decision Laying Down a Series of Guidelines on Trans-European Energy Networks, para. A.5.1. See, more particularly, regarding EU decisions in the field of fisheries policy, the Opinion of 16 July 1998 on the future of peripheral areas in the EU (CdR 23/98) para. 8.6.

[71] Article 198a(2) of the draft TEU prepared by the Commission (Bull. EC, Supp. 2/91, 178). See, similarly, the position of the European Parliament in its Resolution of 18 November 1993, *supra* n. 47, para. 9.

[72] The members of the earlier Consultative Council of Regional and Local Authorities were required to be so qualified. See Art. 3(1) of Declaration 88/487 (OJ 1988 L247/23) setting up the Council.

[73] Commission Reply by Mr Millan to WQ 1405/92 (OJ 1993 C16/15) by Mr Sotiris Kostopoulos.

[74] M Vellano "Coesione economica e sociale e ripartizione di competenze: le nuove iniziative comunitarie" (1995) *RDE* 193, 195.

impossible. But equally, the fact that contrasting regional opinions may not fully be heard suggests that, in the absence of further reform, the EU may face an increased legitimacy crisis.[75]

One option is EC Treaty amendment. In particular, consideration may be given to amendment of Article 230 EC. Article 230 EC provides for review of the legality of measures adopted by EU institutions. According to this provision, Member States enjoy "privileged" standing before the European Court of Justice. Regional institutions, however, are "non-privileged" applicants which may challenge only those EU decisions that are specifically addressed to them or are of "direct and individual concern" to them. The European Courts' approach[76] to the standing of non-privileged applicants has, on balance, tended to be restrictive,[77] and the result has been for regional access to the review process to be limited.[78] Indeed, the problems encountered by regional institutions may be exaggerated because, in the absence of a clear mandate from the EU legislature for the European Courts to do otherwise, the Courts tend to "individualise" the effects of EU enactments by reference to market interests.[79]

Article 230 EC may need to be amended, therefore, to entitle regional institutions to challenge before the European Courts the legality of EU enactments which disregard regional interests recognised by EU law.[80] The understanding that review proceedings can provide an alternative "democratic" forum has long been recognised in other contexts,[81] and

[75] G de Búrca "The Quest for Legitimacy in the European Union" (1996) 59 *MLR* 349.

[76] Review actions brought by non-privileged applicants have, since 1993, been heard by the Court of First Instance: see Council Decision 93/350/EEC, OJ 1993 L144/21. The ECJ continues to hear actions initiated by privileged applicants.

[77] An approach most famously associated with Case 25/62 *Plaumann & Co* v. *Commission* [1963] ECR 95. For criticism of the ECJ's approach see, e.g., C Harlow "Towards a Theory of Access for the European Court of Justice" (1992) 12 *YEL* 213.

[78] Case 222/83 *Municipality of Differdange* v. *EC Commission* [1984] ECR 2889. It should be noted that regional institutions may have the opportunity to intervene in proceedings before the European Courts (see, e.g., Case T–194/95 *Intv I Area Cova SA* [1996] ECR II–591). However, given that an intervener has to accept the case as he finds it at the time of the intervention (Art. 93(4) of the Rules of Procedure of the ECJ (OJ 1991 L176/7)), a regional institution may be precluded from raising arguments of specific relevance to the region.

[79] Case C–321/95P *Stichting Greenpeace Council (Greenpeace International)* v. *EC Commission* [1998] ECR I–1651.

[80] e.g. in relation to cohesion or environmental protection. See, e.g., Case C–2/90 *Commission* v. *Belgium* [1992] ECR I–4431, I–4480. See in the same connection, Case C–155/91 *EC Commission* v. *EC Council* [1993] ECR I–939.

[81] See, e.g., D Feldman "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55 *MLR* 44.

a system of open access for regional institutions might, without overloading the broader institutional framework, provide for a form of residual participation.[82] More importantly, the knowledge that such challenges would be possible might be expected to lead central institutions of Member States to take account of regional interests when participating in EU decision-making. Under those circumstances, the result would be for regional institutions to enjoy something approximating the kind of autonomy assumed by the literature on multilevel governance and the coupling of decision-making arenas.

The need for "amendment" is also apparent beneath the level of the EC Treaty. EU legislation governing the Structural Funds, for example, provides for decision-making under the legislation to be based on a partnership.[83] This partnership is defined in the legislation as "close consultation . . . between the Commission and the Member State, together with the authorities and bodies designated by the Member State within the framework of its national rules and current practices, namely: the regional and local authorities and other competent public authorities, the economic and social partners, and any other competent bodies within this framework". It must, according to the legislation, "be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners".[84] The legislation thus seeks to facilitate participation of regional institutions in EU decision-making, but it also seeks to avoid challenging national law provisions which may preclude their effective participation.[85]

The desirability of reassessing the EU's understanding of partnership has been recognised by the European Commission. According to the Commission, the Council wrongly watered down its 1993 proposals for greater participation by regional actors.[86] In particular, the

[82] Although, of course, there remains the question of whether the European Courts would wish to become involved in essentially political disputes. On the ECJ's role as an institutional actor see, e.g., G de Búrca "The Principle of Subsidiarity and the Court of Justice as an Institutional Actor" (1998) 36 *JCMS* 217.

[83] Article 8 of Regulation 1260/1999 (OJ 1999 L161/1).

[84] *Ibid*. Art. 8(1).

[85] See, regarding "unequal" partnership, the COR Opinion of 19 November 1997 (OJ 1998 C64/5) on the Views of the Regions and Local Authorities on Arrangements for European Structural Policy After 1999, para. 3.6.1. Note also that this latter feature of EU legislation is tacitly recognised by the ECJ which defines partnership as "a kind of dialogue . . . between the Commission and the Member State concerned": Case C–303/90 *France* v. *EC Commission: Code of Conduct* [1991] ECR I–5315, I–5338 (per AG Tesauro). Such a definition does not guarantee, or imply, a role for regional institutions.

[86] Explanatory Memorandum to the Re-examined Proposals of 15 July 1993 (COM(93)379) p. 2.

Commission criticised the Council for stipulating that regional participation must take place "within the framework of each Member State's national rules and current practices" and "in full compliance with the respective institutional, legal and financial powers of each of the partners". For the Commission, partnership should ensure that decisions regarding the use of EU funds are made collectively by all those involved, notably the Commission, the Member States, and the regional institutions concerned.[87] However, the placing partnership within the framework of EU-Member State relations, means that the "mobilisation" of regional institutions, social partners, and non-profit-making organisations has often been inadequate and always too formal.[88] Consequently, while the Structural Funds may be of great importance to Northern Ireland, the Northern Ireland institutions may have only limited opportunities to participate in the system of "partnership" associated with the Funds.

In this context, therefore, EU legislation might be amended to protect such decision making against unduly restrictive national rules and practices. At the very least, the application of national legislation restricting regional participation in such decision-making should have to be justified by reference to much more than simply the requirements of state sovereignty. Possible justifications might still be found in the obligation of the EU to respect the national identities of Member States.[89] To the extent that no such justification was established, however, the Commission and regional institutions should be free to adopt decisions on cohesion unhindered by national legislation restricting the role of regional institutions in such decision-making. To the same extent, the relationship between such decision-making and Council decision-making might become horizontal rather than being determined by the hierarchical supremacy of Council decision-making.

[87] *Community Structural Funds 1994–9* (COM(93)67) p. 21. In the view of the Commission, the partnership should also incorporate the economic and social partners, such as chambers of commerce, employers, and trades unions, all of whom have a valuable role to play in the success of a region's economy: see Bruce Millan's address to the European League for Economic Cooperation's Conference on "Developing Europe's Regions after 1992: New Ideas for the New Europe" Cleveland, 10 July 1992 (IP92/563).

[88] *Community Structural Assistance and Employment* (COM(96)109) p. 26. Even Interreg programmes may be left to be administered by central institutions. See, e.g., E Meehan "Britain's Irish Question: Britain's European Question? British-Irish Relations in the Context of European Union and the Belfast Agreement" (2000) *Review of International Studies* 83, 92.

[89] Art. 6(3) TEU.

CONCLUSION

This chapter has sought to provide an overview of the legal framework governing the Northern Ireland Assembly's role in EU policy formation. It has suggested that orthodox constitutional and institutional considerations in the United Kingdom and the European Union might serve to limit the Assembly's ability to participate in the policy-making process. Specifically, the chapter has suggested that orthodoxy may deny the Northern Ireland Assembly the degree of autonomy that is prescribed by literature on multilevel governance in the European Union. Multilevel governance literature is premised upon an understanding that different levels of government may interact in a non-hierarchical manner which maximises opportunities for regional and sub-national participation in the policy-making process. Although interaction of this kind was identified as necessary if the Northern Ireland Assembly is to perform a truly representative function, it was suggested that the centralising tendency of UK constitutional law and the neutrality of EU law militate against such interaction. The chapter's core argument, therefore, was that there is a need for reforms that will move the existing legal framework "beyond orthodoxy".

It may be many years before a new orthodoxy emerges in UK law and EU law. Indeed, the emergence of a new orthodoxy in EU law would seem to depend in part upon the emergence of new constitutional understandings within the United Kingdom. The extent to which the Member States control the process of EC Treaty amendment, for example, would suggest that, in the absence of UK constitutional law adopting a more decentralised perspective, it is arguable whether the UK Government would endorse the suggested amendment of Article 230 EC. UK policy is clearly premised upon the need to maintain a centralised policy line, and greater access to Article 230 EC actions would only weaken the centralised approach by allowing "the Northern Ireland institutions" to raise issues of specific regional concern. For that reason, central government enthusiasm for amendment of Article 230 EC may be limited.

The development of an enhanced institutional role for the Northern Ireland Assembly, therefore, clearly depends upon internal developments in UK law. In this regard, the chapter has suggested that the potential to move beyond orthodoxy might already be said to inhere in the British-Irish and North/South Ministerial Councils. The chapter's argument in this regard may, of course, prove to be ill-founded.

However, if the argument is not ill-founded, the creation of the Councils, when set beside related institutional developments in the United Kingdom, may, through time, lead to a demand for a recasting of orthodoxy. The Belfast Agreement that gave rise to these bodies is only one part of a much wider process of change. The devolution of power to Scotland and Wales, for example, has created other institutional dynamics that will interact with, and maybe overtake, the specific dynamics of the Northern Ireland settlement. Indeed, it has already been argued by other commentators that devolution has initiated a process which can only lead to fundamental change in the institutional balance of the United Kingdom.[90] Consequently, while the objective of instruments such as the *Concordat on Co-ordination of European Union Policy Issues*[91] is the maintenance of a unified UK policy line, it might be expected that such centralised approaches will become increasingly difficult to justify and sustain in future years.

[90] e.g., R Brazier "The Constitution of the United Kingdom" (1999) 58 *CLJ* 96.
[91] (Cm 4444, 1999).

4

Equality

CHRISTOPHER MCCRUDDEN

INTRODUCTION

IN NORTHERN IRELAND talk of equality and human rights has often been ignored or marginalised. It has been perceived by too many in positions of power as divisive, as ignoring "the real problems", even as subversive. During 1998 something remarkable happened. Discussions about equality and human rights moved from the margins into the mainstream. The Good Friday Agreement, drawing on the best international and European practice, identified equality and human rights as a central element in a new constitutional settlement. The purpose of this chapter is to discuss this sea change and what happened subsequently. Following the Agreement, there was a real danger that equality would be pushed back to the margins. However, as we will see, a coalition of the disadvantaged and politicians ensured that this did not happen.

The chapter focuses on four aspects: first, the emergence and development of the equality agenda in Northern Ireland from the initial anti-discrimination legislation to the development of "mainstreaming" as a political and legal approach to equality; secondly, the convergence of the political and equality agendas in the negotiations leading up to the Agreement; thirdly, the strengthening of the equality agenda in the Agreement and its subsequent incorporation into the Northern Ireland Act 1998, the legal basis for the new constitutional settlement in Northern Ireland; fourthly, the major developments in the area of equality from the enactment of this legislation until the second anniversary of the Agreement. But first, what does mainstreaming equality mean?

In essence "mainstreaming" is the principle that equality be seen as an integral part of all public policy-making and implementation, rather than something separated off in a policy or institutional ghetto. The

concept has emerged from several sources, of which the most important are debates about how best to advance women's equality. One early, 1980s, source was the attempt to integrate gender issues into policy-making in the area of development assistance, such as lending by the World Bank or decision-making in the United Nations Development Programme.[1] Since then, the concept has been adopted in ever expanding areas. Mainstreaming was adopted as a policy goal at the Fourth United Nations world conference on women in 1995.[2] More recently, the European Commission has become involved in developing such approaches in Europe.[3] The Council of Europe convened a group of specialists on mainstreaming in February 1996; their report in March 1998 presented a conceptual framework, a methodology for conducting mainstreaming, and a discussion of "good practice" in the area.[4] At the national level also there are examples of mainstreaming policies, some already in existence, some in embryo, in the Netherlands, Sweden, Denmark, Flanders, Portugal, Finland, Ireland, Canada, Australia, and New Zealand.[5]

We shall see below that the concept is not free of ambiguities and problems, some of which are brought into greater clarity by the experience of constitutionalising mainstreaming in Northern Ireland. The Northern Ireland model is unusual, if not unique, in two respects. First, the mainstreaming undertaken goes beyond gender. In particular, it focuses attention on equality between the two religio-political communities in Northern Ireland as well as several other groups. Secondly, it is underpinned by a firm legal foundation. How did this come about? To understand fully the development of mainstreaming in Northern Ireland, we need to begin the story much earlier, with the civil rights movement of the late 1960s.

[1] Shahra Razavi and Carol Miller *Gender Mainstreaming: A Study of Efforts by the UNDP, the World Bank and the ILO to Institutionalize Gender Issues* (Geneva, United Nations Research Institute for Social Development, 1995).

[2] United Nations Report of the Fourth World Conference on Women (UN DOC A/Conf.177/20, 1995).

[3] European Commission *Equal Opportunities for Women and Men in the European Union 1996* (1997) pp. 15–20.

[4] Council of Europe, Rapporteur Group on Equality between Women and Men, *Gender Mainstreaming* (GR-EG (98), 1 March 26 (1998)).

[5] Christopher McCrudden "Mainstreaming Equality in the Governance of Northern Ireland" (1999) 22 *Fordham International Law Journal* 1696–1775.

DEVELOPING AN ANTI-DISCRIMINATION AGENDA IN NORTHERN IRELAND

The Northern Ireland civil rights campaign of the 1960s focused on the need to eradicate discrimination between Catholics and Protestants.[6] This movement led to some action by the then Northern Ireland Government, but anti-discrimination legislation as such began after the Northern Ireland Government was suspended in 1972 and "direct rule" was introduced. The Northern Ireland Constitution Act 1973 made it unlawful for a public authority carrying out functions relating to Northern Ireland to discriminate, or to aid or incite another person to discriminate, against a person or class of person on the ground of religious belief or political opinion. Two features of the Act's approach are important. First, it protected from discrimination only in the religio-political context. Secondly, it protected only from direct discrimination, that is (to put it somewhat over-simplistically) discrimination which arises from an intentional act. There was, as a consequence, little litigation under these provisions.

The second major development in anti-discrimination legislation was in the area of employment. A government committee (the Van Straubenzee Committee) considered the question of discrimination in the private sector of employment in 1973 and produced a penetrating report.[7] The Fair Employment Act 1976 partially implemented this report, and addressed also employment in the public sector. A Fair Employment Agency was established to enforce the legislation in 1977. However, the legislation had little effect on employers' practices. Research carried out by the Policy Studies Institute in 1987 showed that the vast majority of employers believed that the Act had made little, if any, impact on their behaviour.[8] The research also confirmed the extent of the economic inequality between the two communities in Northern Ireland. According to the PSI study, for example, Catholic male unemployment, then at 35 per cent, was two and a half times that

[6] *Disturbances in Northern Ireland: Report of the Commission appointed by the Governor of Northern Ireland* (Cmd 532, 1969).

[7] *Working Party on Discrimination in the Private Sector of Employment: Report and Recommendations* (the Van Straubenzee Report) (Belfast, Ministry of Health and Social Services, HMSO, 1973).

[8] David Smith and Gerald Chambers *Inequality in Northern Ireland* (Oxford, Clarendon Press, 1991).

of Protestant male unemployment, and continued at this level despite there being over 100,000 job changes a year.

From the mid-1980s, inequality of opportunity between Catholics and Protestants again became a key political issue, largely due to pressure from outside Northern Ireland. A campaign was begun in the USA to bring pressure to bear on American corporations, state legislatures and municipal governments with investments in Northern Ireland to adopt a tougher set of anti-discrimination principles (called the "MacBride Principles") and sought to encourage employers to engage in affirmative action.[9] The MacBride campaign met with opposition from the British Government, but proved popular with American state and city legislators. A number of states enacted legislation requiring American companies in which they invested to ensure fair employment practices in their Northern Ireland subsidiaries. This American campaign began to fill, however partially and inadequately, the vacuum caused by the failure of institutions in Northern Ireland to address the issue adequately.

Partly in response, in 1986 the Northern Ireland Department of Economic Development proposed new legislation that offered hope of a more robust approach, but the proposals, emphasising voluntary compliance, fell short of what was likely to be effective.[10] In October 1987 the Standing Advisory Commission on Human Rights (SACHR) published a major report providing a comprehensive and authoritative analysis of the problem and a detailed set of proposals for legislation and other government initiatives.[11] Crucially the report shifted the terms of the debate from the eradication of prejudiced discrimination to the reduction of unjustified structural inequality in the employment market, whether caused by discrimination or not. In December 1988 the Government responded by publishing new legislation. After significant amendments this was passed in July 1989.[12] The new Fair Employment Act 1989 marked a departure from existing approaches, emphasising compulsory rather than voluntary compliance, giving

[9] Christopher McCrudden "Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?" (1999) 19 *Oxford Journal of Legal Studies* 167–201.

[10] Department of Economic Development *Equality of Opportunity in Northern Ireland: Future Strategy Options* (Belfast, HMSO, 1986).

[11] SACHR *Religious and Political Discrimination and Equality of Opportunity in Northern Ireland: Report on Fair Employment* (Cmd 327, 1987).

[12] Christopher McCrudden "The Evolution of the Fair Employment (Northern Ireland) Act 1989 in Parliament" in R J Cormack and R D Osborne (eds) *Discrimination and Public Policy in Northern Ireland* (Oxford, Oxford University Press, 1991).

broader powers to the enforcement agency (the Fair Employment Commission), and requiring limited affirmative action and compulsory monitoring. The Act adopted many, but by no means all of the SACHR Report's Recommendations.

In some respects, the requirements of the legislation were far-reaching and certainly ahead of their time in comparison with the rest of the United Kingdom. The main features of the legislation, until substantially amended in 1998 (see below) were that individual complaints of religious and political discrimination in employment were made to the Fair Employment Tribunal, a specialised wing of the industrial (now employment) tribunal system in Northern Ireland. Unlawful discrimination was defined to include both direct and indirect discrimination. The Fair Employment Commission (FEC) might assist complainants in taking such complaints. Remedies included damages (except for unintentional indirect discrimination) and recommendations for action by the employer for reducing the adverse effect on the complainant of any unlawful discrimination.

There were several exceptions to the general prohibition of employment discrimination, including exceptions for various types of affirmative action: training to remedy under-representation; encouraging applications from an under-represented community; and agreed redundancy schemes to preserve progress made under affirmative action measures. Another important exception provided that discrimination which was necessary for safeguarding national security or for protecting public safety or public order was not unlawful. The Act provided that the Secretary of State's certificate was conclusive evidence that an act was done for these purposes.

In addition to providing a means of resolving complaints of unlawful discrimination, the legislation established a detailed regulatory structure to ensure that employers took action without the need for a complaint to trigger action. Many private sector employers (those specified in delegated legislation) were required to register with the Fair Employment Commission. Public sector employers were deemed to be automatically registered with the Commission. Registered employers were required to monitor the religious composition of their full-time workforce. Larger employers (those with more than 250 employees) and all public sector employers were required to monitor the religious composition of applications for employment. A monitoring return had to be completed yearly. Employers had to classify existing (and where relevant, prospective) employees by sex, religion and occupation.

Religion might be determined either by reference to the school(s) attended or by directly asking the employee or applicant, or by using other specified methods. This monitoring return must be submitted to the Fair Employment Commission. Although not provided for by the Act, the Fair Employment Commission decided soon after the Act came into force to publish regularly an overview of the results of monitoring.

Employers were also under a duty periodically (every three years) to review their employment practices (excluding redundancy) for the purpose of determining whether members of each community were enjoying, and were likely to continue to enjoy, fair participation in employment in the concern. Where fair employment was not evident, employers were required to engage in affirmative action. Affirmative action was also enforceable by the Commission, as was the setting of goals and timetables against which to measure progress. Government contracts and grants might be withdrawn in cases of persistent and recalcitrant behaviour.

The FEC had the power to review patterns and practices in employment and where necessary to issue directions which were enforceable on employers. Appeals against such directions were heard by the Fair Employment Tribunal. The Commission was also able to accept binding agreements from employers which were enforceable if not complied with. The Commission was able to revise the Code of Practice, the first version of which was produced by the Department of Economic Development.

This basic structure remained substantially unchanged between 1990 and 1998. However, several changes of detail were introduced. In particular, in 1991, the 1989 Act was amended to introduce a revised approach to the confidentiality of monitoring information. The revised approach generally preserved the confidentiality of monitoring information, but permitted the disclosure of this otherwise confidential information to several statutory bodies (including the FEC), and the Fair Employment Tribunal. The legislation was also amended in 1994 to remove the limit on compensation which might be awarded by the Fair Employment Tribunal.

Aside from these provisions regarding discrimination and employment equality between the two religio-political communities, from 1976 Northern Ireland adopted equivalent measures to those dealing with sex discrimination and equal pay as those adopted in the rest of the United Kingdom. Provisions dealing with discrimination on the

basis of race were much longer delayed. Although the main legislation addressing racial discrimination in the rest of the United Kingdom had been passed in 1976, it was not until 1997 that the equivalent legislation was enacted for Northern Ireland.

"POLICY APPRAISAL AND FAIR TREATMENT" (PAFT)

Anti-discrimination law (even of the breadth of the fair employment legislation) was, however, gradually perceived as insufficient to achieve the substantial change that the 1987 SACHR Report had defined as necessary. In its Second Report in 1990, SACHR argued that the Government should establish machinery that would monitor the impacts of legislation, policy and administration on equality of opportunity and on relations between the two sections of the community.

Another development at this time involved the reform of "community relations" policy making within the Northern Ireland Office. In September 1987 Tom King, then Secretary of State for Northern Ireland, announced the establishment of a Central Community Relations Unit within the Central Secretariat of the Northern Ireland Office. The purpose of this reorganisation, according to the announcement, was to ensure that in "every decision we take, whether it is in the fields of housing, education, planning or employment, or any other fields of government, . . . we have taken into account any community relations aspects there may be".[13] The new unit would coordinate all Northern Ireland policy-making. In discussions with the Northern Ireland Office before the new initiative was announced, SACHR was informed that it was intended that a senior officer in each department would be made responsible for examining policies and proposals in relation to their community impact. If, in the view of that officer, any such policy or proposal might have a disparate community impact, the matter could be taken to the Permanent Secretary and ultimately to the Secretary of State for decision.

More generally, British administrative policy in the rest of the United Kingdom was becoming more favourably disposed to attempts to engage systematically in "policy appraisal", and to "mainstream" other policies in government.[14] Since the 1980s regulatory impact

[13] "Secretary of State takes Direct Responsibility for Community Relations Matters", Northern Ireland Information Service, 8 September 1987.

[14] McCrudden *supra* n. 5.

assessments had often been required, as had occasional cost/benefit analyses of proposed projects. In addition, "proofing" government policy proposals to ensure compliance with certain obligations was becoming more common.

All these elements contributed to the announcement by the Government in 1990 that a non-statutory policy of "equality proofing" would be introduced in Northern Ireland. A circular was issued giving advice to all Northern Ireland departments about the need to consider discrimination in relation to religious affiliation, political opinion and gender.[15] This was coordinated with an initiative launched in the United Kingdom by the ministerial group on women's issues that encouraged all government departments to develop basic guidance on equality proofing throughout the United Kingdom.

There were several years of controversy over the content of the guidelines in Northern Ireland, including the failure to cover areas such as race, disability and age. Revised and more inclusive guidelines, renamed the Policy Appraisal and Fair Treatment guidelines (PAFT), came into effect in January 1994. The groups coming within the scope of its guidelines went beyond the two religious communities, and included people of different gender, age, ethnic origin, marital and family status and sexual orientation, and the disabled. PAFT was an attempt to establish a procedure within government decision-making by which the principles of equity and equality could be made effective. "Equality and equity", it said, "are central issues which must condition and influence policy making in all spheres and at all levels of Government activity".[16] We can see here the crucial shift from an anti-discrimination to a mainstreaming approach. But little detailed guidance was given to departments or other public bodies as to how to accomplish this task, although a commitment was subsequently given that the Annual Report on PAFT implementation by the Central Community Relations Unit (CCRU) would be published, providing a degree of transparency to the process.

There were, moreover, a number of unresolved ambiguities. First, it was unclear how far the Government was willing to go beyond action of an anti-discrimination kind. Secondly, it was unclear whether the initiative was much more than "window dressing" in response to political pressure, particularly from the USA. Thirdly, many aspects of the

[15] Central Secretariat Circular, *Equal Opportunity Proofing: Guidelines* (January 1990).

[16] Central Secretariat Circular, *Policy Appraisal and Fair Treatment* (May 1993).

guidelines—the stress on the UK context, their inclusiveness, the use of international human rights language and concepts—seem to have been designed to make more acceptable to civil servants and public opinion an initiative whose primary rationale was the need to tackle Catholic disadvantage.

The inclusive, broad and radical-sounding nature of the initiative raised expectations that proved difficult to satisfy in practice. Unlike the equivalent guidelines in the rest of the United Kingdom, the PAFT guidelines were available from government on request and were widely circulated by NGOs among the relevant groups. Perhaps naively, they took the PAFT guidelines at face value, expected fairness, and behaved accordingly. When the promise was not delivered, unsurprisingly, they mobilised. The guidelines were soon embroiled in public controversy. Unison, the public sector trade union, took judicial review proceedings against one of the public bodies that intended to privatise its services on the grounds that to do so discriminated against women. The judicial review was ultimately unsuccessful, but two things emerged. First, the PAFT guidelines had not formally been issued to the public body concerned, which was a considerable embarrassment for the government. Secondly, the court held that, had the guidelines been issued properly, the public body would have been legally required to take them into account. This appeared to give the guidelines a legal status, something that had hitherto not been clear.

It became clear later, however, that while departments had to take the guidelines into account, once they did so, it would be difficult to contest their decision legally, whatever the result of that consideration—in short that PAFT was legally enforceable procedurally, but not substantively. However, the effect of all this was to raise the political status of the guidelines in the eyes of both the public bodies and departments to which they applied and the campaigning groups. In a sustained attempt to encourage groups to use the guidelines, the Committee on the Administration of Justice (CAJ), a Northern Ireland human rights NGO, organised briefing sessions on the guidelines for a range of interested voluntary and community organisations. The NGOs responded with enthusiasm. A loose coalition was born that was dedicated to putting PAFT into effect.

Meanwhile, another factor played an important role in making PAFT a major focus of political interest. During the passage of the Fair Employment Act 1989, the Government committed itself to conducting a formal review of the operation of the legislation and other

government policy in this area within five years of its commencement. Originally, this task was given to the CCRU within the Northern Ireland Office, the government department responsible for Northern Ireland, but responsibility was later transferred to SACHR. SACHR commissioned research into several areas of government policy as part of its enquiry. Particularly important among this research was a short but highly critical piece on the operation of PAFT, which showed that PAFT appeared to be largely ignored by substantial sections of the policy-making apparatus of government.[17] Increasingly, the focus of political attention shifted from concern about the operation of the Fair Employment Act narrowly conceived, to the ineffectiveness of the policy that had been seen as a necessary complement to the legislation—PAFT.

EMERGENCE OF ALTERNATIVE MODELS OF MAINSTREAMING

The potential for a mainstreaming approach to impact significantly on inequality, combined with evidence of the lack of such impact in practice, contributed to pressure for reform. Unison, the union involved in the initial judicial review, commissioned the author to prepare a study on reform of PAFT. A discussion paper, *Mainstreaming Fairness*, was produced which set out various options and raised questions for further consideration.[18] A possible model for a statutorily-based PAFT was tentatively suggested to stimulate debate. The proposals included provision for a statutory duty to be imposed on the Secretary of State and on public bodies to ensure that material inequalities between certain groups should be progressively reduced.

In November 1996 the Committee on the Administration of Justice (CAJ), the human rights NGO which had taken up the PAFT issue, circulated the paper extensively among opinion formers, trade unions, voluntary groups, lawyers, politicians, and civil servants in Northern

[17] Robert Osborne, Anthony Gallagher, and Robert Cormack, with Sally Shortall "The Implementation of the Policy Appraisal and Fair Treatment Guidelines in Northern Ireland', in Eithne McLaughlin and Padraic Quirk, (eds), *Policy Aspects of Employment Equality in Northern Ireland,* Employment Equality in Northern Ireland Series, vol. 2 (Belfast, Standing Advisory Commission on Human Rights, 1996) pp. 127–52.

[18] Christopher McCrudden, Committee on the Administration of Justice, *Mainstreaming Fairness? A Discussion Paper on "Policy Appraisal and Fair Treatment"* (Belfast, Committee on the Administration of Justice, 1996).

Ireland, and requested comments. Significantly, one of the earliest responses to the paper was in the form of an extensive discussion by one of the researchers within SACHR.[19] This developed the "Mainstreaming Fairness" proposal further, and suggesting the establishment of an Equality Commission to oversee public sector application of equality proofing mechanisms.

In early 1997 the Government responded to both papers with a detailed critique.[20] Prominent civil servants had earlier expressed concern at the growing pressure to give legislative force to PAFT.[21] Now, a sustained attack was mounted against the idea. It was argued that the proposals would "effectively constitutionalize [*sic*]" the equality aspiration in a manner which "would seek to dictate the socio-economic policies of future governments, irrespective of electoral mandates or budgetary constraints",[22] and that the emphasis on consultation and external participation could undermine representative democracy. Other concerns were also raised, including the bureaucratic burden and extra costs in implementing PAFT.

Despite these objections, the Mainstreaming Fairness proposal was substantially taken up by SACHR and became one of its central recommendations for reform. SACHR reported in June 1997, criticising the existing implementation of PAFT and making detailed recommendations for a revised scheme.[23] The Report recommended, as a minimum, that a number of measures should be incorporated into the PAFT system. These included, "effective political control over, and responsibility for, the policy on both direct and indirect effects on equality generally and community differentials in particular", "adequate monitoring of both the direct and indirect impacts of policy on community differentials, and other equality measures", "full consideration of alternative policies which might give effect to government

[19] Nigel Hutson *Policy Appraisal and Fair Treatment in Northern Ireland: A Contribution to the Debate on Mainstreaming Equality* (Belfast, Standing Advisory Commission on Human Rights, 1996).

[20] *Commentary on "Mainstreaming Fairness?—A Discussion Paper on Policy Appraisal and Fair Treatment" by Dr Christopher McCrudden and on "Policy Appraisal and Fair Treatment in Northern Ireland: A Contribution to the Debate on Mainstreaming Equality"* (Belfast, Committee on the Administration of Justice, 1997).

[21] David Watkins "Comments", in Equal Opportunities Commission for Northern Ireland *Working Towards Equality in the Twenty-First Century: Report of a Conference held on 23 October 1996* (Belfast, Equal Opportunities Commission for Northern Ireland, 1997).

[22] *Ibid.*

[23] SACHR *Employment Equality: Building for the Future* (Cmd 3684, 1997).

objectives but reduce or avoid unwelcome effects on equality generally and community differentials in particular", "greater transparency in the manner in which government policy is assessed" and "greater accountability in the manner in which the civil service and public bodies fulfil their remit to promote equality". More far-reaching still, the SACHR Report recommended that the policy on PAFT be given legislative form, with enforcement based on an internal NIO unit, such as a strengthened CCRU.

THE GOOD FRIDAY AGREEMENT AND EQUALITY

The Good Friday Agreement had a crucial impact on the development of these issues. Up to then the debate had only indirect relevance for, or input into, the search for a constitutional settlement to the conflict. By 1997, however, a new politics was emerging in Northern Ireland that meant that previous approaches to resolving the constitutional problem were to be supplemented with a new concentration on equality. The debate on equality issues, including PAFT, previously separate from the political negotiations, now became entangled with them. In particular, both the revision of the Mainstreaming Fairness proposal, and the British Government's response to the SACHR Report, have to be seen in the context of the peace negotiations which culminated in the Good Friday Agreement.

Several developments affected the ultimate outcome. First, in May 1997, a new Labour Government was elected, committed to breathing new life into the constitutional talks, unencumbered by a unionist veto, and backed by a substantial majority in the House of Commons. Soon after, the IRA resumed its cease-fire. Suddenly it seemed as if a peace settlement might actually emerge. The two issues—equality and the search for a settlement—now became intertwined. For the two Governments, equality issues were perceived as an important part of "confidence building" in the Catholic/nationalist community and, from then on, policy proposals on equality were affected significantly by the talks process.

Secondly, while earlier attempts at establishing peace in Northern Ireland had addressed questions of discrimination and human rights, this time the talks involved parties which had not participated previously and which viewed equality and human rights issues as particularly salient, including Sinn Féin and the various fringe loyalist parties. For

these parties, failure to address successfully equality and human rights issues important to their communities would make it much more difficult for them to "sell" any agreement. Once human rights were identified as an area that was important, particularly to Sinn Féin, it then became important for those who wanted to keep Sinn Féin "on board" to include it in their own proposals. The SDLP, Sinn Féin and the PUP all embraced a reform of PAFT as part of its strategy on equality. So too did the Women's Coalition, which played an important role in keeping the issues to the fore in the negotiations. For the Ulster Unionist Party, equality was either an issue that it considered it could not oppose, or did not consider sufficiently important to make a priority.

Thirdly, there developed outside the formal talks process what the journalist, Mary Holland, called a "parallel peace process", involving an informal coalition of such bodies as the Committee on the Administration of Justice, Unison, the Women's Support Network, and many other community and NGO groups in Northern Ireland.[24] This loose network had contacts within the talks process, in particular through the Women's Coalition, and succeeded in getting at least part of the human rights and equality agenda into the negotiations both before and during the final frenzied days.

Fourthly, the new Labour Government was more comfortable with a strong "rights" approach than the earlier Conservative Government had been. The new Secretary of State, Mo Mowlam, whilst in opposition, had supported draft legislation on equality, and was much closer to the "parallel peace process" than any of her predecessors had been. Before the election she publicly announced that she intended "to make it a statutory duty for government bodies to take equality of opportunity into account through more rigorous enforcement of the Policy Appraisal and Fair Treatment guidelines".[25]

Negotiations on the equality agenda in the talks took place largely in the months of December 1997 to April 1998. In January 1998 the British and Irish Governments published a joint statement—the so-called "Heads of Agreement" paper—setting out their best guess on the bare bones of a settlement. The statement included a paragraph on human rights and equality that envisaged provisions to safeguard the rights of both communities in Northern Ireland "to achieve full respect for the

[24] Mary Holland "Latest Plan to Tackle Inequality Crucial to North Peace" *The Irish Times,* 12 March 1998.

[25] Majorie Mowlam "Towards Genuine Consent in Ulster" *The Independent,* 25 February 1997.

principles of equity of treatment and freedom from discrimination, and the cultural identity and ethos of both communities". The use of the term "equity", rather than the stronger term "equality", met with a hostile response from both nationalist commentators and human rights advocates. This appears to have concentrated Irish Government minds further on the equality issue.[26]

In February 1998 the Committee on the Administration of Justice published a revised proposal by the present author, *Benchmarks for Change*.[27] It proposed replacing PAFT with a statutory obligation to promote equality of opportunity and establishing a strong mechanism within the Northern Ireland civil service to monitor and enforce this obligation. It also envisaged a high degree of involvement by those outside government in the assessment and development of equality issues, including those affected by policy proposals and the statutory equality agencies. The proposal received extensive support across the range of groups most affected. Several of the political parties picked up aspects of it, as did the Irish Government.

The British Government's proposals on equality were set out in the White Paper, *Partnership for Equality*, published in March 1998. From the perspective of what subsequently occurred, two proposals were particularly important. First, the Government proposed a new statutory framework to supersede the PAFT's administrative guidelines. There would be a statutory obligation on Northern Ireland "public sector bodies" (including district councils and UK governemtn departments operating in Northern Ireland, as well as the Northern Ireland departments) to ensure that "consistent with their other responsibilities", their various functions "are carried out with due regard to the need to promote equality of opportunity in those areas covered by the current PAFT guidelines". Each public body would be required to adopt a statutory scheme setting out "how it proposed to take regard of its new statutory obligations in its day-to-day work".

[26] Niall O'Dowd, "Delicate Balance has been Upset by Paper's Pro-unionist Slant" *The Irish Times,* 17 January 1998; Christopher McCrudden "Replacing 'Equality' with 'Equity' shows the Difference a Word can Make" *The Irish Times,* 22 January 1998; Bertie Ahern Speech at Trinity College Dublin, 3 February 1998; Bertie Ahern Statement of An Taoiseach, Mr Bertie Ahern TD on Northern Ireland, Dáil Éireann, 4 February 1998.

[27] Christopher McCrudden, Committee on the Administration of Justice *Benchmarks for Change: Mainstreaming Fairness in the Governance of Northern Ireland* (Belfast, Committee on the Administration of Justice, 1998).

Secondly, the Government proposed, subject to public consultation, to create a new unified statutory authority bringing together the existing Northern Ireland equality agencies: the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Northern Ireland Disability Council. The intention was to provide an institutional mechanism to monitor and enforce the new statutory duty. The new body, external to the civil service, would provide the various public bodies with the assistance necessary to enable them to implement the duty effectively. The proposed amalgamation of the existing bodies was to prove the most controversial element of the White Paper, giving rise to considerable unease amongst the equality bodies themselves (with the exception of the Fair Employment Commission) and many of the NGO groups.

One of the key issues urged on the parties to the negotiations was the centrality of the human rights and equality issues to the success of the peace process. Moreover a consensus emerged that discussion should go beyond a classical, narrow definition of rights centred on political and civil rights, to include social, cultural and economic rights, and that equality issues should be mainstreamed. In the months of negotiation, it also emerged that there was significant support across the political spectrum for the CAJ and SACHR approach to the replacement for PAFT. It was feared that the British Government would seize the opportunity of the negotiations to bolster its, apparently more limited, White Paper proposals with the authority of a peace agreement. Arguments were put to several of the parties to the negotiations to try to prevent this, and to have stronger proposals inserted in the final text.

All this activity was reflected in the "Mitchell Document" that was presented by the Chairmen of the talks at the beginning of April 1998 as a draft paper for discussion. The bones, and much of the flesh of the ultimate Agreement, were in the Mitchell Document, including the sections on equality and human rights. However, some significant changes regarding equality were made to these aspects of the document in the run-up to final agreement on 10 April. Also, the Agreement departed from the White Paper proposals in some important respects.

Two equality agendas were addressed in the Agreement, one national, the other social. The national equality agenda—equal respect for the two different allegiances, Irish and British—was reflected in the institutional provisions designed to ensure fair representation in the Assembly and Executive, and in the establishment of North-South institutions. Beyond these arrangements, however, the parties affirmed

a list of important rights; the right of free political thought: the right to freedom and expression of religion; the right to pursue democratically national and political aspirations; and the right to seek constitutional change by peaceful and legitimate means. A new Bill of Rights, supplementing the European Convention on Human Rights, was envisaged to reflect the principles of "mutual respect for the identity and ethos of both communities and parity of esteem". In addition, there were new obligations on government to encourage the use of the Irish language.

The Agreement was equally forthright and inclusive on social equality and it is on this area that I will concentrate in the remainder of the chapter. The parties affirmed "the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; . . . and the right of women to full and equal political participation". (The references to disability, ethnicity and participation by women were inserted by the negotiators during the final days.)

Provisions governing Ministers in the new Executive Authority, in particular the Pledge of Office, required Ministers "to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination". (This was also inserted in the last few days of the negotiations.) Under the Code of Conduct for Ministers, Ministers were required to "operate in a way conducive to promoting good community relations and equality of treatment". Moreover, an individual "may be removed from office following a decision of the Assembly taken on a cross-community basis, . . . for failure to meet his or her responsibilities including, inter alia, those set out in the Pledge of Office" which included the duty of equality and impartiality.

Pending the devolution of powers to a new Northern Ireland Assembly, the British Government committed itself to pursuing policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life. Subject to public consultation, the British Government would also develop a new regional development strategy for Northern Ireland, for consideration in due course by the Assembly. This would aim to tackle the problems of a divided society and social cohesion in urban, rural and border areas. The Government also planned to introduce "a new more focused Targeting Social Need initiative" and a range of measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.

A new Northern Ireland Human Rights Commission would be established, with membership "reflecting the community balance". This would be established by Westminster legislation, independent of government, with an extended and enhanced role beyond that exercised by the Standing Advisory Commission on Human Rights. Its duties would include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to government, providing information and promoting awareness of human rights, considering draft legislation referred to it by the new Assembly and "in appropriate cases" bringing court proceedings or providing assistance to individuals doing so. It would consult and advise on "the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience". It would also give consideration to offering "a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors". In this respect, the Agreement kept open the possibility that a Northern Ireland Bill of Rights would include the concept of "indirect discrimination" in any new anti-discrimination duty applying to the actions of public bodies in Northern Ireland, an idea which was rejected in the earlier White Paper.

The Agreement noted that "[s]ubject to the outcome of public consultation underway, the British Government intends as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation". Under the Agreement, "[p]ublic bodies [would] be required to draw up statutory schemes showing how they would implement this obligation". As part of the equality duty, they would be required to include "arrangements for policy appraisal, including an assessment of impact on relevant categories". The references to impact assessment and information were added at a late stage of the negotiations. In these respects the Agreement went further than the White Paper.

The Agreement additionally proposed "arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland". The Assembly "may appoint a special Committee to examine and report on

whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights". This had not been included in the White Paper. The Assembly "shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure". It would be "open to the new Northern Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality". These elements, too, were added at a late stage.

The Agreement noted that the British Government proposed to create a new statutory Equality Commission to replace the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Disability Council. Such a unified Commission would "advise on, validate and monitor the statutory equality obligation and will investigate complaints of default". However this proposal, which did not have the support of the negotiating parties or the Irish Government, was "subject to the outcome of public consultation currently underway", a condition which had not been included in the original Mitchell document.

The British Government also undertook, subject to public consultation, to "make rapid progress" with the measures on employment equality included in the White Paper, "and covering the extension and strengthening of anti-discrimination legislation, [and] a review of the national security aspects of the present fair employment legislation . . .".

The new British-Irish Intergovernmental Conference was also given significant human rights responsibilities. Strand Three provided that "[i]n recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border co-operation on non-devolved issues. The Conference . . . will address . . . the areas of rights . . . in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration)".

LEGISLATING THE EQUALITY ASPECTS OF THE AGREEMENT

The Agreement thus contained strong provisions on equality. The question was whether these would be adequately reflected in the implementing legislation. For campaigners, the issue became how to translate what appeared to be a breakthrough at the political level into legislative text. This was to prove a difficult task, particularly in ensuring the effective incorporation of the public sector equality duty that would replace PAFT. The period between the conclusion of the Agreement in April, and the publication of the Bill implementing that Agreement in July, saw 123 submissions on the Government's White Paper of March, *Partnership for Equality*. All but two of these were received after the Agreement was concluded and many took account of the Agreement in their submission. Most endorsed the principle that equality of opportunity should be placed on a statutory basis, though a substantial proportion questioned whether the government proposals would achieve their stated objective. Many also opposed the creation of a unified Equality Commission. These two issues, on which this section concentrates, increasingly dominated public discussion of the equality agenda in this period.

In May, an alternative proposal to that adopted in the White Paper on mainstreaming was submitted to the Secretary of State suggesting that, in the light of the Agreement, several features of the White Paper's proposals should be revised.[28] It argued that the enforcement and monitoring of the equality of opportunity duty on the public sector should be carried out by establishing an effective internal monitoring and enforcement mechanism within the Northern Ireland Civil Service/ Executive. This should be complemented by mechanisms for increased public participation and a role for the existing equality commissions. The powers that the White Paper recommended for the Secretary of State to intervene, where there was a breach of the equality duty by a public body, should be strengthened and clarified. Further research was necessary to assess the effect of the amalgamation of existing equality bodies into one equality body (or into a new Human Rights Commission) before a decision on amalgamation should take place.

[28] Christopher McCrudden, Committee on the Administration of Justice *Equality: A Proposal in the Light of Multi-party Talks Agreement* (Belfast, Committee on the Administration of Justice, 1998).

The Secretary of State announced her decisions on the equality aspects of the Bill on 10 July. Her announcement made it clear that the campaign to modify the Government's proposals on amalgamating the equality commissions into a new Equality Commission had been unsuccessful. The Equality Commission envisaged by the White Paper would be set up. At the same time she was concerned to reassure critics that the White Paper proposals "seemed to pass responsibility for the promotion and oversight of the equality of opportunity obligation to an external body" and stressed that "internal arrangements for co-ordinating, promoting and monitoring the activities of Government Departments and public bodies must also be rigorous and effective".[29] To meet the criticism that issues of religious equality would dominate the working of the new body, she indicated that the legislation would require the Equality Commission to devote appropriate resources to gender, race and disability issues. It would also allow the Commission to establish consultative councils on these issues.

The Secretary of State also responded to public consultations on the White Paper on the matter of the form and content of the equality duty on public authorities. She indicated that several criticisms of the proposals contained in the White Paper "were based on misapprehensions". It was not the intention "to leave substantial areas of discretion to those in the public sector". "To remove any ambiguity, the requirements on the public sector to carry out appraisals of policies, including equality impact assessments, to consult with representatives of interests which might be affected, and to publish information on appraisals, will all be clarified in the Bill".

The Government introduced the Northern Ireland Bill into the House of Commons on 15 July. It received its second reading on 20 July. Clause-by-clause consideration of the contents of the Bill took place (first in Committee, then at Report stage) between then and 31 July when the Bill was given its Third Reading. During the summer, further intensive consultations took place between the Government and interested groups (including the Northern Ireland political parties). The Bill was then given its second reading in the House of Lords on 5 October (again the debate focused on the principles underlying the Bill). This was followed by detailed clause-by-clause consideration of the Bill at the Committee and Report stages on 26 October and 10–11 November respectively. The Lords Third Reading debate took place on

[29] "Secretary of State announces Equality White Paper Decisions", Northern Ireland Information Service, 10 July 1998.

17 November. The next day the Commons considered the Lords amendments, and agreed them. The Bill received the Royal Assent on 19 November 1998 and became law.

The politics of the Bill's passage is important for an understanding of what transpired during the parliamentary phase. The Government commanded a sizeable majority in the House of Commons and there was never any doubt that it could push the legislation through in any form that it wished. Nor was there any serious prospect that the Conservative majority in the House of Lords would choose the legislation implementing the Agreement as a basis for attacking the Government. Indeed, neither in the Lords nor in the Commons did the Conservative opposition appear to have played much of a role in the negotiations surrounding the Bill's passage. The Government Ministers involved were Paul Murphy, MP, in the Commons, and Lord Williams and Lord Dubs in the Lords. Behind Mr Murphy stood the Central Community Relations Unit of the Northern Ireland Office (based in Belfast) and the Northern Ireland Office civil servants in London. The other principal actors on the parliamentary stage, as regards the equality aspects of the Bill, were the Northern Ireland MPs in the Commons, and a few Labour backbenchers. In particular Kevin McNamara, MP, in the Commons and Lord Archer of Sandhill in the Lords both played key roles. Finally, Lord Lester of Herne Hill was the Liberal Democrat front-bench spokesperson on the equality aspects of the Bill in the Lords.

Outside the Houses of Parliament, the main actors were the Northern Ireland political parties, the Irish Government, the statutory equality agencies, and the loose coalition (including such bodies as the Northern Ireland Council on Ethnic Minorities, Unison and Disability Action) that took its cue largely from the briefings of the CAJ. Behind the scenes (only when the Bill was in its final stages was there any attempt to "go public" on these issues), the CAJ and members of the coalition briefed influential figures in the United States Administration and Congress, British parliamentarians, the Irish Government and other NGOs, whilst also being consulted directly by Paul Murphy. Particular attention was paid by the CAJ and the statutory agencies to constructing a sufficient consensus across the Northern Ireland parties to make it difficult for others to argue that the Government should not "take sides" between the parties on these issues. This resulted in several amendments being jointly supported by Ulster Unionists, the SDLP, and Liberal Democrats.

In the Commons Second Reading debate, considerable attention was given to the issue of amalgamation of the existing equality commissions, rather than the issues surrounding the equality duty on public authorities. Both the Secretary of State and Mr Murphy made a strong commitment to engage in further consultations during the summer months after the Bill had left the Commons and to amend the equality aspects of the Bill before consideration in the Lords. During the summer, Paul Murphy consulted extensively on the equality and human rights aspects of the Bill with the political parties represented in the Assembly, the chairs of the existing equality commissions, the CAJ, members of the coalition, and others. As a result of these meetings, it became clear that the Government was prepared to introduce extensive amendments on the equality aspects of the Bill.

On 14 October, a few days before the Committee stage was to begin, Mr Murphy announced the Government's response to the summer consultations on the equality issues in the Bill, and the type of amendments that it would support in the Lords. First, during the summer, confusion had arisen as to the allocation of responsibility for equality issues once powers were devolved to the new Assembly and Executive. The Murphy announcement proposed that the provisions of the Bill on equality (basically the Equality Commission and the equality duty) would be reserved matters. That meant that the Secretary of State would continue to have responsibility for them, although the Assembly would be able to legislate on these issues with the permission of the Secretary of State. However, the existing bodies of law on fair employment, gender equality, race relations and disability discrimination in Northern Ireland would become transferred matters, on which the Assembly would have legislative responsibility. The Bill would be amended, in addition, to ensure that the Assembly would be kept more closely informed on the enforcement of the new statutory equality duty.

Secondly, there was further clarification of the equality duty. The obligation would apply to UK government departments operating in Northern Ireland (including the Northern Ireland Office) as well as to Northern Ireland departments and public bodies. Public bodies would be required to produce equality schemes, without being requested by the Equality Commission to do so, as had been the proposal until then. Greater detail would be included on what would be required to assess the impact of various policies on equality of opportunity. Assessments would include, for instance, consideration of alternatives that would

better promote equality of opportunity. Public bodies would also be required to review their equality schemes on a five-yearly basis.

Some of the amendments introduced by the Government at Committee stage reflected this announcement in a straightforward manner. However, others did not. First, although the amended legislation now imposed a duty on most public authorities to produce schemes, it included the awkward provision that the Equality Commission would have to ask new public authorities to produce a scheme. Secondly, the amendments meant that the Equality Commission would be able to specify that only some functions of a public authority would be affected by the requirement to produce a scheme. Thirdly, there were no amendments requiring several other important aspects of impact analysis, including specification of the aims and purposes of the policy under assessment, specification of alternatives, specification of consultation procedures prior to decision-making and specification of the reasons for the policy eventually adopted by the authority. Nor did the amendments include requirement of a five-yearly review by public authorities of the measures taken to comply with the equality duty. Taken together, the Government's amendments seemed to reflect neither the summer consultations nor the Murphy announcement.

Several other issues had arisen during the summer that needed clarification. First, the consultations indicated that an amendment would be forthcoming which permitted an "affirmative action" exception to the "equality of opportunity" duty on public authorities. There was a concern that, without this, the equality of opportunity duty could be used to argue against measures that aimed at the reduction of disadvantage. There was some evidence that the PAFT guidelines had been mistakenly interpreted by some government departments to undermine just such provisions.[30] There was also a precedent for such an amendment. The Fair Employment Act 1976, which included an equality of opportunity provision, was amended in 1989 to include protection for affirmative action measures. Yet no such amendment appeared. Secondly, the schedule that included the details of the enforcement procedures on the equality duty was potentially ambiguous as to whether the impact of all policies would have to be assessed, or just those policies specifically concerned with equality of opportunity.

[30] Department of Health and Social Services *Policy Development and Review Unit, Review of Charging Policy for Non-Residential Personal Social Services* (Belfast, HMSO, 1997) annex 8.

The Lords Committee stage debate saw a detailed consideration of all the outstanding equality issues. The main challenge to the Government was led by Lord Archer and Lord Lester, both briefed extensively by the Committee on the Administration of Justice, the coalition, the statutory agencies and others. The outcome was that between the Committee stage and Report stage in the House of Lords, the Government came up with many amendments or statements of clarification which met the concerns of those arguing for a more explicit approach, particularly on the equality duty on public authorities. Moreover, where government felt an amendment was unnecessary, interpretative statements by Ministers often indicated why that was so.

THE NORTHERN IRELAND ACT 1998 AND EQUALITY

What, then, was the result of all these amendments and commitments? What does the Northern Ireland Act 1998, as finally passed, require? In this section the provisions of the Act concerning equality are considered. (Other chapters in this book consider the remaining human rights aspects of the Act.) The Act establishes a new Equality Commission for Northern Ireland, to consist of not less than fourteen nor more than twenty Commissioners appointed by the Secretary of State. The Secretary of State is to appoint one Commissioner as Chief Commissioner, and at least one Commissioner as Deputy Chief Commissioner. In making appointments, the Secretary of State is required, as far as practicable, to secure that the Commissioners, as a group, are representative of the community in Northern Ireland.

The Commission takes over the functions of the Fair Employment Commission for Northern Ireland, the Equal Opportunities Commission for Northern Ireland, the Commission for Racial Equality for Northern Ireland, and the Northern Ireland Disability Council, which are abolished. In exercising its functions the Equality Commission is required to aim to secure an appropriate division of resources between the functions previously exercisable by each of these bodies, and to have regard to advice offered by a "consultative council". This will be a group of people selected by the Commission to advise in relation to the functions in question.

The provisions of the Bill on equality—basically the Equality Commission and the equality duty—are to be reserved matters for

which the Secretary of State will have responsibility. The Assembly will be able to legislate on these matters with the permission of the Secretary of State. The existing bodies of law on fair employment, gender equality, race relations and disability discrimination in Northern Ireland will become transferred matters, on which the Assembly will have legislative responsibility. The Bill was amended to reflect this demarcation of responsibility. In addition, further amendments were introduced to ensure that the Assembly will be kept closely informed on the enforcement of the new statutory equality duty.

Important safeguards are included in the Act. All Ministers must affirm the terms of the Pledge of Office set out in the Agreement. This includes a commitment to uphold the Code of Conduct also set out in the Agreement. Potentially, any legislation in the equality area can be made subject to the condition of cross-community support. Also, the Assembly cannot legislate in a way that is incompatible with rights under the European Convention on Human Rights or EU law (which is particularly relevant to gender discrimination issues). Nor may the Assembly legislate in a way that discriminates directly on grounds of religious belief or political opinion. In addition, if the Assembly legislates in a way incompatible with the United Kingdom's international obligations, the Secretary of State may decide not to submit such a Bill for Royal Assent.

Section 75 of the Act provides that each "public authority" is required, in carrying out its functions relating to Northern Ireland, to have "due regard" to the need to promote equality of opportunity between certain different individuals and groups. Many Northern Ireland bodies (Northern Ireland departments, local authorities, and quangos) are automatically included. Other bodies operating in Northern Ireland will have to be "designated" by the Secretary of State, including such bodies as the police, educational institutions, and UK government departments. The relevant categories included are persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; persons with a disability and persons without; and persons with dependants and persons without. Without prejudice to these obligations, a public authority in Northern Ireland is also, in carrying out its functions, to have "regard" to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. Schedule 9 to the Act makes detailed provisions for the enforcement of these duties.

All public authorities included within the definition of public authority are required to submit an equality scheme to the Equality Commission. Only where a public authority has been notified in writing by the Commission that it does not need to, is it exempted from producing such a scheme. In Parliament, concern was expressed at the apparently open-ended power of exemption granted to the Equality Commission. In response, the Government made it clear that it was only in very limited circumstances that the Government envisaged such exemptions being granted by the Commission either to a body entirely, or with regard to particular functions of a body.[31]

An equality scheme must show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant functions, and specify a timetable for measures proposed in the scheme. The Act sets out in some detail (without being exhaustive) what an equality scheme must contain in order to be in compliance with the legislation. The list includes the authority's arrangements for assessing compliance with the duties under section 75, for consulting on matters to which a duty under that section is likely to be relevant (including details of the persons to be consulted), for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity, for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity, for publishing the results of such assessments and such monitoring, for training staff, and for ensuring, and assessing, public access to information and to services provided by the authority. In addition, an equality scheme must conform to any guidelines as to form or content which are issued by the Equality Commission. These guidelines are subject to the approval of the Secretary of State.

The legislation also details what is required in an authority's publishing of its assessments. It must state the aims of the policy to which the assessment relates, details of any consideration given by the authority to measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity, and alternative policies which might better achieve the promotion of equality of opportunity. Also, in making any decision with respect to a policy adopted or proposed to be adopted by it, the authority is required to take into account any such assessment and consultation carried out in relation to the

[31] Paul Murphy, House of Commons, Official Report, 18 November 1998, cols 1068–9.

policy. The Government also made it clear that it expected consultation "to embrace those directly affected by a policy as well as non-governmental organisations and relevant statutory bodies".[32]

What happens after a scheme is submitted for approval to the Equality Commission depends on what type of public body is involved. A distinction is made between Northern Ireland departments and public bodies, and UK-wide public bodies. A "public authority" is defined to include any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 and designated for the purposes of that section by order by the Secretary of the State. The inclusion of these latter bodies, being mainly UK-wide government departments, has resulted in special arrangements being devised relating to the procedures with which they must comply regarding equality schemes.

We describe first what happens in the former case. On receipt of the scheme the Commission must either approve it, or refer it to the Secretary of State. Where the Commission refers the scheme to the Secretary of State, the Commission is required to notify the Northern Ireland Assembly in writing that it has done so and send the Assembly a copy of the scheme. Where a scheme is referred to the Secretary of State he or she has three options: to approve it, to request the public authority to make a revised scheme, or to make a scheme for the public authority. Where the Secretary of State requests a revised scheme, or makes a scheme himself or herself, he or she shall notify the Assembly in writing. Where the Secretary of State has made a scheme for the public authority, he or she is required also to send the Assembly a copy of the scheme.

Certain of these provisions do not apply in the case of UK-wide departments. On receipt of a scheme submitted by a UK government department the Commission shall approve it, or itself request a department to make a revised scheme. Where such a request is made, the government department must, if it does not submit a revised scheme to the Commission in the time provided, send to the Commission a written statement of the reasons for not doing so. The provisions relating to the notification of the Assembly do not apply. Nor do the provisions empowering the Secretary of State to make schemes for the public body directly. These provisions are intended to "avoid a situation where the

[32] Alfred Dubs, House of Lords, Official Report, 11 November 1998, col. 810.

Secretary of State much reach a decision or issue a direction in a case involving her Department or that of a Cabinet colleague".[33]

If the Commission receives a complaint, made in accordance with certain formalities of failure by a public authority to comply with an equality scheme approved by the Commission or made by the Secretary of State, it is required to investigate the complaint, or give the complainant reasons for not investigating. The formalities with which complaints must comply are that the complaint must be made in writing by a person who claims to have been directly affected by the failure. A complaint must also be sent to the Commission during the period of twelve months starting with the day on which the complainant first knew of the matters alleged. Before making a complaint the complainant must bring the complaint to the notice of the public authority, and give the public authority a reasonable opportunity to respond.

In addition to investigating on the basis of a complaint, however, it appears that the Equality Commission itself has power to carry out an investigation into the compliance by the public authority with an equality scheme without having received a valid complaint. Although there is room for doubt, the power to carry out such an investigation appears to be derived from the Equality Commission's general duty to keep under review the effectiveness of the duties imposed by section 75 of the Act. Paragraph 11 of the Schedule, in addition, provided explicitly for the same conditions to be applied to investigations which arise from complaints as investigations which are "carried out by the Commission where it believes that a public authority may have failed to comply with a scheme".

What happens to the results of these investigations depends on the type of public authority involved. Again, a distinction is drawn between Northern Ireland and UK-wide public bodies. In the case of the former, the Commission is required to send a report of both types of investigation to the public authority concerned, the Secretary of State, the Assembly, and the complainant. If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time, the Commission may refer the matter to the Secretary of State. Where a matter is referred to the Secretary of State, the Secretary of State may give directions to the public authority in respect of any matter referred to him. Where the Commission refers a matter to the Secretary of Stare

[33] Paul Murphy, House of Commons, Official Report, 18 November 1998, cols 1068–9.

it shall also notify the Assembly in writing that it has done so. Where the Secretary of State gives directions to a public authority, he or she shall notify the Assembly in writing that he or she has done so.

Somewhat different provisions apply in the case of UK-wide bodies. Certain of these provisions do not apply, particularly those empowering the Secretary of State to give directions to the public authority in respect of its failure to present a scheme. Instead, the Commission may lay before Parliament and the Assembly a report of any investigation regarding compliance with an equality scheme by such a department.

DELIVERING ON THE EQUALITY PROVISIONS OF THE AGREEMENT

The equality provisions of the Agreement represent a major development in the efforts to create a more equal society in Northern Ireland. They constitute a shift from an anti-discrimination to a mainstreaming approach. Before looking at the problems that may arise in implementing this, it is important to stress their innovative nature both in Northern Ireland and international terms.

Governments in North America, Western Europe and the Commonwealth have sought to address the disadvantaged position of ethnic groups, women and other by developing anti-discrimination law in specific areas such as employment or housing, particularly in the private sector. In all countries of Western Europe, and much of the Commonwealth, such legislation is now in place. The Northern Ireland experience suggests, however, that while such legislation is necessary, it is insufficient by itself. The legislation is essentially negative, aiming to prevent discrimination, rather that positively to promote equality. There is, moreover, growing concern in many countries about the extent to which anti-discrimination norms are practically effective.[34] Attempts have been made to develop mechanisms to ensure greater compliance, for instance by creating specialised bodies tasked with enforcement, but these often have little effect on key government decisions. There have also been attempts to develop policies that bring the weight of government to bear more directly, for example, by making government contracts and grants to the private sector conditional on implementing equality policies. However, their influence touches only a limited sphere of activity.

[34] Alfred W Blumrosen *Modern Law: The Law Transmission System and Equal Opportunity* (Madison, Wisconsin, University of Wisconsin Press, 1993).

In this chapter we have been examining an attempt to go several steps further to require government and public bodies to weave policies of equality and non-discrimination into the fabric of decision-making across all spheres of government—in short, to "mainstream" fairness issues in public policy. This attempt is particularly important if the problem is defined, as it increasingly is, as involving not only the problem of "discrimination", but the larger issue of unacceptable inequalities affecting women and particular minority groups, whether caused by discrimination or not.

This is not to underestimate the importance of securing the effectiveness of traditional anti-discrimination legislation. One of the first commitments in the Agreement to be honoured following the Northern Ireland Act 1998 was the promised reform of the fair employment legislation. In December 1998, a new Fair Employment and Treatment (Northern Ireland) Order was published and laid before Parliament, implementing many of the proposals announced in the White Paper. As an Order made under the Northern Ireland Act it was not subject to the degree of parliamentary scrutiny to which ordinary legislation would be subject. It was debated briefly on 7 December 1998 in the House of Lords,[35] and considered by the House of Commons Standing Committee on Delegated Legislation.[36] In several respects, the new legislation more closely resembled that which SACHR had advocated in its 1987 Report that had the 1989 legislation.

In brief, the new Order[36a] repealed the 1976 and 1989 Acts whilst substantially re-enacting major parts of the previous scheme, although with those significant changes set out in the White Paper, *Partnership for Equality*. The major changes enacted included provisions which broaden the scope of the legislation to prohibit unlawful discrimination on the grounds of religious beliefs or political opinion in goods, facilities and services, including the sale of land (subject to the limitation that land sales not publicly advertised are excluded from coverage). The scope of monitoring returns and triennial reviews was broadened in several respects: by increasing the number of employers which must register with the FEC; by including part-time workers within the scope of a new definition of employee; by requiring all reg-

[35] House of Lords, Official Debates, vol. 595, 7 December 1998, cols 755–74.

[36] House of Commons, Fourth Standing Committee on Delegated Legislation, Draft Fair Employment and Treatment (Northern Ireland) Order 1998.

[36a] Fair Employment and Treatment (Northern Ireland) Order 1998, SI 1998 No. 3162 (NI 21).

istered employees to include details of those applying for work; by requiring public authorities to include details of those leaving employment in monitoring returns; by permitting regulations to prescribe only one principal method for assessing community affiliation; by requiring triennial reviews to include assessing community affiliation; and by requiring triennial reviews to include redundancy issues. (New monitoring regulations were published in March 1999 to come into operation on 1 January 2001.)[37] The scope of the affirmative action exceptions was broadened slightly: by permitting employers to train non-employees of one religion where that religion is under represented in the workforce; by permitting employers to recruit from those not in employment; and by modifying the affirmative action provisions relating to redundancy by omitting the need to have an agreed procedure. New powers and duties were given to the Equality Commission, including a duty to keep the workings of the Order under review, and new powers were given to deal with persistent discrimination. The scope of the employment provisions was broadened to include partnerships and barristers. The individual complaints procedure was modified somewhat: by enabling tribunals to make recommendations for reducing the adverse effect of any unlawful discrimination on someone other than the complainant; by providing for tribunals to have the power to award damages for unintentional indirect discrimination; and by empowering the Labour Relations Agency to draw up arbitration schemes. Finally, following the judgement by the European Court of Human Rights in the *Tinnelly* and *McElduff* cases, both the Northern Ireland Act 1998[38] and the new Order[39] provided the right of appeal against a national security certificate, signed by the Secretary of State, to a new tribunal.

These new provisions have yet, of course, to prove their effectiveness. In its first assessment of the legislation, the House of Commons Northern Ireland Affairs Committee, reporting in August 1999,[40] considered that the previous legislation had made an important contribution to improving the degree of fairness in employment in Northern Ireland, though it agreed that there was still much to be done. It was an indication of the new consensus that appeared to be emerging around

[37] Fair Employment (Monitoring) Regulations (Northern Ireland) 1999.

[38] Northern Ireland Act 1998, ss. 90–92.

[39] 1989 Order, arts 79–80.

[40] House of Commons, Northern Ireland Affairs Committee, *The Operation of the Fair Employment (Northern Ireland) Act 1989: Ten Years On: Report and Proceedings of the Committee* (Session 1998–99, HC 95-I).

equality issues in Northern Ireland that a Committee comprising Northern Ireland MPs as diverse as Eddie McGrady (SDLP), Jeffery Donaldson (UUP), Roy Beggs (UUP), and Peter Robinson (DUP), could assent to a report which stressed the need for strong enforcement of equality legislation.

We might have hoped, then, that a major section of this chapter would have analysed the achievements of the new Executive and Assembly in the area of equality. However, as other chapters relate, the provisions of the Northern Ireland Act relevant to the formation and operation of the new Executive and Assembly (with the exception of the section 75 public sector equality duty, which we consider below) had hardly become operational at the end of 1999, before being suspended a matter of weeks later. Even so, we can see even in this short time, that equality issues became an issue of central importance to the new administration.

The operation of the new Targeting Social Need (new TSN) programme had been announced in the White Paper published in March 1998, and identified by the Agreement as one of the British Government's key socio-economic commitments. New TSN was formally launched in July 1998. Every Northern Ireland department and the Northern Ireland Office was to develop an Action Plan describing how it intended to implement New TSN over a three-year period. Departments were expected to consult on their Action Plans before adopting them. The first New TSN Annual Report was published in November 1999 and included the consultative policy areas covered by the Action Plans passed to the new Executive.

In deciding which new Ministries to create, responsibility for equality issues (including new TSN) was allocated, not to a new Department of Equality (as the Agreement had floated as a possibility), but rather to the Office of the First and Deputy-First Minister (OFM-DFM, headed by David Trimble (UUP) and Seamus Mallon (SDLP)). This resulted in the transfer of the equality functions of the Department of Economic Development (in relation to such issues as anti-discrimination legislation) to OFM-DFM, as well as the staff and functions of the Central Community Relations Unit (CCRU) within the Northern Ireland Office (including the coordination of the new TSN).

Within the OFM-DFM, a new Equality Unit was created, headed by two junior Ministers, one an Ulster Unionist, the other from the SDLP, as part of a wider Directorate on Equality, Human Rights and Community Relations. The unit was intended by the SDLP to be

central mechanism for the ensuring the success of the section 75 public sector duty, and the major player in ensuring that equality issues gained a higher public political profile. Arrangements were in place prior to suspension, for example, to ensure that the Unit would have staff heading it at a more senior level that hitherto (Grade 3 rather than Grade 5), in order to ensure that its views should carry weight with the other departments. It was also envisaged that the Equality Unit staff would service the main inter-departmental committee discussing equality-related issues, the Social Steering Group, composed of senior departmental civil servants from each department. The Northern Ireland Office published its first Circular on the section 75 duty and the importance of departments ensuring that the duty was taken seriously.[41]

Progress had also been made, within the Executive, on taking forward a review of the composition of the Northern Ireland civil service. Long a source of concern, particularly in the areas of religio-political and gender under-representation, the Department of Finance and Personnel, headed by Mark Durkan (SDLP) was given the task of establishing a review that would look at progress to date and at how legislation might be changed to enable greater representativeness to be achieved, particularly at senior levels. With suspension, this issue was not taken forward.

The coming into operation of the Equality Commission and the public sector equality duties was independent of whether devolution comes into effect. It was always likely to prove a complex task amalgamating the existing equality bodies into one, and so it proved. A Working Group was established by the Government, chaired by an independent outside expert, consisting of representatives from each of the equality bodies to be amalgamated into the Commission. It was asked to consider how best to proceed with the mechanics of amalgamation, including the appropriate executive structure, staffing issues, accommodation, and resources. It also commissioned a draft set of guidelines on the section 75 equality duties (from the author) that would be ready for the new Commission to consider when it came into office. The Group reported in March 1999.[42] In the rest of the chapter, we shall consider the operation of the equality duty.

Three issues regarding the equality duties have predominated to date. The first was the content of the guidelines to be issued by the

[41] Office of the First and Deputy First Minister, Circular 1/00 *Northern Ireland Act 1998 Section 75 Statutory Equality Obligation* (January 2000).

[42] *Report of Equality Commission Working Group* (March 1999).

Equality Commission. The second involved the issue of the designation by the Secretary of State of those public authorities that were not automatically covered by the Northern Ireland Act provisions. The third issue was whether the Equality Commission would grant extensive exemptions to public bodies, delaying the coming into effect of the duty to submit an equality scheme to the Commission. At the time of writing, other issues are surfacing, such as the adequacy of the draft equality schemes being put out for consultation, the burdens being faced by NGOs that are being consulted on the schemes, and the criteria that the Equality Commission should use in deciding whether or not to approve the schemes, but we shall concentrate on the first three issues.

A common theme links the three issues to be discussed: the question of timing. For those bodies automatically subject to the duties, the equality duty came into effect from 1 January 2000. The legislation provided that a draft equality scheme must be submitted by such bodies within six months of this date, by 30 June 2000. We have seen that the Equality Working Group had prepared a set of draft guidelines that the incoming Commission could consider. This was included in the published report of the Working Group. Following the first formal meeting of the new Commission, this draft was issued for consultations. Following this round of consultations, the draft was revised and sent to the Secretary of State in late December 1999 and were simultaneously sent for legal advice. Following receipt of legal advice, an amended version was sent for formal approval in mid-January 2000. The letter giving formal approval was received on 23 March, and the Guidelines were formally launched on 31 March.[43] The one major change to emerge as a result of the consultation process, apart from the restructuring of the content, was that public authorities were permitted to set out their *arrangements* for determining which specific policies would be subject to impact assessment, rather that have to identify the specific policies in the scheme itself.

The length of time taken to secure approval by the Secretary of State, however, meant that some public authorities subject to the requirement to produce an equality scheme began to worry that they would be unable to prepare a draft scheme, consult effectively, redraft the scheme and submit it to the Equality Commission in time to meet the statutory deadline. In particular, they argued to the Equality Commission that the

[43] Equality Commission of Northern Ireland, *Guide to Statutory Duties: A Guide to the Implication of the Statutory Duties on Public Authorities Arising from Section 75 of Northern Ireland Act 1998* (March 2000).

Commission could and should exercise its statutory power to exempt these bodies from the duty to submit the draft schemes by 30 June. The Commission considered, however, on the basis of legal advice and taking into account the statement by the responsible Minister in Parliament at the time of enactment that such exemptions would be rare, and refused to grant any exemptions on this basis.

Timing was also relevant for the third issue: the designation of those public bodies by the Secretary of State not included automatically under section 75. Initially, it would appear, the Northern Ireland Office has simply "invited" departments and public bodies to submit themselves to the section 75 duty. Perhaps not surprisingly, few did and when the Equality Commission was notified of those few that had, it requested the Secretary of State to consider whether, in the public interest, other bodies should be included. Political endorsement for a much more comprehensive designation had come from the Office of First and Deputy First Minister (when still operating). There was increasing concern among the NGOs both at the delay in designation itself, but also at the range of functions that could escape the statutory duty if the relevant UK body were not be designated. By the time of writing (June 2000), no designation order had yet been made, but it would seem likely that an initial designation of some few bodies would be made sooner rather than later, with a potentially longer list being designated later.

A PRELIMINARY ASSESSMENT

Perhaps at this point we should remind ourselves why mainstreaming is important. How does mainstreaming differ from traditional anti-discrimination approaches? The most important difference is that it concentrates on achieving equality rather than simply eliminating discrimination. Mainstreaming involves government proactively taking equality in to account. It is intended to be anticipatory rather than retrospective, to be extensively participatory rather than limited to small groups of the knowledgeable, and to be integrated into activities of those involved in policy-making. The motivation for mainstreaming lies in the realisation that unless special attention is paid to equality in policy-making, it becomes too easily sidelined and submerged in the day-to-day concerns of policy-makers who do not view equality as central to their concerns. Mainstreaming, by definition, attempts to

address this problem by requiring all government departments to engage directly with equality issues.

Mainstreaming will have other, more indirect, consequences. One of these is to encourage greater transparency in decision-making since it necessitates defining the likely impact of policies at an earlier stage of policy-making, more systematically and to a greater extent than is usually contemplated. It will also encourage greater participation in policy-making. Unlike more traditional mechanisms of consultation, mainstreaming as now to be practised in Northern Ireland requires impact assessments of a degree of specificity that establishes a clear agenda for discussion between policy-makers and those most affected. In combination, impact assessment and participation will develop links between government and "civil society", encouraging greater participation in decision-making by marginal groups and lessening the democratic deficit.

There are dangers and limitations to mainstreaming. In particular, it may result in the over-fragmentation of equality policy, especially if it becomes an alternative to traditional anti-discrimination and other equality mechanisms. If all public bodies have responsibility for equality, there is a danger that none will regard it as an important part of their function. There is a need, therefore for some centralised responsibility within government to ensure that mainstreaming is consistently applied, according to common standards. Nor should one overlook the fact that building such a requirement into civil service decision-making will require considerable cultural change. Apart from practical issues, there are problems of departmental exclusiveness and collective responsibility. Mainstreaming may well cut across the working practices, and potentially the ethos, of civil service bureaucracy. The dismal experienced in Northern Ireland of non-statutory PAFT approach to mainstreaming before the reforms introduced by the Northern Ireland Act 1998 is eloquent testimony to this.

The implication is that a strong political commitment to mainstreaming is absolutely crucial and must drive a new approach being taken by departments and other public bodies. But it means more than that. It means also that the legal status of mainstreaming needs to be considered. It is noticeable that many of the jurisdictions that have introduced mainstreaming have done so without according it any clear legal status. Mostly, mainstreaming has been introduced administratively by circular, without any formal legal underpinnings. At best, the status of mainstreaming in many countries is that of "soft law". The

Northern Ireland experience points to the inadequacy of a "soft law" approach. Whether a "hard law" approach will be any more successful in Northern Ireland remains to be seen. It is to that issue that we now turn.

What are the prospects of the legal mainstreaming approach adopted in Northern Ireland being effective? The provisions of the Act are promises, not reality. They are a necessary part of the process of achieving substantive equality, fairness and justice. But neither the provisions of the Agreement not the Act itself delivers such change directly. This delivery will require political will at all levels. The provisions of the Act, in other words, represent the potential for change. The provisions will reframe the debate. But we must ensure that change actually occurs, particularly in the area of greatest disadvantage.

The provisions will need to be put into effective operation. In this context there is a real difficulty. Ultimately, those who will have to operate this system day-to-day, particularly in the absence of devolved government, are the civil service and other public servants. The response of parts—and I stress parts—of the public service to these initiatives has been problematic in the past. Often it has been ungenerous and lacking in imagination. Sometimes, it seems that it has been actively opposed to necessary change. If the Agreement is to mark a new beginning for Northern Ireland, as is the wish of the vast majority of the population, all institutions have the obligation to change and adapt. The public service cannot be an exception to this, however difficult it must be for some to give up the almost unrestrained power they were able to exercise for a generation. For its own sake, as well as that of Northern Ireland as a whole, the civil service must not be seen as obstructive to this aspect of the Agreement. The Equality Commission can no doubt play a role in assisting the public service to adapt, but ultimately the responsibility will lie with the public service itself, and of course the members of the Executive and the Assembly, now re-established.

Much depends on the quality of the new Equality Commission and on its effectiveness in managing the transition from four separate bodies into one. Its first test was its skill in drawing up effective guidelines as to the criteria to be followed to comply with their statutory duty. Now, it will be important to ensure that the guidelines are adhered to by the public authorities in their day-to-day practice. There will be a substantial opportunity for the groups most affected to insert themselves into the policy-making process.

How far the promise of the Agreement's equality provisions is delivered will depend therefore, on the commitment, determination and skill of all the political parties, on a strong well-financed, and independent Equality Commission, effective NGOs, and crucially, on the political will to place equality at the heart of decision-making. Using the new tools will be a challenge for politicians to ensure that human rights and equality remain central to political life, for civil service and public authorities to incorporate a culture of human rights into administration, and for civil society to use these tools imaginatively and persistently. A lasting peace depends upon them all.

5

Building a Human Rights Culture in a Political Democracy: The Role of the Northern Ireland Human Rights Commission

COLIN J HARVEY

HUMAN RIGHTS SHOULD be effectively protected at the national level and all other mechanisms must be essentially aimed at achieving this basic objective. The argument in this chapter is that national level human rights protection has a priority status, even with the steady proliferation of international and regional standards and institutions. This is the starting point for the arguments presented here. The Northern Ireland Human Rights Commission is one of the important consequences of the adoption of the Agreement. The creation of this new statutory body provided formal recognition of the importance of human rights protection. The aim is to supplement the existing mechanisms of protection with a public body dedicated to raising awareness of human rights issues. The stated aim is the construction of a human rights culture in Northern Ireland, whatever this might be taken to mean. This chapter examines the role of the Human Rights Commission in the new democratic structures of Northern Ireland. First, I raise some critical questions about conceptions of rights and democracy. Secondly, I explore the context, including the international and national dimensions, and finally, I analyse the functions and powers of the Commission. The aim in this chapter, however, is not simply to offer a guide to the powers and functions of the Commission. The primary purpose is to encourage critical legal thinking about the role of a public body like this in a functioning democratic polity. My argument is that national institutions for protecting human rights are important

precisely because they do not suffer from the problems surrounding the judicial protection of human rights. It is much too early to make a comprehensive assessment, so this chapter concentrates on providing an overview and on raising critical questions about the enforcement of human rights.

ENRICHING POLITICAL DEMOCRACY: HUMAN RIGHTS, LAW AND MISTRUST

Before embarking on an outline of the work of the Commission it is worth raising some questions about the protection of human rights. There is a tendency in the literature of human rights law to glorify judicial protection. The courtroom, so it is argued, is the forum of principle where rational argumentation can take place. In such a forum rights are, it is supposed, more likely to be protected by judges who are not subject to the demands of populism and majoritarianism. This is used very often in arguments about minority rights. It is said that judicial protection is important precisely because rights matter regardless of the majority view. This justification of judicial intervention is convenient for judges also, because here they find a suitably noble justification for their role in a modern democracy. There is, however, something deeply disturbing about the reasoning which underpins such arguments. It reveals a mistrust of democracy and of the citizens who function within that democratic structure. The obvious response is that the experience of democracy in Northern Ireland has not been a good one. And this is undoubtedly correct. However, the reasoning contains the seeds of a profound pessimism about humanity. It is effectively ruling out the possibility of reshaping democracy, and the capacity of people to alter their behaviour to reflect human rights considerations. The surprising thing is that the logic conflicts with the reasons offered for thinking in terms of rights in the first place.[1] Rights-thinking is said to matter because of a belief in the autonomy of individuals. Thinking in rights-terms is thought to be important because we value the autonomy of individuals. Often when the move is made to consider enforcement this respect for autonomy turns into a profound distrust. The autonomous individual, who provided the justification for the theory

[1] See Jeremy Waldron *Law and Disagreement* (Oxford, Clarendon Press, 1999) chs 10–13; Jürgen Habermas *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff (eds), Cambridge Mass, The MIT Press, 1998) p. 203.

of rights, now becomes the main danger. Can the autonomous individual be trusted to do the "right thing", we might say. The point I would make is that it is perfectly possible to believe in human rights protection but be sceptical of the merits of exclusively judicial enforcement and thus to believe in the primacy of political democracy.[2] We should be sceptical or "cynical" about placing our faith in the judiciary to promote progressive politics.[3] As a body of men (and it usually is men) they have not shown any great attachment to progressive politics.[4] This is why innovations, such as Human Rights Commissions, can be so important. In Northern Ireland the Human Rights Commission idea formed part of the final settlement, thus giving added legitimacy to its role. It is, however, still a means to an end, and not an end in itself.

The stakes are raised in this debate when we then talk about constitutional rights, or those rights which are granted special protection within a legal system. This has become an issue in Northern Ireland with the proposed adoption of a Bill of Rights. The assumption tends to be that fundamental rights deserve special protection and thus should be removed from the normal channels of legislative amendment. In effect, the argument is that such rights should be given a higher status and thus shielded from normal processes of deliberation. This may seem, at first glance, a wise option given the problems of Northern Ireland. Where there have been human rights abuses, and severe disagreements about the meaning of rights, it is perhaps understandable that closure is sought in the courtroom. When political life appears indeterminate and chaotic, law can seem to bring the certainty of decision. This decisionism is often lauded as one of law's chief merits. We are told that at some point there must be a reasoned decision and who else but the modern judiciary would we turn to? This idea of detachment is superficially appealing but few can now doubt the

[2] See Paul Mahoney "Marvellous Richness of Diversity or Invidious Cultural Relativism" (1998) 19 *HRLJ* 1, at 3: "The Convention is grounded on a certain political philosophy, namely that political democracy is the best system of government for ensuring respect of fundamental freedoms and human rights. Any theory of interpretation or review by the Court must be compatible with that basic underpinning of political theory", illustrating that it is possible in a human rights instrument to respect the fundamental importance of political democracy.

[3] For a definition of the cynic see Friedrich Nietzsche *Beyond Good and Evil* (Marion Faber (trans.), Oxford, Oxford University Press, 1998) p. 27: "I mean by the so-called cynic, those people who simply acknowledge what is animal-like, common, the 'rule' about themselves and still have enough spirituality and excitability to need to speak about themselves and their kind *in front of witnesses*".

[4] See Colin Harvey "Agreement's Rights Promise Must be Fulfilled" *The Irish Times*, 24 February 2000.

situatedness of judges and lawyers in the political struggles that rage in modern democracies. Nietzsche talked of philosophers as "advocates who refuse the name" whose idea of truth was an "abstract version of their heart's desires".[5] The judge, like the philosopher, is such a situated institutional actor whose judgments are again tied to his "heart's desires". The difference springs from the institutional context of judging and not the act itself.

There is another way to present this. In a political community like Northern Ireland there are established struggles for recognition and democratic inclusion. Underpinning these struggles is the right to participate and one wonders how much this is compromised by removing issues from public deliberation. If reasonable people disagree about the meaning of human rights then reasonable judges will also. The next step is to ask why we should then be beholden to the meaning of rights adopted in this forum. In making this assessment surely it does make a difference that we are talking about an unelected group of elite decision-makers. It may not be a welcome argument at present, but it remains a persuasive one. As is evident from what I have said here, the starting point for this chapter is caution about the judicial role in the human rights sphere. If we place the judiciary on a pedestal we will be disappointed. My suggestion is that more attention should be focused on all the other legal and political channels which promote change. The Human Rights Commission is one good example. The intention here is not, of course, to exclude the courts. One could not do this without offending basic tenets of political democracy. They have a role to play. The ambition here is simply to provoke a critical dialogue. There is a danger that some human rights talk encourages an unreflective approach to politics and law and thus impoverishes political dialogue in the public sphere.[6] And that is what is not needed in Northern Ireland. The purpose of human rights in Northern Ireland is to ensure both participation and protection.

[5] Friedrich Nietzsche *supra* n. 3 at p. 8. Cf. Richard Rorty *Philosophy and Social Hope* (London, Penguin Books, 2000) p. 98: "Dewey the romantic would have been delighted that the courts sometimes tell the politicians and the voters to start noticing that there are people who have been told to wait for ever until a consensus emerges—a consensus within a political community from which these people are effectively excluded". Later in this work (at p. 119) Rorty argues that Habermas, for example, is effectively reviving Dewey's social democratic approach.

[6] Cf. Mary Ann Glendon *Rights Talk: The Impoverishment of Political Discourse* (New York, Free Press, 1991); Allan C Hutchinson *Waiting for Coraf: A Critique of Law and Rights* (Toronto, University of Toronto Press, 1995).

THE CONTEXT

There is both an international and local context to consider. First, I will consider the international context. Legal and political discourse in the human rights field is increasingly transnational in nature. What I mean by this is that discussions between politicians, lawyers, judges and NGOs take place not only within the state system but within transnational networks of legal and political communication. Changes in national policy, and judicial decisions, can be quickly transmitted by these networks. This can, in some instances, amount to internationalism or transnationalism in the most superficial sense. Case law from other states can be used as justification for decisions which have already been made. The mere fact that this occurs does not tell us very much. That such networks exist and transmit information does not have any necessary results. For example, the practical impact of this is far from certain. One impact that can be measured is the rise in number of national institutions dedicated to the protection of human rights.[7] There is now considerable support for the creation of these institutions and the United Nations has taken an active role since 1991.[8] Support for such institutions is evidence of the weaknesses of the existing international mechanisms.[9] It indicates that national protection remains of primary significance. Livingstone states:

[7] See Stephen Livingstone "The Northern Ireland Human Rights Commission" (1999) 22 *Fordham International Law Journal* 1465, at 1466–70; Anne Gallagher "Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners" in Philip Alston and James Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (Cambridge, Cambridge University Press, 2000) p. 201, at 202: "National human rights institutions may be defined for present purposes as independent entities which have been established by government under the constitution or by a law and entrusted with special responsibilities in terms of promotion and protection of human rights". See also Mac Darrow and Philip Alston "Bills of Rights in Comparative Perspective" in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights* (Oxford, Oxford University Press, 1999) p. 465, at 523: "In recent years, a number of new constitutions have made explicit provision for the establishment of a national human rights commission. Examples include: Ethiopia, South Africa, Malawi, Uganda and the Philippines. Mandating the creation of such an institution sends a strong symbolic message, gives bureaucratic clout to it, and accords a degree of protection from parliamentary or executive manipulation. While many such institutions will probably fail at least in the short term, the record so far has been more encouraging than might have been anticipated".

[8] Sarah Spencer and Ian Bynoe *A Human Rights Commission: The Options for Britain and Northern Ireland* (London, IPPR, 1998) p. 45. The UN High Commissioner for Human Rights, Mary Robinson, has a Special Adviser on National Human Rights Institutions.

[9] *Ibid*.

> "Although such institutions go under a variety of names, there is a certain degree of uniformity in their structure, functions and powers. Nearly all are established and funded by government, though composed of members of civil society rather than politicians or bureaucrats."[10]

The Paris Principles, adopted by the UN General Assembly in 1993, provide international guidance relating to the mandate and independence of these bodies. The national institutions have been endorsed on many occasions since the formal adoption of these Principles.[11] Livingstone argues that the institutions can play an important role in strengthening the protection of human rights.[12] He does, however, note a recent study which suggests that little evaluative work has been done.[13] These bodies have potential, but their impact will need to be carefully assessed in relation to their effectiveness at the national level. Their importance will rest on the ability to bridge gaps between human rights developments and national political communities. They will also contribute to the concrete application of norms to local contexts. The development is a significant one for the human rights movement.

The other context of relevance is the local. The Human Rights Commission is not the first such body and it does not function within a political or legal vacuum. Its predecessor was the Standing Advisory Commission on Human Rights (SACHR).[14] The body was hampered from its inception by a limited mandate and the absence of sufficiently strong powers.[15] While it undoubtedly did some useful work one commentator has concluded: "Overall . . . SACHR has had a somewhat limited influence on policy-making and implementation as regards the protection of human rights in Northern Ireland".[16]

SACHR was clearly a weak body which was, for a variety of reasons, unable to deliver effective results in the overall protection of human rights in Northern Ireland. Given this it was unsurprising that thoughts turned to the creation of a new institution. The initiative was taken on

[10] Livingstone *supra* n. 7 at p. 1467.

[11] Spencer and Bynoe *supra* n. 8 at p. 47. They note that at the World Conference on Human Rights in Vienna the national institutions were granted separate speaking rights from their governments.

[12] Livingstone *supra* n. 7 at p. 1469.

[13] *Supra* n. 8

[14] For some examples of SACHR's work, of relevance in the context of this chapter, see SACHR *Bill of Rights: A Discussion Paper* (1976); SACHR *The Protection of Human Rights by Law in Northern Ireland* (Cmnd 7009, 1977).

[15] Northern Ireland Constitution Act 1973, s. 20(1).

[16] Livingstone *supra* n. 7 at p. 1474.

this by the NGO sector. As the peace process developed, so the opportunities of feeding this thinking into the process increased. The election of a British Government more attuned to human rights talk also had an important impact. The context was one conducive to arguments for a Human Rights Commission. In a paper commissioned by SACHR, Brice Dickson (now the Chief Commissioner) advanced four strong reasons for creating a Commission.[17] First, new laws to protect human rights were about to be enacted.[18] With the changes in law it was sensible, he argued, to create a body to oversee their implementation.[19] Secondly, as a society emerging from conflict, Northern Ireland could use a Commission.[20] Dickson refers to the problems faced by societies in transition and the help that might be offered by a national Commission.[21] The South African experience is drawn upon as a useful example. The third argument is interesting. Here Dickson argues that a Commission should be expected to take a position on the issue of balancing conflicting rights.[22] He states:

> "By confronting such potential and actual conflicts a Human Rights Commission could help to demonstrate to society that everyone in Northern Ireland has duties and responsibilities as well as rights. This should in turn assist the development of more harmonious relations between different elements of the society. At the very least it should help to defuse potentially explosive confrontations".[23]

This is ambitious. It requires the Commission to take the lead in demonstrating how conflicting rights might be balanced. One can, however, see problems in this argument. Is it not more likely that the conflicts which are evident in the political community will also appear within the Commission? This is particularly so given that it is intended to be representative of the community. If reasonable people disagree about the meaning of rights, then reasonable human rights commissioners will also disagree. Often in discussion of rights the issue revolves around balance, and it is here that substantive disagreement comes to the fore. My argument is that this balancing is inherently political in that it takes place within the structures of a position

[17] Brice Dickson *Creating an Effective Human Rights Commission for Northern Ireland* (May 1998).

[18] *Ibid*. pp. 6–7.

[19] *Ibid*. p. 7.

[20] *Ibid*.

[21] *Ibid*.

[22] *Ibid*.

[23] *Ibid*. p. 8.

(acknowledged or unacknowledged) within political theory. A transparent approach to balancing rights is thus more difficult and demanding than is often assumed. At the very least it requires a clear statement of the normative framework within which the balance has been struck. For it is this which will in practice determine the outcome of the balancing exercise. The final argument advanced is that "this is the way the world is going".[24] In other words, Northern Ireland should join a growing international trend. Dickson also acknowledges the problems and the paper lists potential difficulties. Again he mentions four: first, the fact that there is no equivalent body in Britain. As he notes, this is not really a strong argument against as there is no reason why, for example, England could not have one. Secondly, there is the argument that there are too many other quangos in Northern Ireland already. Here again the argument can be met by ensuring that the Commission is appointed in a transparent manner and that specific criticisms of quangos are addressed. Another issue he identifies is the problem of disputes between related bodies. As with the other difficulties this is one that is possible to address. The final problem he mentions is that a Commission may raise "people's expectations unduly".[25] As he notes, a clear list of specific aims and objectives would reduce the problem. The rest of the paper, which deals with the powers and duties that a Human Rights Commission should have, is not examined in any detail here. It is worth noting, however, that on the duty to investigate human rights issues Dickson states the following:

> "It could include the powers to summon and enforce the attendance of witnesses, to examine witnesses under oath, to compel disclosure of documents and even perhaps (as in South Africa) the power to enter and search premises".

The functions and powers of the Commission are examined below, but it is notable that the power of investigation does not include the matters listed here.

FUNCTIONS AND POWERS

The Agreement refers to the establishment of a new Northern Ireland Human Rights Commission "with membership from Northern Ireland

[24] *Ibid*.
[25] *Ibid*. p. 10.

reflecting the community balance".[26] The Agreement states that it should have "an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights".[27] The Human Rights Commission thus forms a part of the overall settlement. It is to be an independent safeguard on the protection of rights in Northern Ireland.

The functions and powers of the Human Rights Commission are contained in the Northern Ireland Act 1998, which reflects the terms of the Agreement. The Commission is composed of a Chief Commissioner (Professor Brice Dickson) and nine part-time commissioners.[28] The Commission has a general obligation to keep the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights under review.[29] This function relates not only to the content of law and practice but its effectiveness and thus its practical impact. The Commission has initiated reviews of the law and practice in Northern Ireland affecting: older persons; people who are lesbian, gay, bisexual or transgendered; and people who are mentally ill. It will provide advice to the Secretary of State and the Executive Committee of the Assembly on measures which should be taken to protect human rights.[30] This is following a general or specific request for advice or on other occasions when it thinks it appropriate.[31] The Commission has offered advice to the Secretary of State, and to MPs in London, on proposed new laws dealing with asylum and immigration, freedom of information, terrorism, and equality for people with disabilities. This advisory role also involves work on specific pieces of Northern Ireland legislation. The Commission has the job of advising the Assembly if a Bill is compatible with human rights.[32] The Commission has agreed a Protocol with the OFM-DFM with a view to obtaining early access to draft laws and policies proposed by the

[26] "Rights, Safeguards and Equality of Opportunity" para. 5.

[27] *Ibid.*

[28] Professor Christine Bell, Margaret Ann-Dinsmore, Tom Donnelly, Rev Harold Good, Francis McGuinness, Professor Tom Hadden, Angela Hegarty, Patricia Kelly, Inez McCormack. The Commission has a staff of twelve people in addition to this and the Chief Executive is Paddy Sloan.

[29] Northern Ireland Act 1998, s. 69(1).

[30] *Ibid.* s. 69(3).

[31] *Ibid.* s. 69(3)(a) and (b).

[32] *Ibid.* s. 69(4). For the purposes of this section of the Act "human rights" includes Convention rights. In other words, when assessing effectiveness and giving advice the Commission is not confined to the European Convention on Human Rights. This presents its own problems given the proliferation of human rights standards in the last fifty years.

Assembly and Executive so that it can comment on the human rights implications. On UK-wide activities the Commission has participated in the work of the UK task force for the implementation of the Human Rights Act 1998.

The Commission has a role in giving assistance to individuals[33] and has the power to bring proceedings.[34] It has wide powers with respect to assistance to individuals. The Commission may grant assistance in relation to proceedings raising human rights issues when: the case involves an issue of principle; when it would be unreasonable not to do so because of, for example, the complexity of the case; or when special circumstances arise.[35] If it decides to grant assistance it can arrange for the provision of legal advice and/or make arrangements for legal representation.[36] The Commission has a broad discretion in these areas which will permit a more flexible approach. The Commission has developed and applied its own criteria for assisting individuals. It has received over one hundred applications for assistance and has granted assistance in some of these. It has also developed criteria for applying to court for permission to intervene in proceedings as a third party. The purpose is to assist the court with the rules and principles of human rights law which are relevant to the proceedings in question. The Commission has been granted permission to intervene in several instances, including a case before the European Court of Human Rights.[37]

The power to investigate human rights violations is important for national institutions.[38] The Commission may "conduct such investigations as it considers necessary and expedient".[39] It does not, however, have the power to compel the disclosure of documents. The power is thus rendered less effective than it might be, although it is still a valuable aid to its work. The Commission has developed criteria for conducting investigations into matters of human rights concern in Northern Ireland. Thus far it has investigated the juvenile justice system and the effects of the policing of parades. Its research has also been

[33] Northern Ireland Act 1998, s. 69(5)(a).

[34] *Ibid*. s. 69(5)(b).

[35] *Ibid*. s. 70(2).

[36] *Ibid*. s. 70(3).

[37] *McKerr and others* v. *UK*, App. No. 28883/95, 4 April 2000.

[38] See Paris Principles 1993 "Methods of Operation": "Within the framework of its operation, the national institution shall: . . . (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence".

[39] Northern Ireland Act 1998, s. 69(8).

useful in identifying areas where an investigation might be necessary. For example, the Commission has conducted research into the use of plastic baton rounds in Northern Ireland with a view to deciding whether to conduct a formal investigation.

The Commission has been involved in a large number of other activities. It has submitted comments to the UN Committee on the Elimination of Discrimination Against Women and to the Council of Europe's Committee on Social Rights and organised a series of "Training for Trainers" seminars in additional to education seminars on human rights issues. Members of the Commission have attended a large number of national and international events.

The Commission has the potential to be much more effective in the protection of human rights than SACHR. A problem that will arise relates to resources. The Commission has a broad remit, yet it has limited resources.[40] Its ambitions may be curbed by lack of resources. It is therefore fortunate that the Commission must report to the Secretary of State within two years on recommendations for improving *inter alia* its effectiveness.[41] There will be other matters to address, but one suspects that the issue of resources will figure prominently in this report.

The Commission published a draft Strategic Plan for consultation in September 1999.[42] The Plan set out *inter alia* the Commission's core values, its resources and grounds for choosing possible options and its working methods. The core values listed are: independence; fairness; openness; accessibility; accountability; participation, and equality.[43] The possible options included: a Bill of Rights for Northern Ireland; the promotion of a human rights culture; and reference to specific areas such as victims' rights and criminal justice and policing.[44] The section on working methods set out its proposed position on: approaches from individuals and groups; forming strategic alliances; international work, and the exercise of its statutory functions.[45] The Commission, for example, emphasises the importance of international work and thus it has made representations to international committees which monitor the United Kingdom's adherence to international human

[40] It has an annual budget of £750, 000.

[41] Northern Ireland Act 1998, s. 69(2)(a).

[42] Northern Ireland Human Rights Commission *Draft Strategic Plan 1999–2002* (issued for consultation on 30 September 1999).

[43] *Ibid*. pp. 9–10.

[44] *Ibid*. pp. 15–30.

[45] *Ibid*. pp. 31–49.

rights treaties. The Commission adopted a final version of the Plan, to cover the period 2000–2002, in May 2000.

The functions and powers of the Commission are not as extensive as one would have hoped. The resources are clearly inadequate and the power of investigation is a limited one. Nevertheless the Commission has the potential to take a lead on issues of human rights protection in Northern Ireland.

HUMAN RIGHTS PROTECTION ON THE ISLAND OF IRELAND

The Agreement's provisions are not confined to one jurisdiction. Its adoption has implications for the protection of human rights on the island of Ireland as a whole. This will happen both formally and informally. The formal commitments are described below. Informally there are already networks in the human rights sphere which function on an all-Ireland basis. Less tangible is the spill-over impact of the Agreement. It is difficult to imagine that the human rights transition in the North will not have an impact on the South. There will be opportunities for NGOs in the South to make active use of the principles and practices being developed in the North.

The Agreement commits the Irish Government to taking "steps to further strengthen the protection of human rights in its jurisdiction".[46] It is to bring forward measures, drawing upon constitutional reform proposals,[47] to strengthen and underpin the constitutional protection of human rights.[48] These proposals are to draw upon the European Convention on Human Rights and other international human rights instruments.[49] These steps are to lead to "at least an equivalent level of protection of human rights as will pertain in Northern Ireland".[50] In addition to this, it committed itself to: the establishment of a Human Rights Commission with a mandate and remit equivalent to that established in Northern Ireland; proceeding, as quickly as possible, with the

[46] "Rights, Safeguards and Equality of Opportunity" para. 9.

[47] See Constitutional Review Group *Report of the Constitutional Review Group* (Dublin, Stationery Office, 1996). See also the work of the All-Party Oireachtas Committee on the Constitution. It has thus far published four progress reports including: *The President* (3rd progress report); and *The Courts and The Judiciary* (4th progress report).

[48] *Supra* n. 46.

[49] "Rights, Safeguards and Equality of Opportunity" para. 9.

[50] *Ibid.*

ratification of the Framework Convention on National Minorities; implementing enhanced employment equality legislation; introducing equal status legislation; and "continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland".[51] The Agreement makes provision for cooperation between the two Commissions.[52] It envisages the establishment of a joint committee of representatives of the two Commissions "as a forum for consideration of human rights issues in the island of Ireland".[53] In addition:

> "The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland".[54]

The reference to the rights of everyone living in the island of Ireland is of some significance given the heated debates in Ireland on immigration and asylum in recent years.[55] There will be difficult issues to address, including how this instrument would be distinct from, and relate to, the proliferating body of human rights norms. At the time of writing the Irish Government is in the process of appointing the Commissioners to its Commission. It had also announced a time-scale for incorporating the European Convention on Human Rights. The Agreement will have an impact on political and legal life in the North and South of Ireland.

A BILL OF RIGHTS FOR NORTHERN IRELAND

The Human Rights Commission has placed significant weight on the importance of drafting a Bill of Rights for Northern Ireland. The adoption of a Bill of Rights would be a good signal of the fresh start brought about by the Agreement. There has been discussion of a Bill of Rights for Northern Ireland for some time.[56] It was recommended as an

[51] *Ibid*. para. 9.
[52] *Ibid*. para. 10.
[53] *Ibid*.
[54] *Ibid*.
[55] See Colin Harvey "Right to Seek and Enjoy Asylum is a Human Right" *The Irish Times*, 25 March 2000.
[56] See CAJ *Making a Bill of Rights Stick: Options for Implementation in Northern Ireland* (September 1997); CAJ *Making Rights Count* (October 1990). The CAJ has also published its own Bill of Rights for Northern Ireland.

appropriate response by a number of bodies in the past. While there appears to have been widespread consensus among the political parties on the need for such an instrument, it never materialised in practice. There are a variety of reasons for this. The most convincing explanation is that the British Government was opposed to it. The Conservative Government was not as open to the discourse of human rights and equality as the Labour Government which came to power in May 1997. In addition, there was a belief that a Bill of Rights might have to await a constitutional settlement for Northern Ireland.

One of the more important functions of the Commission is its work on a Bill of Rights for Northern Ireland. The Bill of Rights exercise follows the conclusion of a constitutional settlement for Northern Ireland. It is from this settlement, and thus the Agreement, that the exercise derives its legitimacy. A vote for the Agreement can be read as consent for the adoption of a Bill of Rights. It is the content and form that this should take which is to be decided. The Agreement does not spell out precisely which rights should be included. An understanding of the nature of the Agreement is thus essential to consideration of the Bill of Rights exercise. The Agreement is a complex framework which attempts to accord due recognition to the bi-national nature of the conflict in Northern Ireland. It is a rejection of one form of majoritarian democracy and has been described as a consociational settlement. Although recognising the importance of the identity and ethos of the two main communities, it does not sanction action or behaviour which would undermine the principle of democratic inclusion upon which the whole edifice is based. In this sense the consociational and human rights elements perhaps do not conflict as directly as is sometimes thought.

The emphasis in the Agreement is on new beginnings and a fresh start. In moving away from the past this section suggests a fresh start with the "vindication of the human rights of all" as a major part of this. To what extent should the Bill of Rights be seen as part of this new beginning and fresh start? It might be suggested that an unduly narrow approach would not reflect this particular commitment. Other aspects of the Agreement are not so clear on this. The fact that the new constitutional structures reflect the divided nature of Northern Ireland is understandable, given the history of discrimination and exclusion. These sections of the Agreement attempt to ensure that all sections of the community can effectively participate in the governance of Northern Ireland. Human rights guarantees are one way to guarantee

that impediments to full participation in the polity are removed and that one group is not permitted to dominate others. The structures created place great weight on securing trust between the two main political communities.

Reference to the Bill of Rights is included in the section on "Rights, Safeguards and Equality of Opportunity". On human rights, the parties to the Agreement affirm the importance of the following rights: the right of free political thought; the right to freedom and expression of religion; the right to pursue, democratically, national and political aspirations; the right to seek constitutional change by peaceful and legitimate means; the right to choose freely one's place of residence; the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity; the right to freedom from sectarian harassment; and the right of women to full and equal political participation. The Bill of Rights for Northern Ireland is mentioned under the heading "United Kingdom Legislation". The relevant section merits full citation:

> "The new Northern Ireland Human Rights Commission . . . will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and—taken together with the ECHR—to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:
>
> the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
>
> a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors".

This section of the Agreement structures the debate. What is notable is the mixture of consociational and other elements in this passage. Rather than follow the language of a new beginning or a fresh start, thus permitting the Human Rights Commission to take a dynamic approach, the participants have come up with a formulation which enables and limits. On the enabling side it is evident that the passage provides for an instrument which goes beyond the European Convention. The Convention is recognised to be weak in several areas, on a right to equality for example. It is also primarily confined to civil and

political rights. The section also enables the Commission to take account of international instruments and experience.

Arguments have been made for and against an expansive approach to this exercise. Those wishing to see the best possible Bill of Rights are hampered by the limiting language of the Agreement. However, the language of the Agreement is not as limiting as might be thought. This section must be read as part of the overall stress on a new beginning and a fresh start and the importance of the vindication of the human rights of all. It would scarcely accord with the new beginning if a narrow approach was adopted here. There is an additional problem. The voluminous literature on Northern Ireland has not provided us with a consensus position on the "particular circumstances of Northern Ireland". It is precisely this "context" which is contested. To focus on this phrase, and give it undue weight, may result in an unproductive and divisive debate. Given this, the issue should be which rights a modern Bill of Rights must contain, given current developments and international experience. This raises its own problems, in particular, the rights to be included and the mechanism of enforcement. For example, it has been suggested that a new constitutional court might be necessary given the particular circumstances of Northern Ireland.[57] This raises old and familiar questions about the role of the judges and human rights enforcement in a political democracy.

The Commission launched the Bill of Rights exercise on 1 March 2000 and it has placed great weight on the process. The belief is that an open and transparent process, which includes as many people as possible, will secure the legitimacy of any instrument that is drafted. In its work the Commission can draw upon the knowledge and experience of existing social movements in Northern Ireland as well as comparative experience of other countries. It has made clear that it wants to achieve the best possible Bill of Rights within the context of the Agreement. It may be impeded in this by those who want to see this exercise rigidly defined and restrictively implemented. The Agreement is not without its ambiguities and there is scope for a narrow and restrictive approach to be taken. As I have suggested, this would, however, conflict with the spirit of the Agreement which is firm in its commitment to a new beginning and the protection and the vindication of the human rights of all. The Human Rights Commission has sought to make the process an

[57] See CAJ (1997) *supra* n. 56 at pp. 14–16.

inclusive one. In order to draw upon existing expertise it established working groups in the areas of: social and economic rights; children and young people; criminal justice; cultural rights and community identity; language; victims' rights; equality; education; and implementation.[58] The working groups were tasked with making recommendations to the Commission on the rights that might be included in its draft Bill of Rights. The Commission has also produced a training manual as part of its Bill of Rights exercise.

The process of drafting a Bill of Rights for Northern Ireland will be instructive. After years when Northern Ireland was known mainly for the bad aspects of human rights abuse it may now attempt to lead the way in the United Kingdom and Ireland on human rights protection. There are difficult issues of principle and practice to be addressed. As I argue, the Commission has an important role in enriching political democracy. The issue now is to what extent a Bill of Rights can make a real contribution in this regard also.

CONCLUSION

It is too early to reach any conclusions about the work of the Human Rights Commission. This chapter raises some issues about the role of the Commission in promoting progressive political values in Northern Ireland. I have argued that the creation of the Commission moves us away from a court-centred approach to rights protection. I have deliberately been provocative in my comments on the role of the judiciary, and in the thoughts presented on rights-talk. It seems to me that a critical perspective is needed now more than ever. This is largely because everyone is at least trying to "talk the talk" in Northern Ireland. In this it is easy to lose sight of the reasons why we engage in human rights discourse in the first place. My suggestion is that not all uses of rights discourse enrich political democracy and that in some cases it can impoverish the language of political dialogue. On some occasions it has a hegemonic status and thus a detrimental impact on other important political values. This is not an argument against human rights (quite the reverse). The political struggle to create a just political democracy cannot be confined to rights discourse alone. The Human Rights

[58] The Commission produced a series of pamphlets on rights that are not adequately protected by the European Convention. See also Northern Ireland Human Rights Commission *First Annual Report 1999–2000*, HC 715.

Commission thus has a role to play in renewing and enriching rights discourse in Northern Ireland and taking decisive action when the language of rights is patently being abused.

6

And Justice for All? The Judiciary and the Legal Profession in Transition

STEPHEN LIVINGSTONE

INTRODUCTION

THE LAST THIRTY years has witnessed regular use of the law by all parties to the Northern Ireland conflict. The state has made the most extensive use of law, whether it is through emergency powers to repress political violence or fair employment legislation to bring about changes in the distribution of economic resources. However those critical of the state have also had recourse to the use of law, whether through civil actions to challenge the actions of the police and army or judicial reviews to question the actions of the prison service. Political parties have resorted to the courts to continue their disputes by other means and victims on all sides have sought to invoke the law to gain redress. This use of law has been symbolic as well as instrumental. The state has often pointed to the fact that it deals with its opponents through the use of legal process to establish the legitimacy of its actions and distinguish democratic politics from terrorism. However critics have also sought to invoke the law, usually the "higher law" of public international law or international human rights law, to problematise that claim and argue that what has prevailed in Northern Ireland is more a rule of force than a rule of law.

The law therefore has been a contested site for most of the past thirty years. This has posed particular challenges for Northern Ireland's lawyers and judges in terms of the work they do and their own perception of their role. This chapter seeks to explore how they have responded to these challenges as a precursor of a discussion of what the

role of judges and lawyers may be in the future. The Good Friday Agreement and the Northern Ireland Act resulting from it have created a range of new legal institutions and legal provisions. Further reforms resulting from the Patten Commission and the Criminal Justice Review are likely to make even more alterations in the legal landscape. In other words, Northern Ireland's new constitutional structure is heavily underwritten by law and will pose new challenges for lawyers as to how it is operated. Some guidance to their response in the future may come from what they have done in the recent past. The chapter begins with an exploration of the role of the legal profession, before moving on to an assessment of the judiciary from whom they are drawn.

LAWYERS OF THE CONFLICT

Many non-lawyers, both inside Northern Ireland and without, assume that the conflict has been a major boon for lawyers. As the number of criminal trials rose with the growth of political violence from the early 1970s onwards it would seem axiomatic that all lawyers must have gained financially, especially as the defendants in such trials were all legally aided. However, although the number of lawyers in Northern Ireland has risen over the past thirty years[1] it appears the closest many have got to conflict related work is the processing of criminal injury claims. Though there is a dearth of research on the issue, what evidence does exist suggests that only a relatively small number of lawyers, less than 5 per cent of the total legal profession in Northern Ireland, has become engaged with work related to the conflict. One barrister, speaking to Morison and Leith in 1990, refers to a "Crumlin Road Mafia" and suggests that a core of about twelve counsel were regularly involved in such cases.[2] Jackson and Doran, in their study of the operation of the Diplock courts, also observed that a "small core" of counsel appeared regularly for prosecution and defence in these trials.[3] Many of the same lawyers appear to be involved in judicial review and

[1] The number of barristers in Northern Ireland rose from sixty to 330 and solicitors from 500 to 1,000 over the period 1965–93. See B Dickson *The Legal System of Northern Ireland* (3rd edn, Belfast, SLS Publications, 1993) p. 98.

[2] See J Morison and P Leith *The Barrister's World* (Milton Keynes, Open University Press, 1992) p. 40. At the time all Diplock court trials took place at Belfast's Crumlin Road courthouse.

[3] See J Jackson and S Doran *Judge Without a Jury* (Oxford, Oxford University Press, 1995) p. 83.

civil actions relating to the conduct of the police or the prison service. Although a broader range of solicitors than barristers have been engaged in such work most of it has been the preserve of six to eight firms. The UN Special Rapporteur on the Independence of Judges and Lawyers, in the report of his 1997 mission to Northern Ireland, suggested only about twenty to thirty solicitors were actively involved in representing the accused in politically sensitive trials.[4]

As regards the approach taken by lawyers involved in the defence of those accused of terrorist crimes or the judicial review of official policy, most have adopted a fairly traditionalist stance. There has been little in the way of activist, let alone radical lawyering.[5] Even those lawyers involved in conflict-related work have generally presented themselves as offering as good as possible a service to their clients, without endorsing those clients causes or methods. They have generally been content to operate the law as given rather than see it as part of their calling to alter it. One of the few studies existing of barristers involved in the defence of those accused of terrorist charges in Northern Ireland found them firmly wedded to traditional concepts of the cab rank principle and the need to represent all clients equally, whatever their political views or actions.[6] Even those lawyers frequently involved in cases challenging the content or application of emergency laws (including cases before international human rights tribunals) have generally avoided making public statements on them outside the courtroom,[7] indeed perhaps the most important public contribution by a private lawyer to discussion of the justice system was produced by an English QC.[8] Although Northern Ireland has witnessed a significant growth of human rights NGOs, which have played an important role in publicising human rights concerns in Northern Ireland and placing them on the international agenda,[9] practising

[4] *Report of the Special Rapporteur on the Independence of Judges and Lawyers, Param Cumaraswamy, on a Mission to Great Britain and Northern Ireland* (E/CN.4/1998/39/Add.4).

[5] For a discussion of the differences between traditional, activist and radical lawyering See, e.g., S Scheingold *The Politics of Rights: Lawyers, Public Policy and Political Change* (New Haven, Yale University Press, 1974) pp. 171–99, P Marguiles "Progressive Lawyering and Lost Traditions" (1995) 73 *Texas LR* 1139.

[6] B Jorgensen "Defending the Terrorists: Queens Counsel before the Courts of Northern Ireland" (1982) 9 *J of Law and Society* 115

[7] For one prominent exception see the pamphlet by Belfast solicitor Paddy McGrory *Law and the Constitution: Present Discontents* (Derry, Field Day, 1986).

[8] Lord Gifford QC's report on the Supergrass system, which will be discussed further below: T Gifford *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (London, Cobden Trust, 1984).

barristers and solicitors have not generally been to the fore in such organisations, just as they were not generally in leadership positions in the civil rights movement of the late 1960s. Lawyers professional organisations have, as will be discussed in more detail later, been somewhat muted when it comes to expressing concern about aspects of the justice system; and although for many years the chair of the Standing Advisory Commission on Human Rights (precursor to the present Northern Ireland Human Rights Commission) was a practising lawyer, this organisation too adopted a fairly low-key approach to advancing its calls for change. Nor have lawyers themselves formed many *ad hoc* organisations to scrutinise the legal system. Those that were created, such as the Northern Ireland Socialist Lawyers, had a fairly short life. Even where it comes to lawyers who work on human rights cases there is little sense of them developing a strategy, seeking the best case to advance a particular cause, as opposed to responding to circumstances as they present themselves.

Overall therefore there is little evidence of even those lawyers involved in human rights work in Northern Ireland pursuing an activist approach, of seeing it as part of the lawyer's calling to engage actively in public debate designed to uphold the values of the rule of law. There is almost no evidence of lawyers adopting a more radical approach, involving a rejection of the separation between lawyer and client as well as that between law and politics. Lawyers in Northern Ireland have not been prepared to turn trials into political theatre. Indeed, they encouraged republican defendants to move away from the early 1970s strategy of refusing to recognise the courts, as some lawyers in the USA did in the 1960s.[10] While there have been vague and unsubstantiated allegations that some lawyers have offered assistance beyond the scope of their professional obligations to clients involved in terrorism, a matter to be explored in more detail below, it is clear that none of Northern Ireland's lawyers have emulated some of those who defended the Red Army Faction in Germany by explicitly endorsing their client's aims and means.

Perhaps because of this approach there has been little formal official interference with the work of lawyers. Apart from a proposal from the

[9] See P Mageean and M O'Brien "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) 22 *Fordham International Law Journal* 1499.

[10] Notably, William Kunstler's involvement in the Chicago Eight Trial in 1969. For a discussion see J Auerbach *Unequal Justice: Lawyers and Social Change in Modern America* (New York, Oxford University Press, 1976) pp. 288–90.

Independent Commissioner for the Holding Centres in 1994 that a list of government-approved lawyers be established to provide legal representation for those accused of terrorist offences, a proposal dropped in the face of widespread hostility from the legal profession, there have been no moves to restrict a suspect's right to counsel of their choosing. Legal aid on a fairly generous scale has been available for all those charged of politically related offences and has also funded many of the judicial review challenges to decisions of the police or prison service. Lawyers acting for those accused of terrorist offences have not faced any disciplinary action from their professional bodies unlike, for example, American lawyers representing Communists in the 1950s.[11] Informally, however, the situation has been rather different.

Although solicitor Patrick Finucane, murdered by the Ulster Freedom Fighters at his home in 1989, was not the first lawyer to be killed in the conflict[12] his death raised particular concerns as to the extent to which the state endorsed the right of all lawyers to practice freely and independently. Several weeks before Finucane's murder, then Minister of State Douglas Hurd had observed, in a debate on the Prevention of Terrorism Act, that certain lawyers were "unduly sympathetic to the cause of the IRA".[13] After his murder it emerged that clients of Finucane, who represented many republican defendants, and several other lawyers claimed that the police had threatened their lawyers in the course of interrogations. A year after Finucane's death a former military intelligence informant claimed that he had told his handlers that loyalist paramilitaries were targeting the lawyer on several occasions, once very shortly before his death, but that nothing was done in respect of this case.[14] Further information has subsequently come to light that a police informant, who has recently been charged in respect of his involvement in Finucane's killing, claims that he had passed on information on the assassination plan to his Special Branch handlers, again without any action being taken to warn or protect the solicitor.

Finucane's murder, the allegations of security force collusion in it and claims of threats made to the clients of other lawyers occurred at a time when the police were denying immediate access for lawyers to

[11] See Auerbach, *supra* n. 10 at pp. 237–40.

[12] For example, barrister and law lecturer Edgar Graham, a prominent supporter of the use of supergrasses, was murdered by the IRA at Queens University in 1983.

[13] *Hansard*, 17 January 1989, Standing Committee B, col. 508.

[14] For a summary of these events see Lawyers Committee for Human Rights *Human Rights and Legal Defense in Northern Ireland* (1993) pp. 42–61.

clients arrested under anti-terrorist legislation in over 50 per cent of cases.[15] They also routinely refused to allow solicitors to be present during interrogations. Although anti-terrorist legislation permitted delays of access for up to forty-eight hours this was limited to circumstances where the police had reasonable grounds for suspecting that it might lead to interference with evidence or the alerting of a suspect, a narrow exception which one would not expect to occur in more than half of the cases in which people were arrested on suspicion of involvement in terrorism. The combination of these factors led to growing international interest in the circumstances of the relatively small number of lawyers in Northern Ireland involved in the defence of those suspected of terrorist offences. First raised by the Claire Palley, the UK nominee to the UN Sub Commission on Human Rights, in 1992 the issue was taken up by the Lawyers Committee on Human Rights in a 1993 report and subsequently led to a mission to Northern Ireland by the UN Special Rapporteur on the Independence of Judges and Lawyers in 1997. All recommended an independent inquiry into the circumstances of Patrick Finucane's death and the end of restrictions on the access of lawyers to their clients. They also noted that despite allegations in some journalistic accounts of lawyers abusing professional privilege to assist terrorists, no lawyer had been charged with a criminal offence in respect of such actions, nor had the police ever notified the Law Society of any allegations with a view to the pursuing of disciplinary action. However the calls for an independent inquiry, either into Finucane's murder or into the circumstances of lawyers generally, has yet to meet with a positive response from government. Nor has there been any such inquiry into the murder of Rosemary Nelson in 1999, a lawyer who had represented a number of clients in politically sensitive cases in the Portadown area, and who had testified to the US House of Representatives on police harassment of herself and her clients.

LAWYERS AND THE CONFLICT

As noted earlier, most of Northern Ireland's lawyers have, whether through accident or choice, eschewed work related to the conflict. However the issue of threats to lawyers suggested the rather more dis-

[15] The UN Special Rapporteur, *supra* n. 4 at para. 40, observed that access was deferred in 58 per cent of all PTA detentions in 1987–91.

turbing scenario that they were hostile or at least indifferent to the fate of those who did pursue legal practice in this area. Although the Law Society issued a statement condemning Finucane's murder it did not follow this up with calls for an inquiry or measures to protect the independence of solicitors. The Bar Council, apparently taking the view that such threats only concerned solicitors, said nothing on the issue. Nor have these organisations been particularly vocal in respect of changes in the law which, in the opinion of many domestic and international human rights observers, have brought the law into disrepute by undermining the extent to which it complies with rule of law principles and international human rights standards. The Law Society and Bar Council have failed even to make submissions to some of the inquiries looking at anti-terrorist law in Northern Ireland and even where they have taken a strong position, for example on the restriction of the right of silence in 1988, their advocacy has not assumed a particularly vocal form. The Lawyers Committee on Human Rights, in their 1993 report, commented on the "startling lack of concern accorded the small minority of defense solicitors by their colleagues in civil practice"[16] and described the Law Society's response to the Finucane murder as "tepid". Similarly the UN Special Rapporteur argued that both the Law Society and Bar Council should have been more vocal in their defence of lawyers' rights and argued that by not doing so they were failing to live up to their obligations under Principle 25 of the UN Basic Principles on the Role of Lawyers.[17]

These criticisms appear to have had some impact. In May 1999 a special AGM of the Law Society overturned a Law Society Council decision not to press for an independent judicial inquiry into the Finucane case and also passed a motion calling for a similar inquiry into the case of Rosemary Nelson.[18] However the vote on the Nelson case in particular was only reached after an acrimonious debate amid allegations of the discussion descending into a sectarian headcount.[19] That it has taken so long for Northern Ireland's lawyers collectively to reach a decision to call for fuller investigation into the deaths of their colleagues (only shortly before the Law Society meeting did the Bar Council endorse the need for an inquiry) raises important questions as

[16] See *supra* n. 14 at p. 41.
[17] See *supra* n. 15 at para. 36.
[18] *The Irish Times*, 12 May 1999.
[19] See E Moloney "Northern Solicitors Demand Inquiries" *Sunday Tribune*, 16 May 1999

to lawyers' attitudes to those involved in conflict-related work. A number of reasons can be advanced for their relative quiet on such issues.

One is the structure of the legal profession which, as we have seen, is made up largely of sole practitioners and small firms.[20] Such a structure encourages a sense of independence among lawyers and does not lend itself easily to collective work or the forming of collective opinions. Fear is undoubtedly a second major influence and fear comes in several forms. One is physical fear for the safety of the lawyer and their family. The murders of Graham, Finucane and Nelson, plus the threats relayed to other lawyers, have no doubt discouraged others from taking a more public stance on issues of the justice system. However there is also the fear, not uncommon in other professions in a divided society such as Northern Ireland, that being seen to take a public stand on certain issues is somehow unprofessional and may undermine one's credibility and professional reputation. This may be one reason why, despite the growing number of Catholics entering the legal profession, exactly the sort of articulate people from a nationalist background one might have expected to be critical of repressive legal measures, there has been little criticism of the justice system from lawyers as a whole.[21] As Finnouala O'Connor comments on the growing number of Catholic lawyers with nationalist sympathies in Northern Ireland, although some may feel guilt at saying nothing publicly:

> "In the main the most affluent and those on the next few rungs down have neither opted for posts that would expose them to IRA attack, nor offered any criticism of the system in which they prosper. Emergency legislation has repeatedly tinkered with conditions of arrest, powers to detain and the conduct of trials. The new wave of Catholics in the legal profession, like most of their predecessors, have with very few exceptions been content to work the system in silence".[22]

Raising explicitly "political" concerns may be seen as unsettling a professional, meritocratic, consensus that helps ensure reputation and

[20] For further discussion of the structure of the profession in Northern Ireland see M Fox and J Morison "Lawyers in a Divided Society: Legal Culture and Legal Services in Northern Ireland" (1992) 19 *J of Law and Society* 124.

[21] Since the legal profession is effectively exempt from Fair Employment Act 1989 monitoring, estimates of the religious make-up of the profession is guesswork at best. However as Fox and Morison *supra* n. 20 at p.139, observe one indicator is that the graduating class from Queens University's Law School, the main source of entrants to the profession, has been over 50 per cent Catholic for the last twenty years.

[22] F O'Connor *In Search of a State: Catholics in Northern Ireland* (Belfast, Blackstaff, 1993) pp. 27–28.

financial security for all lawyers. More positively some may argue that eschewing such issues has ensured that the legal profession is not dragged into Northern Ireland's sectarian maelstrom and that the law therefore remains open to all, no matter how unpopular their cause. While the idea that lawyers "held the line" against a descent into barbarism, especially in 1970s, may not be without merit it has the appearance of an argument thought up after the event rather than one which has been argued through against alternatives.

A third factor is that Northern Ireland's lawyers, trained mostly in Britain and Ireland, share the positivistic legal culture of most lawyers in these islands. This draws heavily on British traditions which, as Hunt has recently observed, espouse an essentially positivist approach to law and, via a stress on the sovereignty of Parliament, a rejection of the idea that law reflects particular values.[23] In this paradigm the lawyer's role is to remain essentially *neutral* and to shelve any personal political views when he or she enters the professional arena. Several of those arguing against the Law Society endorsing inquiries into the Finucane and Nelson cases claimed that this was departing from the Society's traditional *neutrality*. The argument is even more clearly made in a letter from the Lord Chief Justice, Sir Robert Carswell, to the Lord Chancellor on the issue of whether the declaration new QCs are required to make should be altered to ensure it was more open to all sections of the community. Carswell stated that: "I have little doubt myself that this is all part of an ongoing politically based campaign to have the office of Queens Counsel replaced by a rank entitled Senior Counsel or something like that".[24] The clear implication is that seeking change is "political" and that "political" activity is not something lawyers should be involved in.

This paradigm of neutrality, plus fear and a sense of independence, would appear to have constrained Northern Ireland's lawyers from contributing fully to the very extensive public debate which has raged on the institutions of justice. Given that such a debate has occurred, with extensive participation from political parties and NGOs, the question may be asked as to whether the lawyers' greater presence would have made a difference. I would suggest that it would in that, in a society without effectively functioning political institutions, the

[23] See M Hunt "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 *J of Law and Society* 86.

[24] An extract from the letter is quoted by Kerr J in *In re Treacy and McDonald's Application*, 2 May 2000, QBD (unreported).

only frame of reference for most judges was the views of their peers. When lawyers did express a more public view, for example in respect of the Supergrass trials, it appears to have been a significant influence on judicial decisions that ultimately gave effect to defendant's rights. Perhaps similar action in respect of areas such as confessions, the use of lethal force by the state or the abrogation of the right of silence might also have had a significant impact. More interesting still is the issue of whether this quietism is likely to continue. I would suggest it would not. The debate within the Law Society on the Finucane and Nelson inquiries plus the decision, after some internal debate, of the Bar Council to support a challenge to the QCs oath, would seem to presage a change. The Good Friday Agreement's commitment to parity of esteem seems likely to lead to further challenges to the exclusively British character of most of Northern Ireland's legal institutions. As the spectre of political violence recedes it is likely that more people within Northern Ireland, including lawyers, will become more comfortable with asserting their political allegiances and with demanding that these are respected. With the end of terrorism, the focus of legal action is likely to shift from the reactive arena of the criminal trial to the proactive civil sphere of judicial review and human rights actions, where lawyers have to craft arguments which require greater empathy with their client's objectives. In any case, with the advent of the Human Rights Act 1998, plus a potential Bill of Rights for Northern Ireland, lawyers' training and legal culture is likely to alter in a way which emphasises the idea of law having a particular normative content and of lawyers as having an obligation to uphold this. All in all, the legal profession in Northern Ireland is likely to face pressure to move away from one which eschews any public commitment to particular values or politics towards one which recognises and accommodates diverse views. The extent to which it achieves this is of importance not just for lawyers but also for the judiciary from whom they are drawn.

THE ROLE OF THE JUDICIARY

Background

The civil rights movement that developed in Northern Ireland in the 1960s took its name, some of its strategy and many of its slogans from

the civil rights movement in the USA.[25] One thing it did not take was a belief in seeking to pursue change through the courts. While this may again reflect the under-representation of lawyers in Northern Ireland's public life it may also in large part be due to the fact that in the years between 1920 and 1968 the judiciary had given little indication of being sympathetic to change. Although the Government of Ireland Act 1920 had placed the courts in the (for a British court) constitutionally unusual position of being able to review and invalidate the legislation of the devolved legislature, there was little experience of this having been successfully invoked,[26] even less evidence of it being employed to challenge the inequalities of Northern Ireland society.

There were a number of reasons for this. The Government of Ireland Act 1920 was hardly a Bill of Rights. Although section 5 prohibited the Northern Ireland Parliament from making a law to "directly or indirectly establish or endow any religion. . . . or give a preference, privilege or advantage, or impose any liability or disadvantage, on account of religious belief" this was narrowly drawn and fell short of being a provision which prohibited discrimination on grounds of religion. It was therefore powerless to prohibit the indirectly discriminatory legislation, such as that abolishing PR for local elections or requiring long periods of residence to qualify for benefits, which entrenched sectarianism in the Northern Ireland state.[27] Moreover much of the entrenching of inequality, such as the reserving of jobs or council houses for Protestants, occurred through government administrative action or private sector recruitment rather than legislation. As campaigners throughout the common law world have found, the common law itself is not the best instrument for combating such discrimination. Some of it was also due to broader nationalist reluctance to engage with the institutions of the state. In a 1947 debate the Attorney General conceded that the Education Act 1930 (which he was in the process of repealing) was probably in contravention of section 5.[28] However, in its eighteen years of existence it had never been challenged before the courts.

To some extent therefore the lack of judicial engagement with minority concerns can be traced to factors beyond the control of the judiciary. However there were also aspects of the courts themselves

[25] See, generally, B Purdie *Politics in the Streets* (Belfast, Blackstaff, 1990).

[26] See H Calvert *Constitutional Law in Northern Ireland* (London, Stevens, 1968) p. 289.

[27] For a summary of these measures see P Buckland *A History of Northern Ireland* (Dublin, Gill and Macmillan, 1981) pp. 61–2.

[28] See Calvert *supra* n. 26 at p. 289.

which made them an unappealing vehicle of civil rights concern. For one thing the composition of the higher judiciary was, for most of the period of devolved government, almost entirely Protestant and unionist. Several had served as unionist MPs or as Attorney-General before joining the bench.[29] For another, on the few occasions that people had resorted to the courts to challenge actions of the executive in relation to matters of constitutional controversy, they had shown themselves to be essentially deferential to those holding elected office. In an early case on the Civil Authorities (Special Powers) Act 1922 the High Court had refused to question whether any evidence existed that a detainee had been involved in conduct prejudicial to peace or the maintenance of order.[30] The court indicated that its role terminated once it had satisfied itself that the regulation under which the detention occurred was validly made by the Minister of Home Affairs. A similar attitude prevailed in *Forde* v. *McEldowney* where the Court of Appeal, despite a spirited dissent from MacDermott LCJ, took the view that it could not rule *ultra vires* the same Minister's decision to prohibit a "Republican Club or any like club howsoever described".[31] To Boyle, Hadden and Hillyard this decision served to significantly undermine the position of those advocating peaceful change in the Northern Ireland state.[32]

The judges involved in these decisions may well have taken the view that they were acting consistently with British law at the time which, before the development of judicial review from the 1970s onwards, encouraged substantial deference to elected officials. The *Forde* v. *McEldowney* decision was indeed upheld by the House of Lords.[33] However, as McCrudden and others have pointed out, understandings of the judicial role predicated on a deference to elected officials as the expressions of a democratic will were hardly appropriate when those officials were part of a permanent government.[34] The failure of

[29] K Boyle, T Hadden and P Hillyard *Law and State: The Case of Northern Ireland* (Oxford, Martin Robertson, 1975) p. 12 observed that of twenty High Court judges appointed between 1920–70, fifteen were openly associated with the unionist Party.

[30] *R (O'Hanlon)* v. *Governor of Belfast Prison* (1922) 56 ILTR 170.

[31] [1970] NI 11.

[32] See Boyle, Hadden and Hillyard *supra* n. 29 at pp. 14–15. Harry Calvert "The Republican Clubs Case" (1970) 21 *NILQ* 191, 193 commented that such was the judicial capitulation in this case that "even moderate men may start looking to the streets".

[33] [1969] 2 All ER 1053.

[34] See, generally, C McCrudden "Northern Ireland and the British Constitution" in J Jowell and D Oliver (eds) *The Changing Constitution* (3rd edn, Oxford, Oxford University Press, 1994) p. 323; J Morison and S Livingstone *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (London, Sweet and Maxwell, 1995) ch. 3.

Northern Ireland's courts to develop a constitutional jurisprudence which challenged abuses of power by an entrenched unionist Government rendered them at best irrelevant, at worst hostile, to the developing politics on the streets in the late 1960s. However those protesting often appealed, at least initially, to ideas of law and to the equal application of British legal standards in particular. As a British Government took over direct rule of Northern Ireland in the 1970s and appealed to such standards, including ideas of democracy and the rule of law, rather than communal loyalty, as underpinning the legitimacy of their authority, so the role of the courts became increasingly significant.

THE JUDICIARY IN THE NORTHERN IRELAND CONFLICT 1969–99

Compared to the situation of lawyers, there is almost a glut of writing on the Northern Ireland judiciary, some it even from judges themselves.[35] Most has concentrated on the judicial response to anti-terrorist legislation and the extent to which the Northern Ireland courts have upheld individual human rights. While this is a valuable perspective and one which must be included in any assessment of judicial performance in Northern Ireland, as I have argued elsewhere a full picture of the role of the law in the Northern Ireland conflict must embrace both its repressive and reforming dimensions.[36] Since the late 1960s successive governments in Northern Ireland have sought to use law not just to prevent and punish political violence but also to produce political and social change which might bring about greater social consensus. A comprehensive analysis of the role of the judiciary requires assessment of their engagement with these forms of law too. Therefore in this section I look at the judiciary in respect of three areas—anti-terrorist law and policy, judicial review and anti-discrimination law—

[35] See, e.g., B Dickson "Northern Ireland's Troubles and the Judges" in B Hadfield (ed.) *Politics and the Constitution* (Buckingham, Open University Press, 1992) p. 131; B Dickson "The European Convention in Northern Irish Courts" [1996] *EHRLR* 496; S Lee and C Hill "Without Fear or Favour? Judges and Human Rights in Northern Ireland" in *Standing Advisory Commission on Human Rights: Eighteenth Report* (Cm 739, HMSO, 1993) p. 81; S Livingstone "The House of Lords and the Northern Ireland Conflict" (1994) 57 *MLR* 333; Lord Lowry "Civil Proceedings in a Beleaguered Society" [1987] *Denning LJ* 109.

[36] See S Livingstone "Using Law to Change a Society: The Case of Northern Ireland" in S Livingstone and J Morison (eds) *Law, Society and Change* (Dartmouth, Aldershot, 1990) p. 51.

before examining debates on the composition of the judiciary and the challenges facing it in the wake of the Good Friday Agreement.

Anti-terrorist law and policy

As noted earlier, special legislation to deal with political violence is hardly a new phenomenon either in Northern Ireland, or in Ireland generally.[37] However the past thirty years have witnessed the most extensive emergency legislation in Northern Ireland and, perhaps because of the rise of a number of lawyers specialising in this type of work, the most extensive efforts to challenge its scope and application. Therefore a significant body of jurisprudence has arisen which largely tracks changes in anti-terrorist policy. In the early 1970s internment and its fall out in terms of the treatment of suspects preoccupied the courts. Throughout most of the 1970s and into the 1980s there was extensive examination of the circumstances in which confessions could be admitted before trial courts. The issue of Supergrasses predominated in the mid-1980s, giving way in the 1990s to concerns relating to the curtailment of the right of silence and access to defence lawyers. Throughout these thirty years there have been recurrent issues of the scope of emergency powers and the legality of the use of force, including lethal force, by the security forces.

In responding to these issues judicial attitudes appear to be shaped by a number of influences. One is a clear abhorrence of terrorism and a belief in the right of society to prevent and punish it. This may be seen as hardly surprising given that Northern Ireland's judges have always been high on the target list of republican paramilitary organisations and five have been murdered since 1973.[38] Several others have survived assassination attempts and all have lived lives subject to extensive security precautions. Second is an approach to statutory interpretation and the development of the common law that is largely shaped by British traditions of positivism. A third is a strong commitment to judicial independence and a view that judges must not simply become rubber stamps for the executive. In examining their response to a number of

[37] See C Townshend *Political Violence in Ireland* (Oxford, Oxford University Press, 1983).

[38] Lord Justice Gibson in 1987, County Court judges William Doyle in 1983 and Rory Conaghan in 1974, Magistrates William Saunders in 1973 and Martin McBirney in 1974.

issues in detail we shall see that these do not always pull in the same direction.

Consider, for example, the issue of confessions. In the immediate wake of internment the police developed a number of specialised interrogation centres which, coupled with detention over a number of days, they hoped would produce confessions from terrorist suspects. In *R* v. *Flynn and Leonard* Lowry LCJ concluded that such confessions could not be regarded as "voluntary" since they were produced by a "set up officially organised and operated to obtain information . . . from persons who would otherwise have been less than willing to give it".[39] Within a year the Westminster Parliament, acting on the recommendations of the Diplock Report that the approach of Lowry was "hampering the course of justice",[40] replaced the voluntariness test with the Northern Ireland (Emergency Provisions) Act 1973 requirement that confessions be admitted unless there was *prima facie* evidence of torture, inhuman or degrading treatment.[41] In the face of a clear statutory injunction to admit confessions that they would previously not have done the Northern Ireland courts retrenched. In *R* v. *McCormick* McGonigal LJ, in a judgment that would subsequently be the focus of substantial criticism, indicated that the new standard "leaves it open to an interviewer to use a moderate degree of physical maltreatment for the purpose of inducing a person to make a statement".[42] Although it is worthwhile noting that McGonigal's comments came directly from the European Commission's opinion in the *Greek* case,[43] two years later Lowry LCJ in *R* v. *O'Halloran* appeared to take the view that such retrenchment went too far.[44] He stated that the court would be reluctant to find that any physical violence would be relevant to an interrogation and hence that it would amount to *prima facie* evidence of inhuman and degrading treatment. The courts also indicated that the new 1973 Act test had not abolished the judicial discretion to exclude statements where, in all the circumstances, it was fair to do so.[45] However this discretion was rarely to be exercised and the courts

[39] [1972] 5 NIJB 1.

[40] *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland*, Cmnd 5185 (1982) (The Diplock Report) para. 87.

[41] Originally the Northern Ireland (Emergency Provisions) Act 1973, s. 6, now modified and contained in the Northern Ireland (Emergency Provisions) Act 1991, s. 11.

[42] [1977] NI 105, 111.

[43] (1969) 12 *Yearbook of the European Convention on Human Rights*1, 501.

[44] (1979) 2 NIJB 1.

[45] See, e.g., *R* v. *Milne* [1978] NI 110.

also showed a reluctance to find that treatment had amounted to inhuman or degrading treatment in the absence of physical, as opposed to verbal, mistreatment. Many of the cases in the early 1980s focused not on allegations of physical violence but on lengthy periods of interrogation coupled with allegations of verbal abuse or threats.[46] Only in the rarest cases were these confessions excluded and the new consensus appears to be reflected in the revised test included in the Northern Ireland (Emergency Provisions) Act 1987, which expressly preserved the discretion and added violence or threat of violence as a new ground for exclusion.

The judicial approach to the admissibility of confessions has come in for significant criticism.[47] Critics note that in the two years between the decision in *McCormick* and that in *O'Halloran* complaints against the police relating to interrogations doubled, leading to an Amnesty International mission and eventually to the Bennett inquiry which recommended significant changes in interrogation practices.[48] They also note that in its first report on the holding centres the European Committee for the Prevention of Torture recommended substantial immediate improvements or closure if this could not be achieved.[49] However the confessions cases reveal a clear tension between the three factors identified earlier as influencing judicial decisions in this area. Preserving a sense of judicial independence leaned in the direction of exercising close supervision over interrogation practices, lest trials become rubber stamps of what had happened in the interrogation rooms.[50] On the other hand it was clear that obtaining confessions proved effective in jailing those involved in terrorist activity[51] and that Parliament had clearly, on a number of occasions, endorsed legislation explicitly designed to ensure confessions would be admitted more

[46] See, e.g., *R* v. *Dillon and Gorman* [1984] NI 292; *R* v. *Cowan* [1987] 1 NIJB 15; *R* v. *Howells* [1987] 5 NIJB 10.

[47] See, e.g., D Walsh *The Use and Abuse of Emergency Legislation in Northern Ireland* (London, Cobden Trust, 1983) p. 53.

[48] *Report of the Committee into Police Interrogation Practices in Northern Ireland* (Cmnd 7497, HMSO, London, 1979).

[49] *Report to the Government of the United Kingdom on the Visit to Northern Ireland by the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment from 20 to 29 July 1993* (CPT/Inf (94) 17) at para. 45.

[50] See D Greer "The Admissibility of Confessions under the Northern Ireland (Emergency Provisions) Act" (1980) 31 *NILQ* 205.

[51] E Mallie and P Bishop *The Provisional IRA* (London, Heinemann,1987) p. 255, note of the interrogation techniques used in the mid-1970s: "it was a development that produced immediate and potentially disastrous results for the Provisionals".

easily. At least it can be said that the Northern Ireland cases, in contrast to those of Israel and South Africa where even physical violence was not always deemed sufficient to rule a confession inadmissible, reveal a judiciary struggling with these tensions.

Similar issues have arisen in relation to the curtailment of the right to silence. Like the replacement of the voluntariness rule for confessions, the Criminal Evidence (Northern Ireland) Order 1988 (SI 1987/NI 20) struck at a well established common law principle. Defence lawyers sought to ensure that any such derogation was as minimal as possible and received some early support when courts ruled that inferences could only be drawn where a *prima facie* case was already made out against the defendant.[52] However the Northern Ireland courts had already allowed a somewhat broader interpretation of the Order before first the House of Lords and then the European Court of Human Rights in the *Murray* case suggested that courts should use a "common sense" approach to the drawing of inferences.[53] The *Murray* decision also had implications for the denial of access of solicitors to their clients in police detention. This had not generally been raised by lawyers until the late 1980s, despite the fact that the police regularly exercised a discretion given to them by the emergency provisions legislation to delay detainee's access to a solicitor for forty-eight hours[54] and never allowed solicitors to be present during interviews. This changed once the additional risk of a client's silence in those initial forty-eight hours being used against them was added.

The first wave of cases focused on the denial of immediate access. These were at least successful in forcing the police to offer some more specific reasons for denial of access in each case.[55] When the police subsequently responded by arguing that they feared solicitors would be asked to pass on messages which (unknown to the lawyers themselves) contained coded instructions for other terrorists, some solicitors

[52] See J Jackson "Curtailing the Right to Silence: Lessons from Northern Ireland" [1991] *Crim LR* 404.

[53] *Murray* v. *DPP* (1993) 97 Cr App R 151; *Murray* v. *United Kingdom* (1996) 22 EHRR 29.

[54] In his study, Walsh *supra* n. 47 at p. 66 found that none of the detainees he interviewed were granted access within the first forty-eight hours. The discretion to deny access can only be exercised on a number of specified grounds, which relate to things like interfering with evidence or alerting other suspects. This evidence suggested it was being exercised in a blanket fashion.

[55] See, e.g., *Re McNearney's Application*, September 1991 (unreported). However, in *R* v. *Harper* (1990) 4 NIJB 75 the Court of Appeal refused to exclude a confession after the defendant had been denied access to a solicitor.

offered undertakings that they would not communicate to anyone what passed between them and their client. However the courts concluded that not even that was enough in some circumstances and accepted police arguments that a solicitor giving such an undertaking might nevertheless be kidnapped and tortured by the IRA to reveal information.[56] This was despite an affidavit from one of the solicitors in these cases that:

> "The firm in which I am a partner has acted for over twenty years for many people alleged to have committed serious terrorist crimes. I personally have been in a position to give advice in these matters for a period of seven years and during that time have advised many hundreds of people . . . It has not been my personal experience nor has it been the experience of any member of this firm that any pressure has been brought to bear by members of terrorist organisations to divulge confidential information".[57]

Although the litigation was largely unsuccessful, it did appear to have a significant impact on police practice and denials of immediate access dropped dramatically from 1992 onwards.[58] Attention then shifted to the issue of whether solicitors had a right to be present during interviews, especially in the wake of the European Court of Human Rights decision in *Murray* that denial of access, coupled with inferences drawn from silence, could amount to a breach of Article 6 of the Convention. Within Northern Ireland the issue was most extensively considered by a three judge court of Queens Bench in *Re Russell's Application*.[59] In a decision replete with concerns as to the nature of the terrorist threat and Parliament's right to specify special measures to deal with it Hutton LCJ rejected the idea that the common law conferred a right to participate but added that even if it did:

> "The court has to decide these applications in a situation where there has been a very grave terrorist threat in this jurisdiction and where Parliament has passed the relevant section to give effect to the recommendations of the Diplock report".[60]

[56] See *Re McKenna and McKenna*, February 1992 (unreported); *Re Kenneway*, 1992 (unreported).

[57] Affidavit of Barra McGrory in *Re McKenna and McKenna*, *supra* n. 56.

[58] The UN Special Rapporteur *supra* n. 4 at para. 40, notes that the rate of deferral fell from 58 per cent in 1987–91, to 26 per cent in 1992, 14 per cent in 1993 and by 1996 had dropped to 3 per cent.

[59] [1996] NI 311.

[60] *Ibid*. at p. 346.

Hutton also indicated a view that the PACE code provisions (which generally allowed solicitors to be present but contained an exception for those arrested under anti-terrorist provisions) were consistent with Article 6. He noted that even in *Murray* the Court had not granted a right to participate and had indicated that restrictions could be placed on lawyer's contact with their client for good cause. The following year his view was upheld by the House of Lords in the *Begley* case.[61]

Many of the themes raised in the confessions cases appear again in this saga. However the statutory authority was weaker (Parliament had not expressly provided for solicitors to be excluded from sitting in on interviews) and arguably the need for judicial independence stronger, as these restrictions impugned the integrity of officers of the court. The judiciary could have scrutinised police justifications for denial of access more thoroughly[62] and a view that Parliament must have intended that solicitors be denied the right to sit in interviews only for cause would have been consistent with the Strasbourg Court's approach to Article 6. However perhaps the lack of public complaint from lawyers collectively, as opposed to those specifically involved in defence of those accused of scheduled offences, that these provisions prevented lawyers from doing their jobs effectively left the courts inclined to see the restrictions as justified.

The theme of a need to ensure judicial independence perhaps comes across most strongly in the Supergrass episode, which convulsed the courts in the mid-1980s. Between November 1981 and November 1983 a total of around 600 suspects were arrested on the evidence of nineteen republican and eight loyalist "supergrasses".[63] Initially the courts displayed a willingness both to believe the evidence of the supergrass, Kelly J describing Christopher Black as "one of the best witnesses I have ever heard", and to hold that it was safe to convict on their uncorroborated evidence alone.[64] However, beginning with the successful appeal of Charles McCormick (ironically a police officer implicated by

[61] *R* v. *Chief Constable RUC, ex parte Begley* [1997] NI 275, [1997] 4 All ER 833.

[62] Or balanced these more fully against the interests of suspects. *In re Floyds Application* [1997] NI 414, Carswell LCJ saw no particular reason why immediate access should be granted in respect of a seventeen-year-old suspect who had recently given birth. It is unclear after this when police officers would be found to have exercised their discretion to deny access unreasonably.

[63] S Greer *Supergrasses: A Study in Anti-Terrorist Law Enforcement in Northern Ireland* (Oxford, Oxford University Press, 1995) p. 57.

[64] Thirty-one of fifty-six defendants convicted in the first three trials in 1983 were convicted on the uncorroborated evidence of the supergrass, see Greer *ibid*. at p. 252.

one of his own informers) in January 1984,[65] the use of supergrasses went into decline and by the end of 1986 over 75 per cent of those originally charged on supergrass evidence had been acquitted. A substantial number of these were acquitted on appeals where the Northern Ireland Court of Appeal concluded that their judicial brethren had either underestimated the credibility problems of such witnesses or misapplied the corroboration requirements. These appeal judgments involved a particularly exacting scrutiny of the fact-finding processes of trial judges and, as Greer comments, "legal criteria even more strict than those of the regular common law were eventually observed".[66]

While it is difficult to know what exactly provoked this change in judicial approach it appears not insignificant that, unusually in the history of anti-terrorist law in Northern Ireland, the judicial performance was subject to significant criticism from within the legal profession. In January 1984 Lord Gifford QC published a highly critical report, which crucially argued that supergrass evidence would not have been accepted by juries, and other public criticisms were made by members of the Northern Ireland Bar.[67] While the use of supergrasses was clearly highly efficient at putting those suspected of involvement in terrorism behind bars it also brought judicial independence into substantial doubt. Perhaps crucially, unlike other aspects of anti-terrorist strategy that have been reviewed by the courts, it had no explicit parliamentary approval.

Parliament has also had little to say about the use of force by the police and army in Northern Ireland, yet here judicial scrutiny has been rather less exacting. Over 350 people have been killed by the security forces during the Northern Ireland conflict, mostly by the army.[68] A significant proportion of these killings have occurred in circumstances which cast suspicion on claims that the force used was reasonable but to date only four security force members have been convicted of murder for killings committed while on duty. Although this low rate of convictions is primarily due to the limited number of prosecutions brought, especially in respect of killings resulting from planned interception operations, the judicial role is also worth examining. Acquittal rates for security force personnel in these cases run at over 80 per cent

[65] *R* v. *McCormick* [1984] NI 50.

[66] See Greer *supra* n. 63 at p. 273.

[67] T Gifford *Supergrasses: The Use of Accomplice Evidence in Northern Ireland* (London, Cobden Trust 1984). See also E Grant "The Use of Supergrass Evidence in Northern Ireland 1982–5" (1985) 135 *NLJ* 1125.

[68] A total of 294 of 357 deaths can be attributed to the army.

and arguably the way in which the judiciary has interpreted the key legal provision at issue, section 3(1) of the Criminal Law Act 1967, has discouraged the bringing of prosecutions in the first place.[69] In the 1975 case of *R* v. *Naughton*, Lord Lowry LCJ took the view that "the security forces are operating in conditions with which the ordinary law was not designed to cope and in regard to which there are no legal precedents".[70] The Attorney-General for Northern Ireland subsequently sought greater clarity from the House of Lords as to what standards should apply in the special circumstances of Northern Ireland but their lordships simply responded that it was essentially a matter for the jury (despite the fact that juries had been suspended on the recommendation of one of its members).[71] Some of their dicta however indicated that where security force personnel reasonably suspected they were engaging terrorists courts should be loath to second-guess their actions.

Bereft of such guidance therefore Northern Ireland's judges have continued to adjudicate on a number of criminal and civil cases relating to killings by the state. In some they have displayed a commendable willingness to examine the facts thoroughly and to scrutinise the evidence of security force personnel as closely as anyone else. However it is probably fair to observe that this has been in cases where those killed clearly had no connection with terrorism and where even some security force members were prepared to testify against their colleagues.[72] Moreover such cases are arguably offset by those where the courts have displayed considerable sympathy for the police officers or soldiers involved.[73] The most notorious was the comments of Gibson LJ who, acquitting several police officers of murder of alleged republican paramilitaries, commended them for bringing the suspects to justice, "in their case the final courts of justice".[74]

In addition to the criminal trials of security force personnel, issues of lethal force have also engaged judicial attention via inquests. In those

[69] This provides that "a person may use such force as is reasonable in the circumstances in the prevention of crime or in affecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large".

[70] [1975] NI 203, 208.

[71] *Attorney-General for Northern Ireland's Reference* (No 1 of 1975) [1977] AC 105.

[72] As, e.g., in the cases of Clegg or Fisher and Wright. However even these cases, where convictions ensued, were followed by extensive campaigns to seek early release and a review of the conviction. Clegg's murder conviction was subsequently quashed.

[73] See *R* v. *Robinson* [1984] 4 NIJB 1; *R* v. *Montgomery*, 1984 (unreported); *R* v. *Elkington*, 1992 (unreported).

[74] See *R* v. *Montgomery supra* n. 73. These killings and the cover-up which emerged at the trial subsequently became the focus of the Stalker inquiry.

cases where a criminal prosecution is not brought, and even some of those where it is, the inquest becomes often the only form of public examination of how the death occurred. Inquests in Northern Ireland have been extensively criticised in respect of a number of structural flaws, notably the lack of legal aid for victim's relatives and the attenuated form of verdict available.[75] However those flaws have arguably been exacerbated by a number of judicial decisions. In *McKerr* the Northern Ireland Court of Appeal had at least indicated that a coroner could compel security force members involved in the killing to testify at the inquest, but this was subsequently reversed by the House of Lords.[76] More recent Northern Ireland decisions have upheld the issuing of public interest immunity certificates and the screening of soldiers giving evidence which only increase the difficulties for the inquest to perform its function.[77]

These cases on use of lethal force by the security forces, together with some on excessive use of non-lethal force,[78] are perhaps the most disturbing in the area of anti-terrorist law and policy. By suggesting that the police or army enjoy some implicit level of immunity for their actions when dealing with suspected terrorists they undermine the judges' own ideology of the law being equally applicable to all. They also undercut efforts to suggest that the law, far from being simply an emanation of a unionist state, is open for appropriation by all communities in Northern Ireland. Throughout the history of Northern Ireland nationalist support for illegal armies has always in part been underwritten by fears that the law will not check the use of force by unionists against them. While Northern Ireland's judges have scarcely shown themselves unwilling to convict loyalist paramilitaries, this reluctance to ensure the effective accountability of the security forces fails to assuage such fears.

Overall the judicial engagement with anti-terrorist law and policy suggest that images of a judiciary wholly subservient to the executive, still less to a unionist agenda, are misleading. Instead we have seen a judiciary which clearly shares the state's abhorrence of terrorist

[75] See, e.g., Amnesty International *Northern Ireland: Killings by Security Forces and Supergrass Trials* (London, 1988).

[76] *McKerr* v. *Armagh Coroner* [1990] 1 All ER 865.

[77] See *Re Ministry of Defence's Application* [1994] NI 279; *Re Jordan's Application* [1995] NI 308.

[78] Though there the courts have given some important verdicts criticising ill treatment, see, e.g., *Re Gillen* [1988] 1 NIJB 47 (habeas corpus granted in respect of mistreatment of suspect); *Adams* v. *Chief Constable*, 1998 (unreported) (£30,000 awarded for assault on suspect).

violence but which also struggles to reconcile ideas of judicial independence with fidelity to traditional British constitutional notions of the sovereignty of Parliament. Neither the House of Lords, which has displayed an almost total deference to the views of the executive in respect of Northern Ireland,[79] nor Parliament, which has regularly supplemented emergency law to overturn any unfavourable judicial decisions,[80] have made its task easy. Given that the anti-terrorist law regime has primarily been administered against the nationalist community in Northern Ireland it would be hard for any judiciary, no matter how rigorously independent, to preserve the image of equal justice. Moreover failure to firmly enforce what Parliament has commanded in this area would risk losing the confidence of other sections of the community. What is perhaps most conspicuously missing from this jurisprudence is what Kirchheimer has called "the most awesome as well as the most creative part of the judicial experience, the entertaining of a small but persistent grain of doubt in the purposes of his own society".[81] There is no sense of wonder as to whether anything has ever been wrong in the state of Northern Ireland, no sense of any alternative perspective to the evil of terrorism and the right of the state to combat it, even in such a divided polity. A greater interest in international human rights norms might have provided at least some sort of partial alternative discourse to the official language of Westminster and Whitehall but although such norms have been referred to more frequently recently the courts have largely done so only to dismiss them.[82]

Judicial review

In Northern Ireland, as in the United Kingdom generally, judicial review has mushroomed since the mid-1980s.[83] Some of the reviews

[79] See Livingstone *supra* n. 35; C Gearty "The Cost of Human Rights: English Judges and the Northern Ireland Troubles" [1994] *Current Legal Problems* 19.

[80] Beginning with the immediate passing of retrospective legislation to annul a decision of the Northern Irish courts that special powers allowing the army to make arrests were *ultra vires* the Government of Ireland Act 1920, see *R (Hume)* v. *Londonderry Justices* [1972] NI 91 and B Hadfield "A Constitutional Vignette—From SR & O 1970/214 to SI 1989/509" (1990) 41 *NILQ* 54.

[81] O Kirchheimer *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, Princeton UP, 1961) p. 233

[82] See B Dickson "The European Convention in Northern Irish Courts" [1996] *EHRLR* 496.

[83] See B Hadfield and E Weaver "Judicial Review in Perspective" (1995) 46 *NILQ* 113.

taken relate to aspects of anti-terrorist law and policy, such as access to solicitors or inquests, which has already been explored in this chapter. However there are also many more which engage different issues of controversy. Whereas criminal defence is a necessity for clients, the invocation of judicial review represents a choice to engage with the legal system and one that may owe as much to the ingenuity of lawyers as to the demands of their clients. Although the majority of judicial reviews in relation to matters of controversy have been launched from a nationalist perspective there are an increasing number from unionists[84] and even different parts of government itself.[85] This section focuses on three areas where the courts' intervention into matters of significant public debate has been sought.

The first relates to the prisons.[86] Although the domestic courts were largely by-passed during Northern Ireland's major prison controversy, the protests and hunger strikes of 1976–81,[87] things changed from the early 1980s onwards. In part this may have been due to lawyers' perception of a greater availability of judicial review in the prison context following the *St Germain* decision,[88] in part to prisoners seeing it as a more economical way of challenging the authority of prison staff. Whatever the reason prisoners, primarily republican prisoners, became the most enthusiastic exponents of judicial review in Northern Ireland from the mid-1980s onwards.[89] These challenges originally focused on the disciplinary powers of prison governors and Boards of Visitors but moved wider to deal with matters such as visits, release schemes and equal treatment between men and women in prisons. In relation to discipline powers prisoners had some significant victories. The Northern Ireland Court of Appeal took the lead in the United Kingdom in declaring that governor's adjudications were subject to judicial review[90] and

[84] See e.g. *Re Austin* [1998] NI 329 (loyalist prisoner challenging temporary release conditions); *Re Dallas* [1996] NI 276 (unionist mayor challenging censure actions by local council); *Re Williamson*, 2000 (unreported) (victim of IRA bombing challenging early release of prisoner convicted of the offence).

[85] See *Re Secretary of State for the Home Department* [1999] NIJB 68 (Home Secretary challenging Sentence Review Commissioners' early release decision).

[86] For a general summary of Northern Ireland prison cases see B Dickson "Judicial Review and Prisoners in Northern Ireland" [1998] *Public Law* 57.

[87] Although the European judicial institutions were engaged, see *McFeeley* v. *United Kingdom* (1980) 3 EHRR 161.

[88] *R* v. *Board of Visitors of Hull Prison, ex parte St Germain* [1979] QB 425; this decision rejected the argument that prisons were beyond the judicial review jurisdiction.

[89] Hadfield and Weaver *supra* n. 83 at p.119, note that prisoners cases reached 53 per cent of all judicial review cases by 1991.

[90] *McKiernan* v. *Governor HM Prison Maze* (1985) 6 NIJB 6.

subsequently imposed more stringent procedural requirements on the conduct of some of these hearings.[91] Most of the cases on other issues have been lost[92] but the court's willingness to grant leave for review of such matters may have done something to reassure those in prison that avenues for redress of grievances existed.

A second area is cases concerning local councils. With the rise of Sinn Féin as a political force from the early 1980s its members began to be elected in numbers to local councils. Unionist councillors in a number of councils then sought either to exclude such councillors altogether or place significant barriers in the way of their effective participation in council business. Most of these actions led to judicial reviews and most were ruled *ultra vires* by judges who, while not hiding their distaste for Sinn Féin's support for the IRA,[93] nevertheless came to the conclusion that unionists had exceeded their powers.[94] Such cases, coming as they did only a year after the height of the Supergrass saga, may well have done something to assuage nationalist fears of unionist judicial bias and certainly cleared the way for greater political participation by Sinn Féin.

A third and most recent set of cases concern what might be seen as issues relating to "parity of esteem between the two communities". One manifestation of this has been cases relating to the parades issue. In *Re Farrell's Application*, Nicholson LJ concluded that the Parades Commission had given a sufficiently clear statement of its reasons, which were based on relevant criteria, to uphold its decision to permit a parade down Garvaghy Road.[95] More recently in *Re White's Application* (a case which will be discussed in greater detail below) Carswell LCJ rejected a challenge to the composition of the Commission.[96] Another manifestation of this issue is the case on the

[91] See, e.g., *Re O'Hare* [1989] 1 NIJB 1 (delay in charging); *Re Murphy's Application* [1988] 8 NIJB 94 (content of charges).

[92] See, e.g., *McCartney* v. *Governor HM Prison Maze* (1987) 11 NIJB 94 (visits of Sinn Féin councillor prohibited).

[93] Hutton J in *In re Curran and McCann's Application* [1985] 7 NIJB 22 expressly took judicial notice of the fact that when Sinn Féin representatives took part in local councils this "is just one plank of their policy, the other plank being the unambivalent support of murder and other acts of terrorist violence committed to overthrow democratic government in Northern Ireland".

[94] See *In re Curran and McCann supra* n. 93; *In re French and others Application* [1985] 7 NIJB 48; *In re Neeson's Application* [1986] 13 NIJB 24. Indeed it has sometimes seemed that judges' revulsion for Sinn Féin has been exceeded only by their exasperation at the conduct of unionist councillors.

[95] [1999] NIJB 143.

[96] 18 May 2000 (unreported).

QCs' declaration, which has been discussed earlier.[97] Although Kerr J rejected all of the applicants' claims of discrimination in that case his recognition that the issue of the declaration was a matter of controversy on which the Lord Chancellor would wish to consult marks a welcome acknowledgement of deep-seated conflicts of identity and allegiance within Northern Ireland.

Overall the development of the judicial review jurisdiction in Northern Ireland is a matter worthy of note. While some applicants may have been left disappointed by decisions against them, the willingness of courts to consider such issues has provided a significant official avenue for their airing of grievances in a society hitherto bereft of political institutions. Moreover the values of judicial review, such as transparency and the need for consultation, are of particular relevance in a polity where one community complains of an historic exclusion from decision-making. Some of those involved in prisons cases have subsequently played a part in other judicial reviews after their release. They are unlikely to have done so had they felt the courts were closed to them. In this way judicial review may have served as something of a counter-balance to the unequal appearance of anti-terrorist law.

Fair employment

The same may be said of the development of fair employment law, especially since the introduction of the Fair Employment Act 1989. Clearly the judges have not been in the vanguard of dealing with religious discrimination. We have already seen how they failed to offer much in the way of a remedy to those campaigning on the issue in the 1960s. Rather this has been a legislative effort, with significant political pressure from Ireland and the USA, as well as within the United Kingdom; combining to produce perhaps Europe's most advanced anti-discrimination law.[98] One of the themes of this development has been to avoid judicial enforcement of anti-discrimination law, first through the use of the Fair Employment Agency in a quasi-adjudicative capacity, later through the creation of Fair Employment Tribunals to deal with individual claims of religious discrimination.

[97] *In re Treacey and MacDonald's Application*, 2 May 2000 (unreported).

[98] See S Rose and D Magill "The Development of Fair Employment Legislation in Northern Ireland" in Magill and Rose (eds) *Fair Employment Law in Northern Ireland: Debates and Issues* (SACHR, 1995) p. 1.

However this legislation still allows the Tribunal to state a case for the Court of Appeal and it is here that the courts must engage with questions as to what amounts to discrimination and the legality of measures to combat it. Although commentators have observed some differences between court and tribunal interpretations these have not been stark.[99] The Court of Appeal has delivered a number of enlightened and progressive judgments on issues such as the burden of proof in discrimination issues,[100] sectarian harassment[101] and affirmative action.[102] At the very least it can be said that there is no evidence of the courts significantly undermining progressive equality legislation, as has been observed in relation to courts in Great Britain or the USA in dealing with race and sex equality law. In respecting the clearly expressed wishes of Parliament the performance of the Northern Ireland courts in these cases may have assuaged the fears of those who saw them as implacably committed to a unionist agenda. As with the judicial review cases these decisions may have contributed something to republicanism's turn to constitutionalism by demonstrating the possibility of a justice equally open to all.

COMPOSITION OF THE JUDICIARY AND CHALLENGES FOR THE FUTURE

Unlike the police or the civil service, the Northern Ireland judiciary has faced few calls for structural change over the past thirty years. Efforts by the Irish Government to explore the notion of three judge trial courts at the time of the Anglo-Irish Agreement in 1985 were swiftly rebuffed, apparently after opposition from the judiciary in Northern Ireland. In the Good Friday Agreement, while most of Northern Ireland's other public institutions were cited for change, the judiciary appeared as the one that got away. Whether this is testament either to political parties' satisfaction with their work, their own ability to resist change or a lack of political interest in what happened in the courts is difficult to say. However the Agreement did contain a sting in the tail, the provision for a Criminal Justice Review whose terms of reference included "the arrangements for making appointments to the judiciary

[99] See C Bell "The Case-Law of the Fair Employment Tribunal" in Magill and Rose *ibid*. at pp. 71, 93.

[100] *Belfast Port Employers* v. *Fair Employment Commission* [1994] NIJB 36.

[101] *Smyth* v. *Croft Inns* [1995] NI 292.

[102] *Hall* v. *Shorts Missile Systems* [1996] NI 214.

and magistracy, and safeguards for protecting their independence". In the end the issue of judicial appointments proved to be one of the most contentious of the Review, with newspaper reports indicating that its publication had been delayed due to concern within both the Northern Ireland judiciary and the Lord Chancellor's office as to its recommendations for an independent element in the appointments mechanism.

The Review keeps strictly to its terms of reference and eschews any discussion of the role or performance of judges in Northern Ireland over the past thirty years in favour of a concentration on appointments and training. While stressing that "merit . . . must in our view continue to be the key criterion in determining appointments"[103] it goes on to add that there is a need for action to ensure a judiciary which is "reflective of Northern Ireland society".[104] To achieve these objectives it advocates the establishment of a Judicial Appointments Commission, whose members would include both judges and lay members, relaxation of eligibility criteria and efforts at outreach to communities who are currently under-represented among the judiciary. However it retains the idea that the judiciary should be drawn exclusively from legal practitioners and rejects arguments for applying Fair Employment Act 1989 monitoring procedures to judicial appointments or applications. Moreover its key recommendation of a Commission is dependent on control of justice matters being devolved to the Northern Irish Assembly and Executive.

Whether the Review's recommendations will ever come to fruition is therefore subject to a number of considerations, most notably the progress of devolved government and the speed at which it is deemed safe to devolve further functions to it. However, the very fact of the Review and its recommendations has served to shed light on an institution which seemed almost beyond public scrutiny. Some have expressed dismay that implementation of its recommendations would lead to a highly politicised judiciary, with lawyers jockeying to see if they can get their cases before a "nationalist" or "unionist" judge. However the Review indicates that its aim is not to produce a "representative" judiciary, in the sense of one which actively pursues the interests of particular groups, but a "reflective" one. While acknowledging that judges must continue to apply the law independently of the will of the executive or political parties it acknowledges that the confi-

[103] *Review of the Criminal Justice System in Northern Ireland* (HMSO, 2000) para. 6.84.

[104] *Ibid*. para. 6.85.

dence of the whole of the public in the administration of justice may be undermined if the judges are all Protestant men. Currently there are greater concerns in respect of gender (only one of Northern Ireland's twenty-five most senior judges is female) than community background (although no public information exists there appears to be a balance at High Court level, less so in the County Court). A more reflective judiciary would ensure that a greater range of experiences and insights are brought to bear on judicial decisions, a matter commentators throughout the United Kingdom have seen as of increasing importance as judges grapple with more policy laden choices in interpreting the Human Rights Act 1998.[105] It would also bring the judiciary more into line with other public institutions in Northern Ireland.

However, as the earlier discussion of the traditionalist character of Northern Ireland's legal profession (from which judges will continue to be drawn) suggested, it would not be impossible to produce a bench which is reflective in terms of community background and gender but overwhelmingly conservative. For some this may seem entirely appropriate. With the restoration of devolved government, and on a power-sharing basis, it might seem desirable that the judiciary maintains a traditionalist stance of deference to elected officials and does not encourage what Brendan O'Leary has referred to as "the temptations of legalism".[106] However this, it seems to me, would risk a return to the constitution as a framework for pragmatic interest bargaining, an approach which has already been described as inappropriate for Northern Ireland and which undermines the Good Friday Agreement's innovative blend of communal and individual rights. The approval of the Agreement in a referendum suggests that it is more than a deal between political elites but rather the development of a set of principles that will govern relations between all citizens of Northern Ireland. The task of policing the application of these principles remains one for the courts.

This insight returns us to the question of the paradigm of judicial interpretation referred to earlier in this chapter. This reflected traditional British constitutional practice whereby the absolute sovereignty of Parliament was recognised and deference was owed to the actions of elected officials. This in turn was based on the idea that the outcome of parliamentary elections reflected expressions of the democratic will in

[105] See K Malleson *The New Judiciary: The Effects of Expansion and Activism* (Aldershot, Ashgate, 1999) pp. 31–2.

[106] B O'Leary "The Nature of the Agreement" (1999) 22 *Fordham ILJ* 1628, 1659.

response to competing political programmes. Only the electorate could subsequently decide that the government had erred, the courts lacked the legitimacy to offer an alternative vision. It was argued that, however appropriate such a paradigm was for the United Kingdom as a whole, it failed to reflect either the lack of real electoral challenge to unionist government between 1921–72 or the existence of any electoral challenge to direct rule in 1972–2000. With the Agreement, the passing of the Northern Ireland Act 1998 and the return of devolved government the courts now face a choice about which paradigm they pursue. They can treat the new constitutional arrangements purely as the outcome of Westminster's passing of the Northern Ireland Act 1998, in which case legislation of the new Assembly is to be approached much in the same way as that of the Stormont Parliament was—Westminster legislation is entitled to a higher level of deference and judicial review of administrative action will be shaped largely by developments in the English courts. Alternatively, and more imaginatively, they can recognise that the Northern Ireland Act was, as its preamble states, "for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland set out in Command Paper 3383" and treat that Agreement too as part of the constitutional paradigm, in other words that the Agreement is the founding of a new constitutional order within Northern Ireland and that the exercise of public power must reflect it. This would not be to authorise a highly interventionist judiciary but rather to encourage the development of a more supple constitutional jurisprudence.

The content of this constitutional jurisprudence is obviously a matter for more extensive reflection and future development but some initial outlines can be sketched here. One would be that, given the cross-community support requirements and pre-legislative human rights scrutiny provisions, legislation of the Assembly should be entitled to a high level of deference by the courts. The voting arrangements should diminish concerns that "discrete and insular minorities" will be ignored by the legislature.[107] However the Agreement and the Act also envisage the upholding of individual rights. Where Assembly legislation strikes at the very essence of such rights (for example were it to abolish non-religious schools, contrary to Article 2 of Protocol 1 of the Convention) then a court must clearly intervene. A second is that the

[107] The phrase is taken from Justice Stone's footnote 4 in his judgment in *United States* v. *Carolene Products* (1938) 304 US 144. See also J Ely *Democracy and Distrust* (Cambridge, Harvard University Press, 1980).

Agreement and the Act clearly envisage leaving the development of policy on a significant number of controversial issues to various commissions rather than the legislature. These include policing, parades, human rights and equality. However a clear theme running through the establishment of all these bodies is that they must be "representative of the community". Since representativeness is key to their legitimacy the courts have a clear duty to ensure it is maintained. In this respect the recent decision of Carswell LCJ in *Re White*, that a Parades Commission lacking any female members remained representative, is not an encouraging precedent. Thirdly, when it comes to administrative action, the need to ensure equality of opportunity, reflected in section 75 of the Northern Ireland Act 1998, is a key principle. The courts should not see the devising of Equality Schemes, required under section 75(4) of the Act, as exhausting this requirement. It is clearly reflective of the spirit of the Agreement and therefore should impact on its implementation. Finally, the courts face an interesting challenge as to how to deal with actions of the UK Government in respect of Northern Ireland. Westminster legislation is of course exempt from the competence requirements of the Northern Irish Assembly and most UK government departments acting in Northern Ireland seem likely not to be designated for the purposes of section 75. Arguably, therefore, they should be governed by "old British" and not "new Northern Ireland" constitutional paradigms. However given that the UK Government is also a signatory to the Agreement it can be argued that its content has implication for the actions of the British Government too, in so far as they relate purely to Northern Ireland.

Adoption of such a new constitutional paradigm might also have implications for how Northern Ireland courts view the Human Rights Act 1998. On one level this can be seen as purely Westminster legislation, responding to UK-wide concerns. However the explicit reference to it in the Agreement offers the courts an opportunity to see it as also responding specifically to concerns as to inadequate human rights protection in Northern Ireland, though this will obviously be an easier step to take in respect of any specific Northern Ireland Bill of Rights. Viewing it in this way might provide the courts with a way into what has previously been argued is missing from their decisions, a sense of concern about what has gone wrong in the past. Certainly, in the absence of any comprehensive truth commission for Northern Ireland, they may well find that people invoke Human Rights Act provisions as a way of reopening debates about what has happened in the past. One

can think especially of incidents involving lethal force where the Act could presage changes in inquests, civil liability and discovery. Dealing with the past while devising paradigms to govern the future—such, as Teitel has observed, is the lot of any court system in a time of transition.[108]

[108] See R Teitel "Transitional Jurisprudence: The Role of Law in Political Transformation" (1997) 106 *Yale LJ* 2009, 2014 on the need for legal institutions in times of transition to be both forward and backward looking.

7

Shaping the Future of Criminal Justice

JOHN JACKSON

INTRODUCTION

THE CRIMINAL JUSTICE system in Northern Ireland can truly be said to be currently experiencing a transition from a period when it had to deal with intense political violence towards a period of relative calm which is bringing with it its own challenges. While the troubles have left their mark on the Irish criminal process throughout the nineteenth and twentieth centuries, the past thirty years have put a particular burden on the criminal justice system in Northern Ireland.[1] This is largely because during the 1970s and 1980s there was an intensification of political violence against the institutions of state within Northern Ireland resulting in a need for considerable security precautions to be taken to protect those who work within the system, including the police, prosecutors and the judiciary. But it has also been because the UK Government's response to the violence, particularly from the mid-1970s, has been to adopt a policy of "criminalisation" within the legal process rather than resorting, as in the past, to extra-legal, emergency measures outside the process.[2]

When the UK Government imposed direct rule on Northern Ireland in 1972, it immediately established a Commission under the chairmanship of a British judge, Lord Diplock, to consider what legal procedures

[1] See J Jackson and S Doran "The Judicial Role in Criminal Cases in Ireland" in N Dawson, D Greer and P Ingram (eds) *One Hundred and Fifty Years of Irish Law* (Belfast, SLS Legal Publications, 1996) p. 69.

[2] For a brief account of the "criminalisation" strategy, see T Hadden, K Boyle and C Campbell, "Emergency Law in Northern Ireland: The Context" in A Jennings (ed), *Justice under Fire: The Abuse of Civil Liberties in Northern Ireland* (London, Pluto Press, 1988) pp. 8–10.

were necessary to deal with terrorist activities within the criminal justice system.[3] As a result of the recommendations of this Commission radical departures were made to ordinary criminal procedure such as the introduction of "Diplock" courts which provided for cases connected with the troubles to be tried by judge rather than jury. Those suspected of political violence have for the most part ever since been processed through the criminal justice system rather than through any extra-judicial system.[4]

This emergency legislation has remained largely intact in Northern Ireland throughout the last thirty years. That said, there has been a considerable reduction in the numbers of suspects being processed though the Diplock courts since the declaration of the paramilitary cease-fires in 1994 and this has inevitably led to calls for the legislation to be repealed.[5] Despite the cease-fires, however, paramilitary groups have continued to maintain a strong presence in certain areas of Belfast and elsewhere in Northern Ireland and this has enabled them to "police" and dispense their own form of paramilitary justice in these areas.[6] Paramilitaries and certain political parties have also continued to challenge the legitimacy of the criminal justice system, pointing to the clear over-representation of the Protestant or unionist population in the police and alleging that this community is also over-represented in other parts of the system including the judiciary.

It is against this background that the parties to the Good Friday Agreement in 1998 saw a clear need for a review to take place of the entire criminal justice system. Such a review was, of course, only one of the many issues dealt with in the Agreement and many other issues dealt with under the Agreement such as the mechanisms for devolution, prisoner releases and decommissioning have captured much larger headlines. But in terms of establishing confidence in the institutions of government there are few areas more important than the justice system. One of the central themes of the Agreement has been the commitment which it makes to partnership, equality and mutual self-

[3] See Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (Cmnd 5185, 1972).

[4] The use of internment, the detention of suspects without trial, was eventually phased out in 1975, although the mechanism for its revival remained in the statute book until 1998.

[5] See *Statistics on the Operation of the Northern Ireland (Emergency Provisions) Act 1996*, prepared by the Statistics and Research Branch of the Criminal Justice Policy Division of the Northern Ireland Office.

[6] Paramilitary "punishment beatings" have been given considerable media attention, see *Belfast Telegraph,* 18 February 1999.

respect. In this context the establishment of a Human Rights Commission and a new Equality Commission under the Northern Ireland Act 1998 has been hailed as an important step in creating a Northern Ireland where prominence is given to human rights and equality. Clearly if these principles are to have any meaning they must be seen to penetrate the justice system. The specific concerns about policing were addressed by the establishment of an independent commission into policing under Chris Patten, but in parallel with this Commission the parties to the Agreement called for a criminal justice review to be carried out by the British Government "through a mechanism with an independent element".[7]

This chapter will focus on the unique features of the Criminal Justice Review, the approach adopted by the Review and some of its most significant recommendations.[8] As the author was a member of the Review, the chapter will not make an exhaustive critique of its recommendations. Some of these are examined elsewhere in this collection. Rather it will attempt to show how the context in which the Review was established guided its approach and led to its conclusions. It will be argued that its terms of reference and approach have led to a package of important recommendations which have the capacity to make fundamental changes to the criminal justice system and the legal system, but that even if the reforms are implemented they will not inevitably lead to greater confidence in the system without other issues, which the Review was unable to consider, being addressed as well.

THE SCOPE OF THE CRIMINAL JUSTICE REVIEW

The Criminal Justice Review was the most comprehensive review ever to be carried out into the criminal justice system in Northern Ireland. There have, of course, been a number of reviews on specific issues, chiefly of late on the operation of emergency powers considered necessary for dealing with the political and paramilitary violence. The most famous of these was the review mentioned above carried out by Lord Diplock in 1972 into the powers that would be necessary to enable terrorist or paramilitary offenders to be dealt with by the ordinary criminal justice system. A number of other periodic reviews have been

[7] Belfast Agreement p. 23.

[8] See Criminal Justice Review Group, *Review of the Criminal Justice System in Northern Ireland* (2000).

carried out into emergency legislation since then but they have all more or less endorsed the need for the package of measures which Lord Diplock recommended.[9] What these reviews never did, however, was to look at the operation of the criminal justice system as a whole. There have been some reviews into specific aspects of the criminal system: for example, there was a report in 1968—the Hunt Report—which reviewed the role of the police,[10] there was also a review in 1972 of the prosecution system and there was a report in the early 1970s into the organisation of the magistrates' courts and county courts.[11] But there had been no overall review of the system as a whole.

Although this Review was more comprehensive than any of its predecessors, the review group was given very clear guidance on how to approach its task. Often criminal justice reviews are set up in the wake of particular crises or at least shortcomings that have been revealed about the criminal justice system. The two Royal Commissions on criminal procedure and justice in England and Wales, for example, were established, one in 1979 and the other in 1991, as a result of concern about particular miscarriages of system in the English system.[12] Such reviews often involve looking in a rather technical way at the processes and procedures that led to the shortcomings. As explained above, the Northern Ireland review was set up in a different context, notably the need to ensure fairness and equality and human rights throughout the entire system. The Agreement as a whole affirms the need to establish institutions on the basis of partnership, mutual respect and human rights and this philosophy was brought very firmly to bear on the criminal justice review. The terms of reference of the Review explicitly required the Review to take into account the aims of the criminal justice system as laid down by the participants to the Agreement. These were to deliver a fair and impartial system of justice to the community, to be responsive to the community's concerns, encouraging community involvement

[9] See, e.g., *Report of a Committee to consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland* (Cmnd 5847, 1975); *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* (Cmnd 7497, 1984); *Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987* (Cmnd 115, 1990).

[10] Hunt Committee, *Report of the Advisory Committee on Police in Northern Ireland* (Cmnd 535, 1969).

[11] *Report of the Working Party on Public Prosecutions* (Cmnd 554, 1971); *Report of the Committee on County Courts and Magistrates' Courts* (Cmnd 5824, 1974).

[12] See *Royal Commission on Criminal Procedure: Report* (Cmnd 8092, 1981); *Royal Commission on Criminal Justice: Report* (Cm 226, 1993).

where appropriate, to have the confidence of all parts of the community and to deliver justice efficiently and effectively.

At one level this gave the reviewers an opportunity to take what the Agreement described as a "wide-ranging" look at the whole system.[13] The Review was being asked to look ahead, rather than look behind at any past inequities; to set out a vision for the future, rather than dwell on past failures. The terms of reference required the reviewers to address the structure, management and resourcing of publicly-funded elements of the criminal justice system and six specific issues were then highlighted.[14] Four of these issues were limited to criminal justice, namely the arrangements for the organisation and supervision of the prosecution process, measures to improve the responsiveness and accountability of, and lay participation in the criminal justice system, the scope for structured cooperation between the criminal justice agencies on both parts of the island and the structure and organisation of criminal justice functions that might be devolved to an Assembly. But the two other issues were not limited to criminal aspects of justice, namely the arrangements for making appointments to the judiciary and magistracy and mechanisms for dealing with law reform. Clearly any proposals concerning the appointment of judges could not be limited purely to criminal cases, and similarly mechanisms for addressing law reform, even if limited to a consideration of criminal law reform, could have an impact for the way in which law reform as a whole should be addressed.

So much for the wide-ranging scope of the terms of reference. It must also be noted, however, that there were important limiting features in the terms of reference as well. Mention has already been made of the fact that the Agreement set up another commission to look at policing and the criminal justice reviewers were specifically required to exclude policing from their review. In addition the Review could not consider the significant array of emergency powers that were given to the security forces to counter paramilitary violence and which remain largely in the statute book despite the paramilitary cease-fires. This has been considered separately by the British Government. A Home Office paper into legislation against terrorism for the whole of the United Kingdom reported in December 1998 and a specific Diplock review for Northern Ireland was set up in December 1999 and reported in May 2000.[15]

[13] Belfast Agreement p. 22.

[14] See *Review of the Criminal Justice System supra* n. 8, Annex B; Belfast Agreement p. 24.

[15] See Home Office, *Legislation Against Terrorism; A Consultation Paper* (Cm 4178, 1998).

At one level the exclusion of policing and emergency powers seemed sensible. It is generally acknowledged that policing has been one of the most controversial and divisive issues in Northern Ireland society and few could therefore object to the parties to the Agreement seeing a need for this issue to be handled separately, justifying an independent commission in its own right. An excessive examination of the emergency powers which have largely dominated the recent history of the criminal justice system in Northern Ireland could also have had a debilitating effect on the Criminal Justice Review which was designed to look forward to a future when such powers would no longer be necessary.

The exclusion of these issues, however, undoubtedly prevented the review taking a holistic view of criminal justice as a whole. Policing is such an important part of criminal justice that any criminal justice review which excluded it would inevitably be less than complete. The Policing Commission and the Criminal Justice Review did not work in complete isolation from each other and each was aware in broad terms of what the other was considering. But as the Policing Commission was independent and the Criminal Justice Review was government-led, it was not considered appropriate for the two reviews to share each other's thinking.[16] The fact that the Policing Commission was given until summer 1999 to report while the Criminal Justice Review did not have to report until the autumn of that year did give the Criminal Justice Review an opportunity to take the Policing Commission's recommendations into account and to develop these recommendations.[17] One example of this was the way in which the Review developed the Policing Commission's proposal to establish district policing partnership boards to represent the views of local people and to monitor the performance of the police at a local level. The review group took the view that there was much to be said for combining the functions of community safety and policing. Policing was an important aspect of community safety but not the only aspect and it recommended instead the establishment of local community safety and policing partnership boards.

It would clearly have been more difficult for the review group to disagree with the Policing Commission in any fundamental way, especially when Mo Mowlam, the Secretary of State, accepted the Commission's Report in principle on its publication in September 1999

[16] See *supra* n. 8 at para. 1.23.

[17] The Commission reported on 9 September 2000. See Independent Commission on Policing, *A New Beginning: Policing in Northern Ireland* (1999).

and when her successor, Peter Mandelson, announced in January 2000 after a four month consultation period that the Government accepted many of its recommendations.[18] A government-led criminal justice review, albeit one with an independent element, would have found it very difficult to dissent from these recommendations after this announcement.

The relationship between the Criminal Justice Review and the Policing Commission was therefore a rather curious one. Although policing was outside the remit of the Review, in practice there is a clear overlap between policing and other aspects of the criminal justice system. Each review was in theory free to come up with very different recommendations but as the Policing Commission reported first the Review was inevitably somewhat bound by the approach of the Commission. Both reviews were, of course, bound by the principles of the Agreement and reporting second did not in practice appear to inhibit the recommendations of the Criminal Justice Review. But the completely independent nature of the Policing Commission and the fact that it reported first gave the impression that the Review was of secondary importance to the Commission and served to emphasise the limit of its remit.

The exclusion of policing and emergency legislation did more than merely restrict the scope of the Criminal Justice Review. We have seen that the review was charged with prescribing arrangements which would enhance confidence in the criminal justice system. Yet the exclusion of policing and emergency legislation meant that the Review was unable to address the very issues which have done more than anything to prevent all sections of Northern Ireland society having confidence in the criminal justice system. The Government's own community attitudes survey has consistently shown that Catholic confidence in the police lags considerably behind confidence in other areas of the criminal justice system (for example judges) and that Catholics have less confidence in the disposal of terrorist cases than ordinary cases.[19] In its own consultation exercise the Review found that for many the experience and perceptions of the criminal justice system were influenced by views on policing and emergency legislation. Asking the Review to address the issue of confidence in the context of future criminal justice arrangements without looking at policing and emergency legislation was therefore rather like asking an architect to design a house without

[18] HC Debs cols 845–8 (19 January 2000).

[19] *Community Attitudes Survey Sixth Report*, NISRA Occasional Paper No 10 (Central Survey Unit, 1999).

walls and a roof. The review group recognised this limitation when it rather more circumspectly stated that it was conscious of the linkages between the three areas of policing, criminal justice and emergency legislation, and that "its efforts to develop proposals for a fair rights-based and effective criminal justice system which inspired the confidence of the community as a whole could not be divorced from the outcome of those separate reviews".[20] To look to the recommendations of the Review in the expectation that they will by themselves boost the confidence of all parts of the community in the criminal justice system is therefore somewhat misplaced, as the Review itself accepted.

FORWARD-LOOKING, NOT BACKWARD-LOOKING

Mention has already been made of the forward-looking remit of the Review. This gave the review group an important opportunity to draw a line under the past and recommend solutions for a new era of peace. But it is also important to recognise that its very forward-looking remit disabled it from acting as effectively as it might as a bridge between those considered part of the system and those whose confidence had to be inspired in it. It has been said that questions of history are integral to processes of conflict resolution and political transition, with political reconciliation requiring some form of "historical audit" whereby participants have an opportunity to commit their experiences to a history of the conflict which allows grievances to be aired and experiences to be acknowledged.[21] Although established as part of a "peace" agreement, however, the Review set itself firmly against any attempt to go back into history. It heard a number of calls for it to investigate past events, but like the policing commission it was not set up as a committee of inquiry with legal powers to call for papers and question witnesses. This meant that it was unable to make judgements about the performance of particular organisations and groups such as the Department of the Director of Public Prosecutions and the judiciary, although it did (somewhat more than the Policing Commission) pay tribute to all those who had paid with their lives the ultimate price for

[20] *Supra* n. 8 at para. 1.22.

[21] A Mulcahy, "Policing History: The Official Discourse and Organizational Memory of the Royal Ulster Constabulary" (2000) 40 *Brit J Criminol* 68, 85.

upholding the rule of law and serving the course of justice during the recent troubles.

This did not mean that the Review was not able to take account of the views of those who made representations to it. One of the significant features of the Review was the open nature of the consultation that took place during it, in contrast to many other criminal justice reviews that have taken place elsewhere, certainly within the United Kingdom. It was required to engage in "wide" consultation and during the course of its work it received ninety written submissions, it held over seventy meetings with interested groups and organisations and in order to hear the views of those who operate on the ground it held a series of nine seminars across Northern Ireland. This threw up issues which were not mentioned in the consultation exercise. For example, the Review reported that early in the consultation process, it became clear that a number of groups were anxious for the Review to examine ways of dealing with juvenile crime and the arrangements for managing and delivering juvenile justice.

The Review was also able to take account of the views it received about past events. As it said, it was important to understand those points of view in order to make recommendations that would inspire confidence in the future. What, however, it could not do was to try to reach an accommodation of the very different views that it heard with a view to reconciling these differences. The Review was required to take as its guidance the principles of human rights, mutual respect and partnership laid down in the Agreement and could not act as a "go-between" between various interests. So, for example, when it came to the vexed question of the ethos of the courts, it is not surprising that it heard "mixed views" about the flying of flags, about the proclamation of "God save the Queen" as the judges enter some courts and about symbols and emblems.[22] The Review recommended that symbols such as the royal coat of arms should continue to be displayed in the exterior of courthouses in recognition of the constitutional fact that as the courts remain within the United Kingdom they should continue to be called the "royal courts of justice". At the same time it considered that there was no need for these signs to be displayed in the interior of courtrooms where justice was actually dispensed and where all must feel comfortable.

At first blush this smacks of a convenient compromise, trying to give something to both parts of the divided community. In fact, however,

[22] *Supra* n. 8 at para. 8.30.

the recommendations are better seen as informed by the principles of the Agreement which recognises the constitutional position of the courts in the United Kingdom but which also recognises the need for all parts of the community to feel part of the institutions of the state and to feel comfortable about playing their full part in them. A similar approach was taken towards the question of what kind of oath judges should take on appointment to office. The Review satisfied itself on the basis of legal advice that there was no constitutional impediment to a politically neutral oath in modern language with no reference made to the Crown but which simply required members of the judiciary to swear that they will "well and faithfully serve office" and "do right to all manner of people without fear or favour, affection or ill will according to the law of the land".[23] The Review concluded that this was the best option to take in order to make nationalist members of the community fully comfortable about sitting as judges.

GOVERNMENT-LED

A further limiting feature of the Review was the fact that it was a government review, albeit one with an "independent element", a curious combination of government and independent members. Technically, the five "independent assessors" consisting of members of the legal profession, academia and the voluntary sector appeared able to out-vote the four senior civil servants on the Review who represented the three government departments most involved in the criminal justice issues to be considered, the Northern Ireland Office, the Attorney-General's Office which has responsibility for prosecutions and the Lord Chancellor's Department which has responsibility for courts and the appointment of judges. The way in which the independent assessors interacted with the government members of the group was summed up as follows:[24]

> "We were an unusual group in that we were a mix of civil servants representing the Government and independent members who played a full part in all aspects of the review. As a result, we were not wholly a creature of government, nor were we entirely independent, as was the Independent Policing Commission for Northern Ireland. But we were given freedom to address the task before us in the way we chose".

[23] *Ibid*. para. 6.128.
[24] *Ibid*. para. 1.8.

The last sentence is important as the group was given the freedom to develop its own dynamic without government Ministers breathing down its neck. Nevertheless, the fact that civil servants representing the Government played a prominent role raises questions about the extent to which the Review could recommend matters contrary to existing British government policy. Of course, at a general level there could be no conflict between the principles of the Agreement and government policy as the government was a signatory to the Agreement. Similarly, the commitment the Government has given to human rights by signing various human rights instruments and now by the incorporation of the European Convention on Human Rights into UK law goes hand-in-hand with the commitment in the Agreement towards human rights. But at a level of greater detail it would have been hard for the Review to overturn specific aspects of government policy provided these were sufficiently human rights proofed.

One example suffices to make this point. The Review reported that a number of groups had raised doubts about the legislation which enables inferences to be drawn from a suspect's failure to answer police questions and a failure to testify. The Review's response to this issue was to look rather minimally at the Strasbourg rulings on the right to silence. It referred to the case of *Murray* v. *United Kingdom*[25] which held that in the circumstances of that case there was no violation of Article 6 of the Convention by reason of the application of the law permitting inferences to be drawn from silence. The review group noted that there were other applications currently before the European Court raising the same issue but instead of dealing with the issue as a matter of principle, it merely stated that it would be necessary for the Government to monitor these cases and if necessary take remedial action, although it did recommend that there should be research into the impact of the rules governing police questioning including a review of the cautions which are issued to suspects warning them of the consequences of failing to answer police questions.

MODERNISING THE CRIMINAL JUSTICE SYSTEM

So far we have dwelt upon the limitations of the Review but within the limitations set, the review group proposed a number of changes which

[25] [1996] 22 EHRR 29.

have gone beyond current government policy in the rest of the United Kingdom. Apart from its commitment to human rights, one of the broad themes of government policy has been the need to modernise both government and the courts and instil greater openness, transparency, accountability and accessibility into the process. As the Lord Chancellor put it in his preface to the government White Paper on *Modernising Justice*,[26] the Government was elected on a radical agenda to modernise the country, exposing all its institutions and services to scrutiny. Those that are out of date, he said, or inefficient or unaccountable to the people would not survive unchanged. In another context the Home Secretary has viewed the Human Rights Act 1998 as at the heart of the Government's citizenship agenda whereby the state and civil society should act in partnership, each to facilitate but also to control the other, what Giddens has called the politics of the "third way".[27]

But there are serious questions about how far the Government has gone in its policy to effect this active citizen culture within the justice system. Despite the Lord Chancellor's rhetoric about access to justice, the Government's legal aid reforms seem designed to cut costs rather than deliver greater access to justice.[28] Changes in prosecution practice are coming about as a result of the Macpherson and Glidewell reviews but there is as yet no right for victims to be given reasons when prosecutions are not brought.[29] Belatedly, the Government has established a review of the criminal courts system but the review is focused more on managerial concerns than on concerns about citizens in the courts.[30] Indeed, the Government's policy has gone in the direction of *less* citizen involvement in its proposal to abolish the right of defendants to elect for trial by jury when they are charged with either-way offences. There has also been little to encourage greater transparency and openness. The Freedom of Information Act excludes victims learning details about criminal investigations. Concern about the closed nature of

[26] *Modernising Justice* (1998).

[27] A Giddens, *The Third Way: The Renewal of Social Democracy* (Cambridge, Polity Press, 1998).

[28] See M Zander, "The Government's Plans on Legal Aid and Conditional Fees" (1998) 61 *MLR* 538.

[29] *The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999); *The Review of the Crown Prosecution Service* (Cmnd 3960, 1999).

[30] The Criminal Courts Review by Lord Justice Auld was announced by the Lord Chancellor on 14 December 1999. See M Zander, "What on Earth is Lord Justice Auld Supposed To Do?" [2000] *Crim LR* 419.

judicial appointments has been met by accepting the idea of a commission to review judicial appointments rather than by a full-blown judicial appointments commission.[31] Some attempts have been made to monitor the impact of race and gender in the criminal justice system but there remains much to be done in this area.[32] Finally, the need to reduce juvenile crime has led to talk of encouraging greater civic responsibility in juveniles by means of restorative justice principles but the Government's reforms seem destined to widen the gap between intent and achievement.[33] Principles of restorative justice involve making restoration to the victim, reintegrating the offender into the community and bringing home the consequences of offending to the offender. But it is questionable whether these objectives will be met through the Government's two flagship measures in this area, the Crime and Disorder Act 1998 which focuses on the prevention of crime through a series of orders that may be enforced through the civil courts and the Youth Justice and Criminal Evidence Act 1999 which has followed these initiatives up with a new sentence of referral to a youth offending panel.

By contrast the Northern Ireland Criminal Justice Review's reforms seem more radical and here the advantages of a review able to take a global view of substantial areas of criminal justice outshine the piecemeal approach to reform adopted in England and Wales. Apart from engaging in an active consultation process, the review group was able to take a strong comparative approach towards its work. In order to acquaint itself with structures and arrangements in other countries, the group commissioned a number of research reports and visited a range of jurisdictions, including England and Wales, Scotland and the Republic of Ireland but also countries in Western Europe and North America, South Africa and New Zealand. One of the general lessons brought home was the different ways in which systems tackle crime and organise their criminal justice systems. But the Review also found that the present Government did not have a monopoly on the themes of accountability, transparency, openness and citizen involvement and

[31] The idea of an independent scrutiny of the appointments process was recommended by the Peach Report. See *An Independent Scrutiny of the Appointment Processes of Judges and Queen's Counsel in England and Wales: A Report to the Lord Chancellor by Sir Leonard Peach* (1999).

[32] See the various publications under s 95 of the Criminal Justice Act 1991 cited *supra* n. 8 at para. 3.41.

[33] See C Ball, "A Significant Move towards Restorative Justice, or a Recipe for Unintended Consequences?" [2000] *Crim LR* 211.

responsibility. A number of jurisdictions were also rallying to these themes with the result that prosecutors were more prepared to give reasons to victims for not prosecuting cases, agencies were publishing annual reports, there were more open appointment procedures as regards the judiciary and there was a trend towards greater supervision or control by prosecuting authorities over police investigations. The group reported that a number of countries were also developing restorative justice schemes whereby young people were being dealt with outside the formal justice system by, for example, family conferencing schemes.

Driven by the values of the Good Friday Agreement and drawing on best practice elsewhere, the group came up with a wide-ranging package of reforms dealing with fundamental issues such as prosecution, judicial appointments and youth justice and how to ensure fairness and accountability throughout the system. A new independent Criminal Justice Inspectorate was recommended, responsible for the inspection of all aspects of the criminal justice system other than the courts. The review also recommended that a strategy for equity monitoring be developed throughout the criminal justice system so that the effect of decisions on people can be monitored according to categories such as community background, gender, race, ethnic origin, sexual orientation and disability. The outcome of this monitoring should also be published on a regular basis to demonstrate that problems have been identified and action is being taken.

The principles of independence, accountability, transparency and fairness informed many of the specific proposals. For example, a newly named prosecution service was proposed to take responsibility for prosecuting all criminal cases through the courts with extended powers to direct that specific matters are investigated by the newly-created Police Ombudsman where the prosecutor is not happy with the response of the police. On devolution the head of this service should no longer act under the direction of a politically-appointed Attorney-General. There is to be a presumption in favour of giving reasons to victims and other interested parties for not prosecuting cases and there are a number of recommendations for a published annual report, a code of practice explaining how decisions are taken, a published code of ethics, inspection arrangements and complaints mechanisms.

The group considered that under new devolved arrangements an independent Judicial Appointments Commission could better safeguard the need for appointments to be insulated from political inter-

ference than a system whereby appointments were in the hands of a Minister. A commission would also provide greater transparency than the present arrangements. While appointments should be made strictly on merit, there was a need to make the judiciary reflective of all sections of the community in terms of community background and gender and the review proposed widening the present eligibility requirements to draw upon as wide a pool of legally qualified persons as possible.

To make the courts less remote and give all sections of the community a feeling that they have a stake in the system, the group proposed a number of practical measures such as consulting victims about decisions affecting their cases, as well as ending the practice of lawyers and judges wearing wigs. In this context the proposal already mentioned to abolish coats of arms within courthouses was also seen as a necessary measure to make all people as comfortable as possible in the courtroom environment.

Finally, youth justice was given specific priority as indeed it has in England and Wales. But instead of recommending the coercive model proposed in the Prevention of Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999 which seeks to prevent crime by means of a variety of sanctioning orders, the review group considered that the philosophy of restorative justice should be integrated into the juvenile justice system using a conference model (called a "youth conference") which would be available for all juveniles subject to the full range of human rights safeguards. The group considered that there was also a role for community restorative justice schemes to deal with low-level crime but it considered that such schemes should receive referrals from statutory agencies and be accredited according to human rights standards.

CONCLUSION

Within the spirit of inclusivity and fairness which imbues the Good Friday Agreement, the review group came up with a vision which will bring the legal system truly into the twenty-first century, safeguarding traditional values such as independence but recognising also the need for greater accountability, transparency and civic participation in the system. When the Review reported in March 2000, the British Government announced a six-month consultation period and in October 2000 it reported that a full timetable for reform is to be

completed by April 2001. This augurs well for those believe that the Northern Ireland criminal justice system needs to be reformed along modern human rights grounds. Some anxiety has been expressed about the fact that some of the reforms are contingent upon the devolution of criminal justice functions to the Northern Ireland Executive. But with the exception of the establishment of the judicial appointments commission, few of the reforms are in fact contingent in this way. Of course, the passage of legislation is only a first step towards realising the vision set by the Review. There is a need for all the agencies and professionals involved to aspire themselves towards the civic culture promoted by the Review and this may take time.

What is less clear is the extent to which the Review will help towards resolving the conflict in Northern Ireland. Here we return to the limitations on the terms of reference and the task given to the Review. The parties clearly believed that there was a need for a new vision for criminal justice in a post-conflict situation. If the vision of a rights-based, accountable criminal justice system is realised this can only help heal some of the wounds that have been opened up by an excessively closed system in the past. The recommendation that in future the Director of Public Prosecutions should give reasons to victims or the relatives of victims of criminal or alleged criminal activity should help to inspire confidence in the newly named prosecution system. But these and the other reforms are prospective, not retrospective, and the question is whether they will be enough to heal the rift that has emerged between those deemed part of the criminal justice system and those at the receiving end of it during the times of the troubles.

There has been some discussion about the desirability of a truth and reconciliation commission in Northern Ireland. There is, of course, currently an important inquiry being conducted by Lord Saville into the events on "Bloody Sunday" and the Victims Commissioner has issued a report on the victims of the troubles.[34] But there have as yet been no announcements to investigate other disputed deaths or shootings such as the killing of the lawyers Pat Finucane and Rosemary Nelson.[35] At the end of this chapter it is not proposed to examine how far it is necessary to investigate past events of this kind. The point is

[34] The Saville Inquiry was announced on 29 January 1998. Sir Kenneth Bloomfield, the Victims Commissioner, published his report, *We Will Remember Them*, in May 1998.

[35] Pat Finucane was murdered in 1989 by the Ulster Freedom Fighters and Rosemary Nelson was murdered in 1999 by the Red Hand Defenders and there have been allegations of security force collusion in both cases.

that it may not be enough to reshape the institutions of criminal justice. In some manner there is also a need to reshape the attitudes of those inside and outside the system. One way in which this may be attempted is by more open dialogue. The Criminal Justice Review tried to encourage dialogue by holding seminars to which all those with an interest in criminal justice were invited. These never received the publicity given to the open meetings held by the Policing Commission but they did spark some lively exchanges between those with very different experiences of the criminal justice system. In the new era opened up by the reforms proposed by the Criminal Justice Review it will be important to create as many opportunities for dialogue as possible so that all can begin to feel part of the changes involved.

8

A New Beginning for Policing in Northern Ireland?

LINDA MOORE and MARY O'RAWE

INTRODUCTION

SINCE NORTHERN IRELAND was first created under the Government of Ireland Act 1920, policing has been a key site where issues around the legitimacy of the state have been played out. The place accorded to policing in the Good Friday Agreement of 1998 is indicative of a sense in some quarters that if policing can somehow be "got right" many of the other pieces of the jigsaw will slot into place.

The complex web of identities, loyalties and allegiances tied up in how and by whom Northern Ireland is policed is symptomatic of wider difficulties to be overcome in terms of moving Northern Ireland towards a stable and enduring peace. In signing up to the Agreement, which was subsequently endorsed in a referendum by 71 per cent of the population of Northern Ireland, the political parties recognised that policing in Northern Ireland is a highly emotive subject, invoking great hurt for many people, including police officers and their families.[1] They agreed it to be essential that policing structures and arrangements are such that the police service is "professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it polices; and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms".[2] As such the historical and continuing debate around changes to policing institutions in the North is not, and cannot be, a simple matter of modernisation and professionalisation within a managerialist framework. This said, the extent

[1] Belfast Agreement p. 22.
[2] Belfast Agreement p. 22.

of the challenge set by the Agreement is evidenced in the deep-seated fears and emotions which surface at the mere mention of policing arrangements, past, present or future. Despite the supposedly consensual wording of the Agreement, the policing debate has continued to prove divisive. Alternate displays of everything from intense pride, defensiveness and ownership of the Royal Ulster Constabulary (RUC) by largely unionist sections of the population, to complete antipathy and alienation from the same police force by other parts of the community (increasingly working class loyalist as well as the more traditional republican and nationalist constituencies) continue to characterise public exchanges. In some senses, things have been brought to a head by the current discourse around the changes to policing proposed by the Patten Commission,[3] set up under the Good Friday Agreement of 1998 to look at future arrangements for policing in Northern Ireland. The Disband the RUC/Save our RUC dialectic continues to play itself out and must be sensitively unpacked at both a substantive and symbolic level in order to evaluate whether we really are on the threshold of a new and better beginning for policing in Northern Ireland. By the same token policing change cannot be allowed to be held hostage to political fortune.

It is not that the methods and policies of policing Northern Ireland have remained static over the years, nor a case of the Royal Ulster Constabulary being all good or all bad. On one level, therefore, the dialectic and polarisation of views is based on a false premise. However, attempts to grapple with vital issues of accountability, representativeness and respect for human rights have long been stymied by the narrowness of the official security-oriented political agenda which has never completely taken on board the extent of the polarisation of views or how deeply people have been affected and alienated from the police and/or each other by the differential ways in which policing has been experienced by different sections of the community in Northern Ireland. There are various truths around what the RUC has done and how it has contributed to the containment or exacerbation of violent conflict in Northern Ireland. However, officialdom has, time and again, fallen into the trap of prioritising or validating one discourse and one truth over any other, i.e. that the RUC is the best and most professional police force in the world and has acted as nothing other than a neutral arbiter in a sectarian feud. This approach has many attendant

[3] Report of the Independent Commission on Policing for Northern Ireland, *A New Beginning: Policing in Northern Ireland* (September 1999) (the Patten Report).

implications which are not of benefit to moving us towards more accountable and acceptable policing arrangements.

Analysis of some of the core features of the policing experience and the discourse which fuels and is fuelled by it, therefore has merit not just in terms of what it can say about policing, but also in terms of understanding some of the reasons behind the "one step forward, ten steps back" *danse macabre* which has characterised and dogged the current peace process.

Against this backdrop, this chapter will examine whether the recent report of the Patten Commission, and the current Government's method of implementing the Patten recommendations contain enough to cut through the alienation to create policing arrangements which are representative, accountable and respectful of human rights. The chapter will further consider the potential of the human rights paradigm to build and maintain consensus around policing in Northern Ireland, and whether it has been fully utilised in the current process. Finally, the chapter will argue the prize to be gained by getting things right this time far outweighs the price to be paid if the *status quo* is merely re-invented under a new and better-packaged guise.

THE CURRENT CONTEXT

It would be the contention of this chapter that the Patten Report presents a new and innovative programme for change. It certainly attempts to put human rights, equality and accountability at the heart of policing arrangements. However, in many respects it stops short of articulating how these goals can be reached, and in its failure to follow through coherently the logic of the human rights paradigm on some key issues, it contains inherent contradictions which risk undermining much that is positive about the Report. In part, this has enabled government to reclaim its traditional space in the policing debate. At the time of writing this chapter, the signs are that far from building on the Patten Report's recommendations, they have been severely diluted by the Government in drafting legislation purportedly designed to implement the Report.[4] Of Patten's 175 recommendations, less than one-third have been included within the legislation. The rest have been

[4] Police (Northern Ireland) Act 2000. The Act received Royal Assent in November 2000. However the timetable for it coming into operation is unclear and is essentially in the hands of the Secretary of State for N. Ireland.

drawn into an "implementation plan" devised by a civil service "Patten Action Team", reflecting the views of, and allocating responsibility within, a narrow group essentially consisting of the RUC, the Northern Ireland Office and the current Police Authority.

In part, the dilution of the Patten recommendations has been a result of concessions to the Ulster unionists and linked to fraught political circumstances during the period of consultation on the Patten Report. Unionist opposition to certain of Patten's proposals—most notably the proposed change in the name and badge of the Royal Ulster Constabulary to the Northern Ireland Police Service[5]—won the promise of a reconsideration of these recommendations.[6] Not surprisingly, nationalists were aggrieved at this dilution of the Patten recommendations, particularly given Patten's insistence that there should be no "cherry-picking" of the Report. And once again we were into the hurly-burly of using human rights as bargaining chips and construing the Patten recommendations in terms of what they individually appeared to be conceding to one community or taking away from another. Several hundred amendments were made to the draft legislation as it went through the Westminster Parliament. However the final legislation has still fallen short of convincing nationalist and republican political parties that a "new beginning" is really being delivered. Because they have not so far been persuaded to give up support to the government's plans by nominating party members to sit on the Policing Board created by the Police (NI) Act 2000, veiled threats have been emanating from the Secretary of State's direction that if the SDLP and Sinn Féin are not prepared to endorse the "new dispensation" all plans for implementing Patten's proposals will be shelved for the forseeable future.

Tying the implementation of the Patten Report so closely into the political climate in Northern Ireland creates an inherent uncertainty about the extent to which Patten will be delivered. The on-off nature of devolved government in Northern Ireland raises problems for the implementation of some aspects of the Report. At the time of writing the devolved Assembly and Executive have reconvened. However, the situa-

[5] Patten Report para. 17.6.

[6] The Police (Northern Ireland) Act gives the Secretary of State for Northern Ireland power to make regulations prescribing the design of a flag and emblem for the force, and to make provision for a new name after consultation with the Policing Board. Unionist and government amendments to clause 1 in Committee stage as to whether and to what extent the Police Service of Northern Ireland should specifically be deemed to incorporate the RUC in its "title deeds" led to further political controversy without addressing underlying issues of concern.

tion remains uncertain and there is no guarantee that this government will have a long life.[7] Furthermore, the authority vested in the Secretary of State to speed up or, more likely, slow down the pace of change, on the security advice of the Chief Constable is a potential threat to the process in that the police institution or, the whim of an individual Secretary of State, can come to be seen to dictate the pace of change.

These factors are important in themselves. However, it can be argued that, for the most part, the watering down of the Patten Report in the legislation has less to do with local party politics or legitimate security concerns and is, instead, infinitely more connected on one hand to a broader British state agenda, and on the other to opposition to change within the policing and security department of the Northern Ireland Office.

Policing policies and practice are under challenge throughout the United Kingdom. The admission of institutionalised racism in the Metropolitan Police following the findings of the Macpherson Report[8] is just one indication of the poor relations between sections of the public and the police. Throughout the United Kingdom, the police leadership and their political cohorts struggle to remain in control of the process of change.

In this respect, Northern Ireland is no exception. The whole process of change has to date been overseen by those responsible for policing in the past—the Secretary of State, the Northern Ireland Office and the Chief Constable. This triumvirate has ensured that their own powers in relation to policing remain virtually unaffected. Patten had recommended that an Oversight Commissioner be appointed "as soon as possible" with responsibility for "supervising the implementation of our recommendations".[9] The failure to appoint this person until *after* the consultation process on the Patten Report, when legislation had been drafted and debated in Parliament, and an implementation plan had already been drawn up by civil servants, is one of the most disgraceful aspects of the post-Patten process.[10] Already it would seem that the old order is reasserting itself. To understand why this is so problematic and why the process of change is as vital as the final product in

[7] In the event of a further suspension or collapse of the Executive, the British Government has included reserve powers in the legislation to establish a Policing Board with members selected by the Secretary of State.

[8] *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Cm 4262, 1999) (the Macpherson Report).

[9] Patten Report para. 19.4.

[10] Tom Constantine, former head of the United States Drug Enforcement Agency was selected as Oversight Commissioner in June 2000.

terms of making policing more effective in Northern Ireland, we must look further at the history of policing in Northern Ireland.

POLICING IN NORTHERN IRELAND: THE BACKGROUND

As previously stated, policing and the rule of law have been heavily contested issues since the creation of the Northern Ireland state. From its establishment in 1922, the Royal Ulster Constabulary was seen by large sections of the Catholic/nationalist community as closely identified with the unionist/Protestant cause.[11]

During five decades of Stormont rule, the RUC was directly accountable to the Minister of Home Affairs in the unionist government who ensured policing conformed to the dominant unionist agenda.[12] Changes in policing and the justice system were core demands of the civil rights movement in the 1960s. The policing of the civil rights protests and televised pictures of demonstrators being beaten by police created international consternation. The Cameron Commission and the Scarman Tribunal, investigating aspects of the "disturbances" were critical of aspects of policing and particularly of the sectarian conduct of the B Specials.[13] In 1969 the Hunt Committee produced recommendations aimed at normalising and professionalising policing in Northern Ireland.[14]

However, even after the British Government took direct responsibility for running Northern Ireland in 1972, and after the implementation of the Hunt Report, the RUC was still perceived as a partisan body by

[11] The RUC has always been overwhelmingly Protestant in membership. Initially a quota system was created, with the intention that one-third of officers would be Catholic; one-third Protestant ex-Royal Irish Constabulary (The Royal Irish Constabulary was the police force for the whole island of Ireland before partition) and one-third drawn from the mainly Protestant Ulster Special Constabulary, a body that had been established in 1920 as an alternative to the paramilitary Ulster Volunteer Force (UVF). In reality, many recruits to the new force came from the UVF. The quota for Catholics was never filled and indeed the proportion of Catholics in the RUC actually declined from a peak of 21.1 per cent in 1923 to the present figure of just under 8 per cent. Historical figures from J D Brewer and K Magee, *Inside the RUC* (Oxford, Clarendon Press, 1991), current figure of approximately 8 per cent from Patten Report para. 14.1.

[12] For example, within three months of being formed, a ban on police officers joining the Orange Order was lifted and in 1923 a specifically police lodge was formed. Members of the RIC had not been permitted to be members of political or religious organisations including the Orange Order. See Brewer and Magee *supra* n. 11 at p. 2 for details.

[13] A part-time armed branch of the RUC.

[14] Recommendations included the abolition of the B Specials, the disarming of the RUC and the creation of a Police Authority as a source of accountability. Although the police were disarmed they were soon after rearmed and the Police Authority never became the type of effective oversight body envisaged by Hunt.

many Catholics. This response stemmed not only from the force's mainly Protestant composition[15] but also from the increasingly central role that the police played in the Government's "counter-terrorist" strategy. This role brought the police into regular conflict with large sections of the Catholic population, but particularly with Catholic working class communities.

Ironically, far from eliminating political violence, the attitude and behaviour of the security forces has often served to inflame tensions. The sense of grievance in Catholic working class communities was exacerbated through repeated negative experience of policing; day-to-day harassment; use of plastic bullets; accusations of police collusion with loyalist paramilitaries; and alleged "shoot to kill" policies.[16]

The RUC has never operated as a "normal" police force. Since partition, it has relied on draconian special powers.[17] Police stations are highly fortified and the police routinely armed. The role of the army (both British and local regiments) has given particular cause for concern. Throughout the conflict the RUC patrolled nationalist areas accompanied by large patrols of soldiers. The police themselves were under constant danger of attack. Over the past thirty years, 302 officers have been killed and around 8,500 wounded and disabled.[18] This immense human tragedy should never be discounted or minimalised, but neither should it blind us to the wrongdoing by members of the same force which has inflicted similar suffering on other families.

While the challenge to the RUC has come mainly from nationalists, alienation between some working class Protestant communities and the police has increasingly been a problem for the force. In part this has been because of loyalist hostility to the RUC's role since the signing of the Anglo-Irish Agreement in 1985. More recently the force's role in upholding Parades Commission decisions to re-route certain Orange marches has been particularly resented by unionists. However, aspects

[15] Despite initial quotas (being) laid down to ensure one-third Catholic membership of the RUC, this never reached more than 21 per cent and has long remained under 10 per cent.

[16] For further details on these allegations of human rights abuse in policing see for example: M O'Rawe and L Moore *Human Rights on Duty—Principles for Better Policing: International Lessons for Northern Ireland* (Belfast, Committee on the Administration of Justice, 1997); R McVeigh, *It's Part of Life Here: the Security Forces and Harassment in Northern Ireland* (Belfast, Committee on the Administration of Justice, 1994); Human Rights Watch/Helsinki, *To Serve without Favor: Policing, Human Rights and Accountability in Northern Ireland* (HRW, 1997).

[17] "Emergency" legislation has been on the statute books continually since Northern Ireland first came into being.

[18] Figures from Patten Report para. 8.18.

of "normal" inner city policing—for example regularly stopping and searching young people—have also led to conflict between Protestant communities and police.[19]

As long as the various paramilitary campaigns continued, any talk of policing reform was rejected by the state and by most unionists. The new situation created by the republican and loyalist cease-fires, however, placed the issue of policing high on the political agenda.

The signing of the Good Friday Agreement in April 1998 and support for this in the public referendum provided further momentum for change, culminating in the Patten Commission proposals.

The Patten Commission and its work

The Agreement tasked the Policing Commission with inquiring into policing in Northern Ireland and making proposals for future policing structures and arrangements. These proposals were to focus on composition, recruitment, training, culture, ethos and symbols as well as accountability to the law and to the community. They were also to include recommendations on issues such as re-training and job placement for existing police officers during the period of transition. The Commission was also tasked with finding means of encouraging widespread community support for policing arrangements.[20]

The Agreement provided a mandate for change. Despite protestations from some quarters about unwelcome interference into the "best force in the world", no change was not an option. The crisis of legitimacy for policing in Northern Ireland had been an important aspect of the conflict, and the place given to policing in the Agreement was recognition of the need to address the problems. On the other hand, given the requirement for the Commission to find means of encouraging a broad base of support for their proposals it is unlikely that disbandment of the RUC was ever a real consideration either.

The Commission was established in June 1998 to report in the summer of 1999. The Commission was headed by Chris Patten, previously ousted by the British electorate as a Conservative MP and more recently former Governor of Hong Kong. The seven other Commissioners included a senior female police officer based in Boston; a Canadian criminologist; a local management expert; a former Inspector of Constabulary and an

[19] Research documenting this phenomenon includes McVeigh *supra* n. 16; A Hamilton, L Moore and T Trimble *Policing a Divided Society: Issues and Perceptions in Northern Ireland* (Coleraine, Centre for the Study of Conflict, 1995).

[20] Belfast Agreement p. 23.

academic from John Jay College of Criminal Justice, New York. Two local Commissioners, Dr Maurice Hayes (former Northern Ireland Ombudsman) and Peter Smith QC (barrister) were seen as representing the nationalist and unionist perspectives (although these constituencies would not necessarily have seen them in that light).

The Commission used a wide variety of means for gathering information. It held sixty days of plenary meetings with interested individuals and groups.[21] Advertisements in the press invited the public to write to the Commission with their opinions on policing. Political parties, church groups and others with an interest in policing were also approached for their views. Every police station in Northern Ireland was visited and non-commissioned officers consulted. By the end of the process the Commission had received approximately 2,500 individual written submissions.[22] A series of public meetings was held in every District Council area of Northern Ireland in autumn 1998. In all, more than 10,000 people attended these meetings, with over 1,000 people speaking.[23] The Commission carried out research through focus groups and conducted a public attitude survey. Commissioners carried out field visits to other jurisdictions including the Republic of Ireland, Canada, South Africa, Spain and the USA. A cultural audit of the RUC was also carried out.[24]

The Patten Report notes that attitudes in public meetings tended to fall into one of three categories: "meetings held in strongly Protestant/unionist areas where participants expressed strong, often unqualified, support for the RUC; meetings in strongly Catholic/nationalist areas where participants expressed strong criticism of the RUC and demanded a new police service; and mixed meetings at which a range of views were expressed".[25]

In some cases meetings became rather like truth commission hearings as victims of state violence or families of RUC officers who had been killed or injured told their harrowing stories. The Commission had clearly hoped that public meetings would provide a useful forum for testing possible recommendations. It was clear from early on that this would not be possible.[26]

[21] Patten Report para. 2.3. [22] *Ibid*. para. 2.3.
[23] *Ibid*. para. 2.3. [24] *Ibid*. para. 2.3. [25] *Ibid*. para. 3.16.
[26] Journalist Bea Campbell describes one of the first meetings in West Belfast: "*A huge public meeting, comprised of hundreds of people turning out to have their conversation about policing and peace, with representatives of the Commission who had come into their community to listen to them. What, of course, they gave to the Policing Commission was a litany of grief. Very politely, about two thirds of the way through that meeting . . . the chair of the Policing Commission said politely, 'Thank you for telling us*

Despite the very divided responses to the Commission, Patten reports that there was broad consensus of views on some issues. They noted similarities in views expressed by "people of both traditions in lower income, high unemployment areas":

> "Commissioners found the concerns expressed in, for example, the Shankill Road area of West Belfast very similar to those expressed on the Falls Road; and the same was true in North Belfast and elsewhere around Northern Ireland. People were concerned about youth crime and antisocial behaviour, about the threat to their children from a rapidly growing drug problem and about paramilitary thuggery. They wanted a police service with a permanent local presence to deal with these threats, and officers they recognized and could identify with".[27]

Focus group research demonstrated that Protestants from lower income groups could be as strongly alienated from the police as were their Catholic counterparts.[28]

Overall Patten found:

> "broad acceptance across the communities, albeit with differences of emphasis, that the composition of the police service should be more representative of the population, in particular that there should be more Catholic and women officers".[29]

Given the consensus on these important issues, it is a pity that the Patten Report did not frame its proposals in a way that was seen to build on and reflect back this consensus. For example, the Report is weak on the non-controversial area of increased gender representation within the force. Highlighting the changes and opportunities necessary in this area could have given a very different slant to the subsequent debate and provided a more holistic framework in which proposals to bolster numbers of Catholics and nationalists were seen only as part of a much bigger and much more comprehensive equality agenda. This kind of approach could have been all the more significant given the predictability of the media and many political leaders wanting to focus on a very limited set of recommendations, that is those most likely to provoke divisive reactions. Media attention has focused on proposals to

about your experiences, and if more of you want to tell us about your experiences, fine—but we would also be very interested in positive suggestions about future arrangements'. Now, I have no doubt that the Policing Commission learned instantly that it had made a mistake in saying that": Committee on the Administration of Justice, *The Agreement and a New Beginning to Policing in Northern Ireland* (Belfast, CAJ, June 1999) p. 71.

[27] Patten Report para. 3.19.

[28] *Ibid*. para. 3.20.

[29] *Ibid*. para. 3.23.

change the name of the RUC to the Northern Ireland Police Service and to change the police badge. The proposal to give local councils the power to raise additional money for policing was also controversial as it was alleged this would lead to councils hiring paramilitary groups to conduct policing activities, despite Patten's reassurances that this was not a possibility.

The Patten Report's proposals

In all there are 175 recommendations in the Patten Report. The Commission made clear that these must be treated as a package and "cherry-picking" was not an option:

> "The 'significant change' in policing should not be a cluster of unconnected adjustments in policy that can be bolted or soldered onto the organisation that already exists. The changes we propose are extensive and they fit together like pieces in a jigsaw puzzle".

It was recognised that the recommendations could not all be introduced at once and Patten proposed that while some should be introduced immediately others must be gradual.[30] Furthermore, "there are still some areas where change will, for the time being, be constrained by the threats to police and community security".[31] As noted above, the Secretary of State emphasised that the pace and extent of change would be dependent in many cases on the security situation. While the safety of officers and security concerns are a key determinant, it is also important that change is not blocked or delayed unnecessarily, particularly as human rights organisations have consistently argued that the militarised nature of policing in Northern Ireland has served to fuel rather than ameliorate the conflict.

During consultations human rights organisations had urged the Commission to base its recommendations on human rights principles as these provide a bottom line standard for the treatment of all citizens in a society. Despite the tendency, not least by unionists, to link human rights issues with nationalism, it is important that human rights are not seen as the preserve of one community. The Patten Report tried to take on that challenge and to that end stated clearly that: "we have not tried to balance what may be politically acceptable to this group against

[30] *Ibid*. para. 1.8. [31] *Ibid*. para. 8.3.

what is reckoned to be acceptable to that".[32] However, what has happened since would seem to indicate that the Government's response to the Patten Report is attempting to do precisely that.

Keeping policing very much in the realm of a political football may seem like a good strategy in the short-term. However, until we move beyond the traditional, tried and tested and shown-to-fail responses, we cannot deal with the conflicting legacies of the past nor lay proper foundations for the future.

The Patten Commission set its own questions for testing its recommendations:[33]

- Does this proposal promote effective and efficient policing?
- Will it deliver fair and impartial policing, free from partisan control?
- Does it provide for accountability, both to the law and to the community?
- Does it protect and vindicate the human rights and human dignity of all?

As the Commission notes, these tests are to some degree a matter of judgement, and not a precise science. However, these are good benchmarks and we use them here in assessing both the Patten Report and proposed legislative and administrative arrangements for implementation of the Patten recommendations. The key principles providing a focus for this chapter are, thus, the need for respect for human rights, equality and accountability.

Human rights

The language in the Patten Report is couched quite deliberately in terms of human rights and the Report's first chapter is devoted specifically to the subject. Given the emphasis on human rights in the Report, it is particularly disappointing that the Police (NI) Act 2000 has failed to give a statutory basis to most of the recommendations explicitly relating to human rights.

According to the Report the fundamental purpose of policing should be "the protection and vindication of the human rights of all".[34] Commission consultation showed widespread agreement that people

[32] Patten Report para. 1.10.
[33] *Ibid*. para. 1.10.
[34] *Ibid*. para. 4.1.

want police to protect their human rights from infringement by others, and to respect their human rights in the exercise of that duty.

The Patten Report proposed a raft of recommendations in pursuance of this goal:[35]

- a programme of action to focus policing on a human-rights based approach;
- a new oath/declaration expressing commitment to upholding human rights;
- a code of ethics incorporating the European Convention on Human Rights;
- a human rights dimension integrated into every module of police training, for recruits and experienced officers;[36]
- respect for human rights to be an important aspect of police officers' appraisal;
- appointment of a lawyer with specific expertise in human rights to the police legal services;[37]
- performance of police service as a whole in respect of human rights to be monitored by the new Policing Board.[38]

Despite this, in the sixty-five pages of legislation which comprise the Police (Northern Ireland) Act 2000, the words "human rights" appear only three times, twice in mention of the Human Rights Act 1998 and once in relation to the wording of the proposed new declaration of office. Aspects such as police training and the comprehensive programme of action are not referred to in the Act but are relegated for inclusion in the Implementation Plan. Worryingly, in the implementation plan, responsibility for these important aspects of the Patten Report is vested with the Northern Ireland Office, the Chief Constable and the Policing Board. The extent of the Policing Board's involvement in developing the programmes is dubious given the time-scale suggested. The programme of action is to be published by April 2001, the very month that the Policing Board is expected to become fully operational.[39]

[35] Recommendations all from Patten Report, ch. 4.

[36] The Commission notes that human rights training in the RUC lags behind other police organisations. Even in the new curriculum of 700 training sessions there were only two dedicated to human rights.

[37] This lawyer would be consulted about proposed police operations that raise human rights considerations.

[38] Patten Report para. 4.12.

[39] See NIO Implementation Plan, June 2000.

Alongside, the chapter in the Patten Report devoted to human rights the main body of the Report also contains recommendations with the potential to increase protection in this area e.g.:

- immediate closure of the holding centres at Castlereagh, Gough Barracks and Strand Road;[40]
- the appointment of a commissioner and Tribunal to oversee all intrusive surveillance policing.[41]

This strong emphasis on human rights is positive. It is disappointing, however, that other recommendations and omissions in the Report contradict this human rights ethos. And it is perhaps this lack of follow through which has allowed for such dilution of the human rights aspects of the Report in the legislation. Particularly disturbing aspects are the Report's coverage of emergency law and plastic baton rounds, its lack of consideration of human rights issues in relation to the military and its failure to tackle the issue of past human rights abuse within the force.

Emergency legislation

Policing arrangements cannot be considered in isolation from the legislation which gives police their powers. The UK Government has come under considerable international pressure in relation to emergency legislation in policing Northern Ireland. The European Court of Human Rights has on several occasions found the Government to have breached its obligations under the European Convention on Human Rights.[42] The United Nations Committee on the Rights of the Child has expressed concern about the application of emergency legislation to children[43] and the UN Committee Against Torture has called for the closure of the detention centres.[44]

In their study of the future of policing in Northern Ireland, McGarry and O'Leary conclude that there is a good case, given the cease-fires, for emergency laws to be repealed, "An emergency legal regime, involving draconian police powers, inevitably produces excesses by members

[40] Patten Report para. 8.15.

[41] *Ibid*. paras 6.44 and 6.45.

[42] See *Ireland* v. *United Kingdom*, Series A, No 25 (1979–80) 2 EHRR 25; *Brogan* v. *United Kingdom* No 1 Series A No 145-B (1989) 11 EHRR 117 (and (1991) 13 EHRR 439); *Murray (John)* v. *United Kingdom* (1996) 222 EHRR 29, (1996) 17 HRLJ 39.

[43] Committee on the Rights of the Child, *Consideration of Reports submitted by States Parties under Article 44 of the Convention* (CRC/C/15/Add. 34 (January 1997)).

[44] *Conclusions and Recommendations of the United Nations Committee against Torture* (UN Doc.A/53/44 (1998)).

of the security forces. It may sow dragons' teeth rather than respect for the legal system".[45]

As Robbie McVeigh notes in his study of security force harassment "training may help to address some illegal and inappropriate security force behaviour but the existence of emergency legislation means a whole range of police behaviour that is often perceived to be harassing occurs *inside* rather than *outside* the law".[46]

Despite serious concerns, emergency legislation merits just two paragraphs in the Patten Report. Rather than recommending that the Government repeal emergency legislation, Patten suggests that when the threat of terrorism has diminished to a point where no additional powers are necessary to combat it, the law in Northern Ireland should be the same as the rest of the United Kingdom with a single piece of anti-terrorist legislation.[47] This process is already underway with the introduction of the Terrorism Act 1999. As well as the fact that the Government proposes to keep a whole raft of special powers specifically for Northern Ireland for what could be another five years, this piece of legislation will in effect mean normalising a whole series of draconian, former emergency powers throughout the United Kingdom on a permanent basis. The scope of this chapter does not extend to the thorough examination warranted by a piece of legislation of this type. Suffice to say, it will have serious implications for policing in Britain as well as Northern Ireland, which do not necessarily bode well for the enhanced protection of human rights. If the lessons and experience of Northern Ireland are anything to go by, such legislation will have many negative consequences with the potential to jeopardise police-community relations to the point where they lead to less effective policing.

Positively, Patten recommended that records be kept of all stops and search and other actions taken under emergency powers.[48] Unfortunately, the Report did not explicitly state that these records should

[45] J McGarry and B O'Leary *Policing Northern Ireland: Proposals for a new Start* (Belfast, Blackstaff, 1999) p. 78. Emergency law allows police to stop and search without reasonable suspicion, initially hold detainees for forty-eight hours and then, with political authorisation for up to a total of seven days, and to deny access to a solicitor for lengthy periods. Combined with removal of right to silence, right to jury trial, the weight which can be placed on confession evidence alone, such powers lead to human rights abuse.

[46] McVeigh *supra* n. 16 at p. 192.

[47] Patten Report para. 8.14. Patten's failure to engage seriously with this issue is "justified" by the fact that a government review of emergency legislation was conducted separately. This is a significant flaw compounded by a separate attempt to look at the whole criminal justice system as somehow separate from policing.

[48] *Ibid*. para. 8.14.

include the religion of the subject. The Macpherson Report on the handling of the Stephen Lawrence murder inquiry by the Metropolitan Police has endorsed the need to record stop and search incidents in relation to the self-defined ethnic identity of the subject and to monitor and publish analysis of these records.[49] Translated to our own situation it would seem important to collect and analyse patterns of stop and search in terms of the religion of the person being stopped. This issue has not been addressed in specific follow-up to Patten, though the section 75 duty imposed by the Northern Ireland Act 1998 would seem to require nothing less.

Plastic bullets

The use of plastic bullets in Northern Ireland is another matter which has attracted international attention. The European Parliament condemned the use of plastic baton rounds as long ago as 1982. More recently, the United Nations Committee against Torture recommended the abolition of plastic bullets. The Patten Report states "all of us began our work wanting to be able to recommend that [plastic baton rounds] be dispensed with straight away".[50] Disappointingly, however the Commission did not make this recommendation. Patten recommended restrictions on their use, readily available guidance for officers and urgent research into alternative forms of crowd control. The Report further recommended that the Policing Board and Ombudsperson monitor the performance of the police in public order situations and follow up any concerns.[51]

While no one can doubt that police officers frequently find themselves in dangerous situations during disturbances, an important flaw in the Patten Report is that the Report seems to view the question of plastic bullets in security terms alone. Both the human rights dimension and the particular history of Northern Ireland in respect of these weapons are ignored. The Report appears to assume that plastic bullets are only fired in riot situations. Yet most of those killed have not been rioters.[52]

The United Campaign against Plastic Bullets estimates that since the British Army first used a baton round in August 1970, well over 100,000

[49] Macpherson Report, recommendations 61 and 62.
[50] Patten Report para. 9.15.
[51] *Ibid*. paras. 9.12–9.20.
[52] For details of the circumstances of all deaths, see United Campaign Against Plastic Bullets, *A Report on the Misuse of the Baton Round in the North of Ireland*, Submission to the Mitchell Commission on Arms Decommissioning (January 1999).

have been fired.[53] Seventeen people—eight of them children—have been killed by rubber or plastic bullets since the start of the conflict.[54] The scale of the problem is much larger than official figures suggest. Her Majesty's Inspectorate of Constabulary recorded some twenty plastic bullet injuries between 1 January and 25 August 1996. However, in a recently published medical article, doctors reported treating 155 patients for plastic bullet injuries received during the week of 8–14 July 1996. In one week in 1996, on the RUC's own figures, over 6,000 baton rounds were fired during public disturbances in relatively small areas of Northern Ireland. A breakdown of these statistics would further indicate that plastic bullets have been resorted to disproportionately against nationalists.

The Army

Another important gap in the Patten Report is the absence of any serious discussion about the role of the army including the Royal Irish Regiment in Northern Ireland. The army has been at the centre of many concerns about human rights. Robbie McVeigh noted that "while the RUC structures maintain a semblance of liaison and democratic control—this is completely missing in the case of the RIR and other regiments of the British Army".[55] Yet, apart from stating that the army should be used as little as possible,[56] the Patten Report largely ignores this important question. As long as the army is or potentially will be deployed in support of the police, the same standards in terms of training, accountability and openness should apply to all of the security forces.

Dealing with the past

Perhaps one of the most worrying aspects of the Patten Report's treatment of human rights is the Commission's failure to provide mechanisms to identify and deal with officers responsible for committing human rights abuses in the past in terms of ensuring such abuses do not

[53] *Ibid*. pvii.
[54] *Ibid*.
[55] McVeigh *supra* n. 16.
[56] Patten Report paras 8.11 and 8.12.

recur in the "new" dispensation. Serious allegations have been made over many years by reputable international human rights organisations, the United Nations and other international bodies about the abuse of human rights by RUC officers. Charges of involvement in harassment in local communities, ill-treatment of people held in detention, shoot-to-kill incidents and sectarianism have been made as have charges of inaction in the face of wrongdoing by colleagues. A recent example which indicates that this issue is more than academic is the case of Bernard Griffen. This young man was arrested, beaten and subjected to sectarian abuse by RUC officers who then planted a coffee jar bomb at his home and attempted to frame him for a number of criminal offences, including assault on police officers. The incident only came to light because another officer who had initially gone along with the treatment, decided that things had gone a bit too far. He subsequently reported the matter, but not before Mr Griffen had served a number of months in custody on remand in respect of the hoax charges against him. It was only possible to prosecute and convict the officers involved because their colleague and a soldier who had also been involved in the incident turned Queen's evidence. The whistleblowers in this case were also convicted and fined for their part, which in itself raises a number of questions about protection for whistleblowers, another issue that the Patten Report did not address.

The Griffen case is unusual in that abuse in this case was uncovered and punished. Otherwise, officers have rarely been held accountable for these types of offences. Successive police complaints mechanisms have not substantiated one complaint of assault made by any person arrested under "emergency" law. Even where lethal force has been used in controversial circumstances, there has been a dearth of prosecutions and no police officer has ever been convicted in this regard. To permit this culture to permeate the new policing service is dangerous. In our comparative study of policing in transition, the case of El Salvador was instructive on this matter.[57] There the old police force had been disbanded and a new service created based on a quota system of 20 per cent ex-security force members, 20 per cent former guerrillas and 60 per cent civilians. Given that the police was being created anew, it was agreed to move one of the criminal investigation units en masse into the new police on the grounds that their expertise would be needed and it would take time to train new recruits. This decision proved disastrous.

[57] O'Rawe and Moore *supra* n. 16.

A United Nations evaluation later found evidence of serious corruption within the new CID units including involvement in death-squad type murders. It became necessary to reorganise the whole department, screen all members of the CID, purge some, send them all back for retraining and disperse most to other units within the police.[58]

In Northern Ireland the RUC Special Branch has been the subject of many allegations of human rights abuse. The Patten Report recommended that Special Branch and Crime Branch be brought together under an amalgamated command and that the support units of Special Branch be amalgamated into the wider police service. It further recommended that officers should not spend such long periods in security work as has been common in the past and after five years or so an officer should be posted elsewhere.[59] These recommendations, while positive in themselves, would not appear sufficient to break down the culture of Special Branch that has built up over years and to create a new beginning based on human rights for this "force within a force".

Although the right of individuals to change, reform and be rehabilitated must be acknowledged, this needs to happen in conjunction with some type of vetting and purging procedures aimed at weeding out recalcitrant officers/would be officers who are likely to continue to be involved in serious human rights abuse.

The Patten Report failed to recognise the significance of failure to deal creatively and coherently with this issue. The Report stated simply: "we do not, in this report, make judgements about the extent to which the RUC may or may not have been culpable in the past of inattention to human rights or abuse of human rights".[60] The Report went on to state that "bad apples" should be "dealt with" but did not propose any scheme for tackling the issue.[61] This reluctance to tackle human rights abuse within the force threatens the goal of a new beginning. The officers who are alleged to have made death threats to the defence solicitor Rosemary Nelson prior to her murder by loyalists will still be able to serve, as will those accused of having watched from the safety of their landrover while Robert Hamill was kicked to death by a loyalist mob.[62] It will be difficult for people who have been victims of

[58] O'Rawe and Moore *supra* n. 16 pp. 227–34.

[59] Patten Report paras 12.12–12.16.

[60] *Ibid*. para. 4.4.

[61] *Ibid*. para. 5.19. In light of the evidence, it would also seem that the "bad apple" thesis is unconvincing. This is not simply a matter of individual wrongdoing and structural issues need to be addressed. Patten appears to have missed this boat entirely.

[62] For summary of case see McGarry and O'Leary *supra* n. 45 at p. 39.

security force harassment or violence to believe that this really is a fresh start when those who abused them remain unaccountable.

In any case, the Government has been even less forthcoming in respect of dealing with deviant culture and sub-culture within the force. It has even determined that, while accepting the recommendations in principle, the Patten Report's recommendations on Special Branch must wait as long as a "significant threat from terrorism continues".[63]

The issues above would seem to indicate that the human rights challenge was not sufficiently met in the Patten Report, despite efforts by the Commission to firmly bed human rights principles at the heart of policing in Northern Ireland. Even more so, the Government's interpretation of the Report threatens the change process in its failure to look at human rights in more than minimalist terms. No mention is made in either the legislation or implementation plan of a wide range of international human rights norms and standards with particular relevance to policing. Instead, the emphasis of the Bill continues to be on "efficiency and effectiveness", with no indication that these terms are to be construed in a way which recognises that no police service can be either efficient or effective unless it conforms to human rights standards in theory and practice.

Equality

McGarry and O'Leary have argued that

> "The police should, as far as possible, be representative of all the minorities in Northern Ireland: unionists (of the 'yes' and 'no' persuasions), nationalists and others; and of Protestants, Catholics, agnostics, atheists and those of other religious faiths; and of the majority as well as the minority in Northern Ireland, that is, women and men. Above all, the police must be nationally representative. This criterion is the most important benchmark for change".[64]

Throughout its history the RUC has been a predominantly Protestant and male force. Figures from the Patten Report show that in 1998 only about 8 per cent of its officers were Catholic, while Catholics make up more than 40 per cent of the population in Northern Ireland. Only 12.6

[63] Northern Ireland Office, *Report of the Independent Commission on Policing for Northern Ireland, Implementation Plan* (June 2000).

[64] McGarry and O'Leary *supra* n. 45 at p. 45.

per cent of officers were female (a third of whom are in the Part Time Reserve).[65] Undoubtedly, intimidation by republican paramilitaries has been a factor affecting Catholic recruitment.[66] However, McGarry and O'Leary argue that "emphasising 'intimidation' as the primary explanation of Catholic and nationalist dispositions towards the RUC is simply not historically convincing. Catholics have not joined the RUC in large numbers at any time, even when there was relatively little or no republican violence".[67] They further make the point (accepted by the Commission) that it is important to ensure that nationalists join the police as well as Catholics. The two categories are not always interchangeable.

The Commission was of the view that "real community policing is impossible if the composition of the police service bears little relationship to the composition of the community as a whole".[68] One of the most difficult challenges faced by the Commission was to produce recommendations aimed at increasing Catholic and nationalist recruitment to the police.

The logistics which faced the Commission illustrate the difficulty. The force currently has around 11,500 officers including full-time, permanent and reserve officers. While significant downsizing is necessary to create a viable peacetime policing service, there is a simultaneous need to increase Catholic recruitment to the police in order to create a more representative service.

The Patten Report made a number of recommendations in pursuit of these twin goals. The Commission set a target of downsizing to a police service of 7,500 full-time officers over the next ten years.[69] This is less than the figure of 7,905 projected by the RUC in its Fundamental Review[70] but substantially more than that the estimate by economist Paul Teague that "a peaceful Northern Ireland would only require a

[65] Patten Report para. 13.9.

[66] A 1996/97survey carried out by the Police Authority for Northern Ireland found that when asked about any factors that might deter Catholics from joining the RUC, some 71 per cent of respondents mentioned fear of intimidation or attack. See PANI, *Policing . . . a New Beginning: a Submission by the Police Authority for Northern Ireland to the Independent Commission on Policing* (1998) p. 43.

[67] McGarry and O'Leary *supra* n. 45 at p. 16.

[68] Patten Report para. 14.2.

[69] *Ibid*. para. 14.9.

[70] Cited in Police Authority for Northern Ireland *Shaping Our Future Together: a Response from the Police Authority for Northern Ireland to the Report of the Independent Commission on Policing* (Belfast, 1999, PANI) p. 30.

police force of 3500–4000".[71] Patten's recommendations were based on packages for voluntary early retirement.

Recommendations aimed at increasing recruitment of under-represented groups included more effective liaison between schools and universities and the police service; the support of community leaders, including political party leaders, church leaders and others in removing disincentives to members of their communities joining the police;[72] lay involvement in recruitment panels; and emphasis on advertising aimed at attracting under-represented groups.[73]

Most controversially the Patten Report proposed the introduction of quotas for Catholic and Protestant new recruits. All candidates would be required to reach a specified standard of merit and would then enter a pool from which the required number of candidates would be drawn. An equal number of Protestants and Catholics would then be drawn from the pool of qualified candidates. The ratio of recruits would be kept to 50:50 for ten years. An opinion survey conducted by the PANI found that a strong majority of respondents agreed with the Report's recommendation on quotas.[74] The Commission concluded that such a process would require amendment to existing domestic legislation but would not be incompatible with existing European legislation.[75] Recommendations in terms of increasing female recruitment and retention were neither hard-hitting nor far-reaching. Priority for opportunities for part-time work, job-sharing, career breaks and child care vouchers are proposed. However, though this is obviously an issue at the heart of moving policing from the domain of a male, and often macho, preserve, overall this is an area where the Report, and consequently the implementation measures proposed, are weak.[76]

The Patten Report's recommendations on recruitment were accepted by the Government, although, at the time of writing, wrangling continues about how the issue is dealt with in the Police (Northern Ireland) Act. While the legislation allows for the introduction of quotas for Catholic/Protestant recruitment, the time-scale

[71] Paul Bew, Henry Patterson and Paul Teague *Northern Ireland Between War and Peace: The Political Future of Northern Ireland* (London, Lawrence and Wishart, 1997) p. xx.

[72] The repeal of the Gaelic Athletic Association's rule 21, which prohibits members of the police in Northern Ireland from being members of the Association, was recommended in pursuit of this.

[73] Patten Report paras 15.2–15.8.

[74] PANI *supra* n. 70 at p. 35.

[75] Patten Report para. 15.11.

[76] See Patten Report ch. 14 "Composition of the Police Service".

suggested for continuing this programme is not as generous as recommended in the Report.[77]

It is questionable whether Patten's recommendations will provide the impetus needed to produce the increase in representation of Catholics and other under-represented groups needed to create confidence.[78] In some ways it is a chicken and egg situation. Many community leaders would not be comfortable promoting policing as a career within their community if it appears that the legislation and other implementation measures will not deliver a sufficiently human rights and equality proofed organisation. However, without movement towards a critical mass of women or nationalists or whoever, it will be difficult for the organisation to show that it is capable of change in these respects.

Within this context, it must also be remembered that increasing the presence of under-represented groups in the police is about much more than just a numbers game. People from different backgrounds must feel safe and welcome in the organisational environment or they will quickly leave. Previous research carried out by consultants for the RUC had found strong evidence of sectarian and sexual harassment of Catholic and female officers. The Patten Report proposed changes aimed at creating a more neutral working environment, for example that the Union flag should no longer be flown from police buildings and that on those occasions when it is appropriate to fly a flag, the flag should be that of the police service which should be free from associations with the British or Irish states.[79]

It was also proposed that the name of the force be changed to the Northern Ireland Police Service. This was amended by Peter Mandelson to renaming the force as the Police Service of Northern Ireland. The change to the name, and particularly the loss of the prefix "Royal" has been bitterly contested by unionists and some policing and police relatives' organisations. Also contested was Patten's proposal

[77] However, in a speech by Secretary of State for Northern Ireland, Peter Mandelson MP, Second Reading of Patten Report, House of Commons, 6 June 2000, the Government indicated it was prepared to amend the legislation in this respect in the face of protest.

[78] McGarry and O'Leary for example had proposed that in order to downsize to a peacetime force of 8,000, the Government should aim to cut the number of currently serving officers to 5,000 over a medium period (about four years) while recruiting 3,000 new officers. During this transition period if Catholic recruitment was at 93 per cent the result would be a force that was 40 per cent Catholic: McGarry and O'Leary *supra* n. 45 at pp. 53–4.

[79] Patten Report para. 17.6.

for a new badge which would be "entirely free from any association with either the British or Irish states".[80] Mandelson accepted that the badge should be altered but suggested that consideration be given to incorporating the George Cross in the design. As noted above, this is one area where concessions were granted to unionists and police organisations, such as the Police Federation.

In response to concerns about joint membership of the RUC and loyal orders, the Patten Report proposed a register of police interests, rather than a ban on officers joining secret organisations.[81]

The most fundamental failure of the Patten Report in respect of equality is, perhaps, its unwillingness to address the question of whether there is institutionalised sectarianism within the RUC. The Commission insisted it was not a Commission of inquiry and this is true. However, without confronting the issue of sectarianism and uncovering the extent of it, a rottenness may remain at the core of the organisation. Just as Macpherson unravelled the various threads of racism running through the processes by which the Metropolitan Police dealt with Stephen Lawrence's family, so we need a similar investigation of the RUC. The obvious parallel with the case of Robert Hamill proves the problem if proof were needed.

Despite the Patten Report's failure seriously to address the issue, it would not appear that the Government is minded to establish a taskforce independent of police to investigate and tackle the issue of sectarianism within the police—though it would appear this is exactly what is required.

In terms of an overall equality agenda, it is surprising that the Patten Report appears to have ignored the equality implications of the Northern Ireland Act 1998 for public authorities. Under section 75 of the Act a new duty has been placed on public authorities requiring them to have due regard to the need to promote equality of opportunity. This duty relates not just to people of different religion/political belief but also racial group, age, marital status, sexual orientation, gender and disability. Public authorities are required to produce equality schemes which indicate how they intend dealing with and monitoring these issues in relation to their service.

[80] Patten Report para. 17.6.

[81] *Ibid*. para. 15.16. There are issues too in terms of how this recommendation has been translated into the legislation—who has access to the information, for what purposes and how long such information should be kept after someone has left the service.

The implications for the police in complying with this scheme are profound, and extend far beyond the need to monitor the religious/political background of people being stopped and searched, to examine the implications of policy and practice in terms of equality. The Police have been designated as a public authority for the purposes of the Northern Ireland Act 1998, so it is probably here rather than in respect of Patten's specific proposals that the equality debate will be sited in the foreseeable future.

Legal and democratic accountability

It is key to the transformation of policing that an appropriate framework of legal accountability is set in place. The rule of law has suffered untold damage in Northern Ireland, and it is vital that trust in the law be built across the community. As Crawshaw has argued:

> "In the event of a serious breakdown of public order, perhaps even involving armed insurgency or acts of terrorism, police and members of other security agencies are faced with great personal danger and formidable challenges to their professional expertise. For these, and other, reasons they almost invariably feel justified in breaching legal and ethical standards which would constrain them under other, less daunting, circumstances. When they do so they risk undermining the democratic and legal principles on which the legitimacy of the state they are defending and their own legitimacy are based".[82]

The Patten Report recognised this to a certain extent but missed the boat on such issues as repeal of emergency legislation; the promotion of enhanced legislative protection for whistleblowers, or the creation of a duty on police officers to report misconduct by colleagues. Nor does the Report seem able to countenance the part that the security lobby has played in shaping the law around police powers to date. Boyle and Hadden have argued that:

> "in many respects the law has been tailored to comply with security requirements rather than the other way round . . . The essentials of the structures put in place in 1973 and 1974 have not been changed. The most significant alterations have not been to limit or restrict police or army

[82] Ralph Crawshaw, former UK police officer and advisor to Council of Europe. For further expansion of this argument, see Crawshaw, Devlin and Williamson *Human Rights and Policing: Standards for Good Behaviour and a Strategy for Change* (The Hague, Kluwer Law International, 1998).

> powers but to increase them whenever that has been demanded by the security authorities. In the review of the legislation prior to its re-enactment in 1989, for example, Lord Colville recommended the introduction of a number of significant limitations . . . and a few extensions . . . None of the limitations or safeguards were accepted and all the extensions were approved".[83]

Before looking at the specific laws relating to police accountability, it should be recognised that some broader legislative developments will have an impact on the policing process. The incorporation of the European Convention into UK law in the form of the Human Rights Act 1998 will provide citizens with recourse to the courts when there is an alleged breach of human rights under the Convention. However, given the conservativeness of European jurisprudence to date, particularly in the amount of leeway given to states claiming that a state of emergency exists, this will in no way be a panacea for human rights protection. Section 75 of the Northern Ireland Act 1998 remains to be tested for its potential to safeguard equality and non-discrimination at a range of levels. Meanwhile, as previously stated, the Government continues to persist with a somewhat Jekyll and Hyde approach to the notion of human rights protection. What is given with one hand appears to be taken away with the other in the continued insistence of government on the need for extensive, and in many ways excessive, anti-terrorist powers. In the political arena, one can clearly see the competing needs of security and civil liberties jockeying for position. Unfortunately the translation of this conflict to the legal arena has rarely seen an acceptable balance being achieved. More often, narrow security needs are prioritised at the expense of a broader, more holistic vision of community safety which does not necessarily equate effective policing with erosion of rights.

As this narrow security-led approach has secured permanent anti-terrorist legislation on the statute books, much has already been lost. El Salvador further proves instructive in this regard. Where the legal framework under which police operate is not itself changed to give human rights protection real meaning, the best police structures and policy manuals and codes of conduct will not prevent a return to the same practices previously used to abuse human rights.

The new legislation envisaged to give effect to the Patten Report will obviously be contaminated to some extent by the breadth of police

[83] Kevin Boyle and Tom Hadden *Northern Ireland: The Choice* (London, Penguin Books, 1994) p. 97.

powers provided for in other laws. However, as far as possible it should aim to meet the tests proposed by Patten in terms of its ability to secure human rights, equality, impartiality, transparency and accountability.

The legislative framework is not the be all and end all and will achieve nothing without political will and commitment to the process of change. A test of how much the will to change really does exist is how quickly and how far the police organisation has moved to implement the measures already within its gift. Some evidence of movement is obvious in, for example, the removal of permanent police security on the road to the International Airport, the reduction of vehicle checkpoints and joint army patrols and the decision to close Castlereagh Holding Centre. However, the fact remains that much more could and should be done on a range of issues.

In respect of the proposed framework for improved legal accountability, there is still a long way to go. Maurice Hayes had recommended a new model for dealing with complaints against the police in his report *A Police Ombudsman for Northern Ireland?*.[84] The government claimed to accept his proposals and translated their interpretation of them into legislation prior to the Patten Commission reporting.

The Patten report made it clear by its need to re-endorse Hayes' proposals that the Police (Northern Ireland) Act 1998, hastily and ill-advisedly put through Parliament while Patten was still deliberating, had been inadequate in putting the new Ombudsoffice on an appropriate statutory footing. It would have been expected then that Part VII of the 1998 Act either be extensively amended or repealed and fully redrafted to meet the concerns of both Patten and Hayes.

This has not happened. The new Act does not enhance the Ombudsperson's powers in any respect. Rather the draft legislation sought to circumscribe her powers still further. Despite amendments to the final legislation, the legal provision for this office is still problematic.

Any examination of the 1998 Act and Police (Northern Ireland) Act 2000 shows a failure to measure up to the deeply felt need in the Patten Report that this important office must be staffed and resourced accordingly. As well as acting on her own initiative, compiling data on complaint trends and patterns and having a dynamic and cooperative

[84] (1987, Belfast, HMSO). For further details on this area of the debate see Moore and O'Rawe "Accountability and Police Complaints in Northern Ireland: Leaving the Past Behind?" in A Goldsmith and C Lewis (eds) *Civilian Oversight of Policing* (Oxford, Hart Publishing, 2000).

relationship with other agencies involved in community safety, a key recommendation of Patten was that the Ombudsperson should have the power to investigate and comment on police policies and practice. This has not been given. Similarly, investigatory powers in respect of matters deemed by the Secretary of State to be in the past are essentially rendered null and void.

Despite the Patten Report's failure to deal with serious human rights abusers within the police service the issue will not go away, and in many senses the Ombudsperson appears to be the only possible mechanism whereby past abuse might be addressed. If she is curtailed in this respect, the legacy of a number of high profile cases (e.g. the Stalker and Stevens inquiries), together with a failure to establish patterns of previous abuses which have gone unpunished, will undoubtedly return to haunt the "new" beginning.

Two other important areas where legislative guidance is still lacking are those of the extent of the operational independence/responsibility of the Chief Constable and the whole notion of what is meant by "national security". If these issues are left to be interpreted by politicians and police officers, participative democracy and open government will undoubtedly continue to suffer. It is right that the Chief Constable of the Police Service of Northern Ireland should be free from partisan political control. Northern Ireland still bears testimony to the legacy of such control in the past. It is also correct that managerial, day-to-day, operational decisions be taken by the same Chief Constable. However, often in the past the distinction has been blurred as to where operations end and policy begins. The Patten Report deals with the issue on one level by requiring that even where a Chief Constable does make an operational decision, this does not mean that there should not be *ex post facto* accountability. However, this does not deal with how a dispute might be mediated where the Chief Constable contends that an issue is operational and the Policing Board disagrees. Similar concerns arise over national security. Again, such a concept is so nebulous and the protections it offers so open to abuse that its limits require to be defined in legislation. From an accountability point of view it would appear that the Government feel the Chief Constable should be responsible to the Secretary of State for matters pertaining to national security. However, if the Policing Board is unable to hold the Chief Constable to account on issues so fundamental to community safety, an important level of oversight is removed.

There are many other issues as regards potential legislation that space does not allow us to deal with here. One final issue that should be highlighted is the Government's decision that only new officers should be required to take a new oath/declaration wherein human rights is explicitly mentioned. Mandelson has stated in Parliament that to require serving officers to take this oath would involve "legal difficulties". Unpacking of these difficulties would actually appear to put them more in the category of political ones. In any event, it seems a shame that while the tenor of the Patten Report's report is founded on notions of human rights, the symbolism involved in all members of the policing organisation making an explicit commitment to human rights will be lost. Rather than a new beginning, this has unfortunate echoes of a new beginning for some but not all. Given that the Home Office is considering similar wording for all other UK forces, it would seem sensible to enact one piece of UK-wide legislation that would enable all police officers to express publicly their commitment to human rights.

The Patten Report describes democratic accountability as the way in which "elected representatives of the community tell the police what sort of service they want".[85] The weakness of accountability structures over policing have been a key area of concern from the establishment of the RUC to the present.[86] The Patten Report recognises the inadequacy of the current tripartite system.[87] The Report notes that the Police Authority for Northern Ireland had deficient powers but also criticises the tendency of the Authority to defend police in relation to alleged wrongdoing before such allegations have been properly investigated.[88]

Policing Board

Patten proposed that the PANI be replaced by a new Policing Board, with the primary statutory function of "[holding] the Chief Constable and the police service publicly to account".[89] This Board would have a majority elected membership with nineteen members, ten of whom are Assembly members, drawn from parties comprising the new executive,

85 Patten Report para. 5.4.

86 For a more detailed discussion of the weakness of current accountability structures see O'Rawe and Moore *supra* n. 16.

87 Patten Report para. 5.5.

88 *Ibid*. para. 5.12.

89 *Ibid*. para. 6.3.

selected by the d'Hondt system. The remaining nine members would be appointed by the Secretary of State in consultation with First and Deputy First Minister and should be representative of business, unions, legal profession, community/voluntary sector.[90] While the emphasis on increased democratic involvement is welcome, the proposed basis for membership means that the smaller parties will be squeezed out. It is also a weakness that the independent representatives will not be elected but selected.

Some of the powers recently removed from PANI under the Police (Northern Ireland) Act 1998 are to be returned to the Policing Board. There is a welcome emphasis on transparency with the proposal that the Policing Board meet in public once a month to receive a report from the Chief Constable.[91]

The Policing Board will have responsibility for overall monitoring of police performance including performance on human rights and public order policing. They will be involved in developing medium to long-term policing plans.[92]

One area of the Police (Northern Ireland) Bill which has caused consternation is the Government's interpretation of the powers given to the Policing Board in relation to inquiries and reports. Patten had recommended that the Board should have reasonably strong powers in relation to retrospective accountability and should be able to require the Chief Constable to report on any issue pertaining to the performance of the police service. The Board would be able to follow up his/her reports by initiating an inquiry with which all officers would be required to cooperate.[93] The Patten Report stressed that "the grounds on which the Chief Constable might question this requirement should be strictly limited to issues such as those involving national security, sensitive personnel matters and cases before the courts".[94]

However, the draft legislation gives the Chief Constable much wider grounds for refusing to provide a Report. Grounds include when the issue relates to a matter being investigated by a statutory authority, or if it would be likely to "prejudice the prevention or detection of crime, the apprehension or prosecution of offenders or the administration of justice".[95] Ultimately the Secretary of State is given power to determine

[90] *Ibid*. paras 6.11–6.14.
[91] *Ibid*. para. 6.36.
[92] *Ibid*. para. 6.23.
[93] *Ibid*. paras 6.22 and 6.23.
[94] *Ibid*. para. 6.22.
[95] Police (Northern Ireland) Bill, clause 55(c), (d).

whether a report should be produced or whether an inquiry should go ahead and whether the body or individual recommended by the Policing Board should be allowed to carry it out. This carries dangerous messages in terms of how "trusted" the Board will be to carry out its functions. It would appear that the legislation envisages the Secretary of State as very much the dominant partner in the supposedly tripartite arrangements for accountability. Little can actually be done by the Policing Board without guidelines, approval or goodwill from the Secretary of State. This does not bode well for attracting high calibre people to the Board, or allowing the Board itself to fulfil a real and independent oversight role.[96]

Amongst the voices raised in horror at the Government's implementation of the Patten Report in relation to the Policing Board, even the normally compliant Police Authority for Northern Ireland has condemned the Bill as "set to render [the] Policing Board ineffective".[97]

Accountability at local council level

The Patten Report proposed the establishment of District Policing Partnership Boards (DPPBs) based in local councils and established as a committee of the Council. These would have a majority elected membership with the remaining members being independent people selected by Council. Each DPPB was to be broadly representative in terms of religion, gender, age, and cultural background, which will be no mean feat given the make-up of most local councils in Northern Ireland.

These bodies were proposed as advisory, explanatory and consultative. Government amended this proposal to state that at council level these accountability bodies be called District Policing Partnerships. The Police Bill leaves the bodies as mainly advisory and with no meaningful power. Patten had proposed that DPPBs be able to raise additional funding for policing which could include private policing. However, this raised the spectre in the media of paramilitaries being employed to carry out policing functions and the Government has

[96] For example, the draft legislation not only stipulates that in order to instigate an investigation, a weighted majority—twelve out of nineteen—of Policing Board members must support the recommendation, but even where this is achieved, the Secretary of State still has power to stop the inquiry taking place.

[97] Police Authority for Northern Ireland, Press Release, 19 May 2000.

deferred the decision on whether District Policing Partnerships in the future will be able to raise additional funds.[98]

A particular issue of concern in relation to human rights is the exclusion under the Police (Northern Ireland) Act of people convicted of scheduled offences becoming independent members of District Policing Partnerships.[99] In the case of the Policing Board the Secretary of State has the power to remove either a political representative or independent member from the Board on the grounds of that member having been convicted of a criminal offence.[100] If the political process is to move forward, it is crucial that ex-prisoners are reintegrated into society and into the process itself. The continued exclusion of people with political convictions from political life will be a bar to the process of change. This is quite apart from human rights concerns about the safety of some convictions under emergency legislation and the juryless Diplock courts.

Local accountability

Perhaps the biggest disappointment in terms of democratic accountability is in relation to accountability at community level. The Patten Report represented a historic opportunity to do something creative in relation to accountability and policing at a local level but that opportunity has been missed. District Policing Partnerships will replace council-based Community Police Liaison Committees (CPLCs). However, Patten does not recommend the replacement of other CPLCs despite the problems with these in terms of representation, effectiveness and transparency.

"Local communities and police should be encouraged to develop consultative forums on lines that suit them and their neighbourhoods".[101] It should be the aim of every police beat manager to have such a forum in his or her patrol area. There is a danger that this process will be police led, organised on police terms.

Community safety is much broader than formal policing. The Patten Report made some attempt to address this issue in terms of talking about policing rather than the police. However, this aspect of the

[98] NIO Implementation Plan recommendation 32.
[99] Police (Northern Ireland) Act, Sch 3(8).
[100] *Ibid*. Sch 1.
[101] Patten Report para 6.34.

Report was under-developed and has been well and truly ignored by government. To add to the disappointment in this level of accountability, the Police (Northern Ireland) Act fails to address the issue of local consultative fora, apart from placing a duty on District Policing Partnerships to facilitate police-community consultation at a local level.[102]

Process of change

The above commentary indicates the authors' concerns that the new beginning to policing will not be so new after all. Of course there is much that may constitute improvement in policing arrangements, but similarly there is much that has been lost in failing to open up the process of change to a much wider constituency.

To date interpretation of the Patten Report and how it should be implemented has been entirely in the hands of the same civil service and police organisation (albeit through newly constituted Patten Action Teams) that have failed so miserably in the past to address human rights concerns in relation to policing. In traditional style, much of what was innovative in the Patten Report has been clawed back and the parameters of the debate resituated on familiar turf. This has led to a situation where, rather than seeking to build on and improve the Report, the focus for stakeholders who do not concur with government policy in this area, has switched to trying to reclaim the basis of the Patten recommendations themselves.

The only glimmer of hope that the process might open up to the point that some substantial rethinking take place, was that provided by the role of Oversight Commissioner. Patten's vision of the role was that the Commissioner would "provide more than a stocktaking function". Rather, the "review process would provide an important impetus to the process of transformation".[103] The Government's interpretation of the role appears to be minimalist. The Implementation Plan envisages the Oversight Commissioner conducting progress meetings with Ministers and NIO officials, the Chief Constable, the Police Authority, and in due course the Policing Board, at least three times a year.[104] Although it was heartening that, in the first weeks of his appointment,

[102] Police (Northern Ireland) Bill, Part II, clause 15.

[103] Patten Report para 19.5.

[104] NIO Implementation Plan p. 93.

Mr Constantine sought meetings with groups outside of government, the Oversight Commissioner has already stated himself unwilling to second guess elected and appointed officials. He does not see his role being to monitor the implementation of the Patten Report or intervene proactively in the process. Instead it would appear that he intends to hold the appropriate agencies to account in terms of how they have interpreted that the Report should be implemented, and in respect of the actions and time-scales they set for themselves.

Here, comparisons with the role of the Metropolitan Police in implementing the recommendations of the Macpherson Report are instructive. In their critique of the Macpherson Report, McLaughlin and Murji note that the response of the Metropolitan Police was dominated by a carefully orchestrated reformist discourse.[105] While this means that the police accept a degree of change and cooperate with it, McLaughlin and Murji note that "in a classic police move, the reformers are attempting to claim the report as 'theirs' and pull the debate back inside the organisation. Consultation and change will happen, if the reformers have their way, on terms laid down by the force".[106]

This should ring alarm bells here. The trend for the change process to be led by the current leadership of RUC, PANI, and the NIO must be strongly contested. There is a need for external input beyond these bodies as well as strong independent input from the Overright Commissioner from the earliest opportunity.

The Patten Report was not the end of the exercise but only the beginning. Despite the weaknesses identified in this chapter, many of the changes proposed in the Report are urgently needed. The process of implementing these will be in many ways as important as the substance of the recommendations. That process must be based on transparency, accountability and the participation of the policed as well as the police. Continued failure to recognise this can only result in a not so very new beginning for policing in Northern Ireland.[107]

[105] Eugene McLaughlin and Karim Murji "After the Stephen Lawrence Report" (1999) 19 *Critical Social Policy* 371.

[106] *Ibid*. 379.

[107] At the time of going to press, John Reid has recently taken over from Peter Mandelson as Secretary of State for Northern Ireland. It remains to be seen whether he can undo any of the damage already done by Mandelson's dogged pursuit of a narrow and short-sighted political agenda as regards policing in Northern Ireland.

9

Human Rights, Humanitarian Interventions and Paramilitary Activities in Northern Ireland

KIERAN McEVOY*

INTRODUCTION

FOR THE ALMOST three decades of the Northern Ireland conflict human rights activists lobbied and campaigned on the basis that state human rights abuses were central to the origins and continuance of the conflict and that the protection of rights were key to its resolution.[1] Such arguments appear to have been taken on board by the British and Irish Governments and the pro-Agreement parties who shaped the substantial rights and equality provisions of the Good Friday Agreement.[2] The "mainstreaming" of such issues in future conduct of *state* agencies is, at least in part, the result of a highly successful range of interventions by key human rights actors over a large number of years and the significance of those interventions is beginning

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[1] For a summary of these arguments see e.g. Committee on the Administration of Justice *et al Declaration on Human Rights, The Northern Ireland Conflict and Peace Process* (Belfast, CAJ, 1994).

[2] See C Harvey and S Livingstone "Human Rights and the Northern Ireland Peace Process" [1999] *EHRLR* 162–77.

to attract serious scholarly analysis.[3] In a similar fashion, this chapter seeks to examine the shape and influence, if any, which similar groups and individuals may have had upon the conduct of the non-state actors to the conflict, the paramilitaries.

This chapter thus examines the interventions of various human rights and humanitarian activists who have sought to mitigate or eradicate paramilitary abuses in Northern Ireland. All have been motivated by an opposition to paramilitary violence although their methodologies have differed considerably. For reasons which will become apparent below I have chosen to focus upon a range of different *styles* of intervention, which include but are not limited to the frameworks provided by international human rights and humanitarian law. In particular, the notion of *humanitarian* interventions is broader than the comparatively narrow principles of humanitarian law, if not its philosophical origins.[4]

I have developed four heuristic typologies of intervention with paramilitaries in Northern Ireland. All are based on actual projects. They are designed to capture distinct modes of attempting to influence paramilitary behaviour. These are characterised as (a) interventions by international human rights non-governmental organisations based upon humanitarian law principles; (b) interventions by political lobby groups using a human rights framework; (c) direct engagement by humanitarian groupings seeking to change paramilitary behaviour: (d) state focused human rights groups engaged in the creation of "a human rights culture". Before considering each typology, it is necessary first to offer some brief background on the nature and extent of paramilitary abuses and the context in which they occurred.

[3] P Mageean and M O'Brien "From the Margins to the Mainstream: Human Rights and the Good Friday Agreement" (1999) 22 *Fordham International Law Journal* 1499–538. Some commentators have referred to the actions of human rights groups and other elements of civil society as "the parallel peace process". For a discussion of this process concerning the equality elements of the Agreement and post-Agreement era see C McCrudden "Mainstreaming Equality in the Governance of Northern Ireland" (1999) 22 *Fordham International Law Journal* 1696–776.

[4] "We shall utterly fail to understand the true character of the law of war unless we are to realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose": H Lauterpacht "The Problem of the Revision of the Law of War" (1950) *British Yearbook of International Law* 360, 364. The phrase "humanitarian intervention" in this chapter is therefore defined broadly to refer to attempts to prevent or mitigate suffering at the hands of the paramilitaries in Northern Ireland.

BACKGROUND TO PARAMILITARY ABUSES IN NORTHERN IRELAND

Republican violence

Since 1969 over 3,600 people have been killed and over 40,000 people injured in Northern Ireland. In addition, the conflict has cost the British Exchequer several billion pounds.[5] Since 1973 police figures suggest that approximately 2,300 people have been the victims of paramilitary punishment shootings (usually in the knees, thighs, elbows, ankles or a combination) and since 1983, approximately 1,700 people have been the victim of paramilitary punishment beatings, often involving attacks with baseball bats, hurling sticks studded with nails, iron bars and other heavy implements.[6]

This chapter focuses primarily on the IRA as the largest and most active republican grouping.[7] Interrupted by three major cease-fires, (the most recent called in July 1997 and still in place), since 1969 the IRA have carried out bombings and shootings in Northern Ireland, Britain and Europe.[8] They have attacked the security forces (including the British Army and Royal Ulster Constabulary), political and judicial figures, loyalist paramilitaries and civilians. The IRA has also bombed commercial targets in order to apply economic and political pressure for a British withdrawal.

The IRA has killed or injured civilians by deliberate targeting, for example of those adjudged guilty (by the IRA) of "informing" or those considered guilty of anti-social activity such as drug-dealing. They have also been responsible for numerous "mistakes" wherein civilians have been erroneously or negligently killed in botched attacks on economic, security force or loyalist paramilitaries. In the late 1980s

[5] See M T Fay, M Morrissey, and M Smyth *Northern Ireland's Troubles: The Human Costs* (London, Pluto Press, 1998).

[6] RUC Website 2000. http://www.ruc.police.uk/. The RUC only began systematically to keep figures on punishment beatings by paramilitaries in 1983. Their figures suggest a marked increase in beatings following the IRA and loyalist cease-fires in 1994 as paramilitaries apparently, initially at least, became less ready to use firearms for such attacks.

[7] Other violent republican groupings have included the Official IRA, the Irish National Liberation Army (INLA), Irish People's Liberation Organisation (IPLO) and a number of groupings which have come to prominence in the wake of the IRA cease-fires, the "Continuity" IRA and the "Real" IRA.

[8] J Bowyer-Bell *The Secret Army: The IRA* (Dublin, Poolbeg, 1979); P Bishop and E Mallie *The Provisional IRA* (London, Corgi, 1989); P Taylor *Provos: The IRA and Sinn Fein. The Book of the BBC TV Series* (London, Bloomsbury, 1997).

deliberate attacks on civilians increased after the IRA decided to extend its range of "legitimate targets" to include those involved in service provision to the security forces.[9]

The IRA are a highly centralised and relatively disciplined paramilitary grouping. After reorganising in the mid-1970s into a cellular structure, they have proved to be a ruthless and persistent paramilitary organisation, consistently recognised in military and intelligence circles as the most effective terrorist organisation in the world.[10] They are well armed and apparently highly motivated.[11] While there has been some leakage of IRA personnel and weapons to dissident republican groupings since the cease-fires (including the "Real IRA" who killed twenty-nine civilians in a bomb attack in Omagh in 1998), they appear at the time of writing to remain a cohesive and organised group.

As noted above, violent attacks have been carried out not solely as a result of the IRA's "military" campaign, but also because of what are described as "policing" activities. These punishment attacks have often been the focus of most attention by human rights and humanitarian actors. The IRA has a distinct section within its structure known as the "civil administration" which is tasked with the policing of anti-social activities.[12] The system requires a considerable logistical commitment in order to hear complaints, investigate, make recommendations and carry out the attacks. As the system has become routinised over time, relationships have developed with professional agencies (for example social workers or youth workers) and individuals who have tried to intervene regarding those under threat (discussed below).

Loyalist violence

Loyalist paramilitaries have committed acts of violence, in their case in support of the maintenance of the Union and the perceived failure by the state to "deal with" republican terrorism.[13] The two main loyalist

[9] J Bowyer Bell *The Irish Troubles: A Generation of Violence* (Dublin Gill & Macmillan, 1993).

[10] P Wilkinson *Terrorism and the Liberal State* (2nd edn, London, Macmillan, 1986).

[11] In 1980 and 1981, ten republican prisoners starved themselves to death over a five-month period in protest over the Government's attempts to force them to accept the status of criminal rather than political prisoners.

[12] M O' Doherty *The Trouble with Guns: Republican Strategy and the Provisional IRA* (Belfast, Blackstaff, 1998).

[13] S Bruce *The Red Hand: Protestant Paramilitaries in Northern Ireland* (Oxford, Oxford University Press, 1992).

paramilitary groupings are the Ulster Volunteer Force and the Ulster Defence Association (also sometimes referred to as the Ulster Freedom Fighters), with other smaller groups forming during the peace process including the Loyalist Volunteer Force.

These groups have traditionally targeted Catholic civilians, economic or civilian targets in the Irish Republic or republican activists.[14] They consider themselves driven to the use of political violence because of the IRA's campaign against the British state and their community. [15] Loyalists argue that with fewer clear targets (other than occasional identified republicans) they have been forced to attack the Catholic community as a whole. Other than through information garnered through collusion with the security forces,[16] much of their violence has been described as sectarian and indiscriminate.[17] Loyalists have been considerably less successful than republicans in garnering an international constituency in support of their activities.

Loyalists too have engaged in punishment violence. While such punishments are also directed against anti-social activities by alleged criminals, the phenomenon is arguably more complex than on the republican side. Loyalists share the republicans' sense of responsibility regarding anti-social criminal behaviour in their communities. In addition, however, loyalist punishments also appear concerned with the internal disciplining of their own members, territorial disputes between rival paramilitary factions and drug-related disputes, sometimes between differing factions.[18]

Loyalist punishments are less formalised and systematised.[19] There are no specialist loyalist squads dealing with punishments, activists are also responsible for "military" attacks on nationalists. Warnings tend not to be given, tariff scales are unclear, there is no central bureaucracy

[14] J Cusack and H McDonald *UVF* (Poolbeg, Dublin, 1997).

[15] J McAuley *The Politics of Identity : A Loyalist Community in Belfast* (Aldershot, Avebury, 1994).

[16] e.g., Human Rights Watch *To Serve Without Favour: Policing, Human Rights and Accountability in Northern Ireland* (New York, Human Rights Watch, 1997) especially ch. six.

[17] S Bruce "Re-appraising Loyalist Violence" in A O'Day (ed*) Terrorism's Laboratory: The Case of Northern Ireland* (Aldershot, Dartmouth, 1995) pp. 115–37.

[18] T Winston "Alternatives to Punishment Shootings and Beatings in a Loyalist Community in Belfast" (1997) 8 *Critical Criminology* 122–8.

[19] C Bell "Alternative Justice in Ireland" in N Dawson, D Greer and P Ingram (eds) *One Hundred and Fifty Years of Irish Law* (Belfast, SLS Legal Publications, 1996) pp. 145–67.

with much local autonomy, and punishments tend to be carried out swiftly.[20]

Loyalist command structures are considerably looser than their republican counterparts, and they are widely viewed by academics, security and prison staff as less organised and less disciplined. While a number of capable political and community leaders have emerged from the ranks of former loyalist paramilitaries, most academic commentators suggest that in general they attract a lesser calibre of recruits than the IRA in particular.[21] Such structural and personnel factors mean that interventions with loyalist paramilitaries are all the more problematic.

TYPOLOGIES OF INTERVENTION

Interventions by international human rights NGOs based upon humanitarian law

Given that the origins of the modern human rights movement are often traced to the horror of the Second World War, it is understandable that the focus of most human rights non-governmental organisations (NGOs) has traditionally been directed at state abuses. In recent years however, a heated debate has emerged as to whether the monitoring role of such groups should be expanded to include abuses carried out by non-state entities such as paramilitary groupings.[22] Major organisations such as Amnesty International and Human Rights Watch have broadened their remit to include abuses perpetrated by such groupings.

The arguments which led to that expansion are complex and are not the primary focus of this chapter which is more concerned with the nature and impact of such monitoring.[23] In the Northern Ireland con-

[20] Interview with former UVF prisoner and manager of prisoners' reintegration project which is also involved in establishing a restorative justice scheme in a loyalist area designed to avoid punishment attacks, 29 June 1999.

[21] Steve Bruce, in the primary study on loyalist paramilitarism, suggests this is because those members of the Protestant/loyalist community who wish to fight to maintain the Union may do so legitimately by joining the British Army or the local police, leaving only less able recruits for the loyalist paramilitaries: Bruce *supra* n. 13 at pp. 272–3.

[22] See, e.g., Special Issue of (1996) 6 *International Commission of Jurists Review*; D Petrasek *Heroes and Demons: Human Rights Approaches to Armed Groups* (Geneva, International Council on Human Rights Policy, 2000).

[23] For current purposes, the arguments concerning the expansion of the role of human rights groups to include monitoring of groups by paramilitaries may be summarised as

text, in the 1990s both Amnesty International and Human Rights Watch began to criticise the activities of paramilitaries in Northern Ireland primarily under the rubric of international humanitarian law, in effect defining it as "a conflict not of international character" under the 1949 Geneva Conventions.[24] Both groups focused in particular upon the protections contained in Common Article Three of the Conventions.[25]

falling under a number of headings. These include a sense of genuine moral outrage at the heinous abuses of civilians by some non-state entities (see R Kogod Goldman "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts" (1993) 9 *American University Journal of International Law and Policy* 49–94); the view that some human rights groups were "stung by the taunts" that by ignoring the actions of armed groups they were not acting impartially (see N Rodley "Can Armed Oppositional Groups Violate Human Rights ?" Paper presented at Conference on Human Rights in the Twenty First Century: A Global Challenge, Alberta, Canada, 1990); more recently the suggestion that traditional notions of "the state" and its functions, the human rights/humanitarian law divide and "armed conflicts" were dated concepts (see, e.g., A Clapham *Human Rights in the Private Sphere* (Oxford, Clarendon Press, 1993); P Baer "Amnesty International and its Self Imposed Limited Mandate" (1993) 12 *Netherlands Quarterly on Human Rights* 5); and the related view that social and economic rights were not best enhanced by an exclusive focus on governments in an era of powerful multinationals wielding considerable economic influence (see C Jochnick "Confronting the Impunity of Non-State Actors: New Fields for the Promotion of Human Rights" (1999) 21 *Human Rights Quarterly* 56–80).

[24] It is important to acknowledge that there is a considerable debate in the academic literature as to whether the Northern Ireland context fell within the notion of an "internal armed conflict". See F NT Aoláin *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast, Blackstaff, 2000) esp. ch. 5. A strong view has been argued by some academic commentators that it did not (see G Hogan and C Walker *Political Violence and the Law in Ireland* (Manchester, Manchester University Press, 1989); K Boyle and C Campbell *Human Rights in Situations of Armed Conflict and Political Violenc*e (Santiago, Sinergos Consultores Ltda, 1992). While some of the arguments concerning the non-applicability of humanitarian law are compelling (such as the failure by paramilitaries to exercise effective control over territory), the fact remains that both Human Rights Watch and Amnesty International have applied such principles to the Northern Ireland context regardless.

[25] Common Article 3 states :

> "In the case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions :
>
> (I) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed 'hords de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement

Human Rights Watch/Helsinki

In 1991 Helsinki Watch[26] conducted its first major review of human rights abuses in Northern Ireland. As well as outlining a range of state human rights abuses, its report focused upon loyalist and republican paramilitary abuses. The details of that Report and some of the arguments advanced are worth reproducing in brief.

The Report outlined republican attacks on both military (British Army and RUC) targets and civilians between 1969 and 1990, including paramilitary members who had been killed for actions such as passing information to the security forces.[27] They also detailed "human bomb" attacks, wherein civilians described as "collaborators" were forced by the IRA to drive vehicles loaded with explosives to British Army checkpoints where the bombs exploded. They compared those killed by the IRA (52.7 per cent security forces, 9 per cent IRA members, and 23.6 per cent were Protestant civilians, of whom 1.1 per cent were loyalist paramilitaries) with loyalist killings (89.6 per cent civilians, of whom 80.06 per cent were Catholic). Finally the Report made reference to the scale of punishment shootings carried out by republican and loyalist paramilitaries.

The Report referred to international humanitarian law standards and in particular Common Article 3 of the Geneva Conventions regarding internal armed conflicts, while acknowledging that "the application of Common Article 3 to the conflict in Northern Ireland is debatable".[28] That report also referred to the International Red Cross Rules of 1990 regarding "International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts", the Declaration of Minimum Humanitarian Standards (the *"Turko"* Standards 1990) and Protocol 1 of the Geneva Conventions (not then ratified by Britain but regarded by Helsinki Watch as a principle of international law of general application).

Helsinki Watch concluded by condemning the use of violence by paramilitary groups against civilians, the taking of hostages and the

pronounced by a regularly constituted court, afforded all the judicial guarantees which are recognised as indispensable as civilised peoples.

(II) The wounded and the sick shall be collected and cared for".

[26] After their early reports on Northern Ireland Helsinki Watch changed their name to Human Rights Watch Helsinki.

[27] Helsinki Watch *Human Rights in Northern Ireland* (New York, Human Rights Watch, 1991).

[28] Helsinki Watch *ibid*. p. 111.

conducting of "punishment shootings". In addition, the killings of security forces and opposing paramilitary groups were condemned on the grounds that they constituted a "resort to perfidy".[29] That criticism was repeated in their 1992 *World Report* and in 1993 and 1994. In 1993 and 1994, Helsinki Watch called for all paramilitaries in Northern Ireland to refrain from the use of violence for political ends and called for an end to punishment shootings, assaults and banishments.[30] In effect, in these various reports Helsinki Watch concluded by making no ultimate distinction between attacks on civilians and combatants (because of the "perfidy" argument), and interpreted the notions of customary norms of international humanitarian law to preclude all politically motivated violence by paramilitaries in Northern Ireland.

Helsinki Watch has also written a number of reports which have focused more specifically upon the question of paramilitary punishment attacks and banishments. In 1992, the relevant section of a report on Children in Northern Ireland argued that the activities of the paramilitaries breached customary standards of international humanitarian law.[31] Similarly, in the Human Rights Watch/Helsinki 1997 report on policing in Northern Ireland, a chapter on paramilitary "policing" concluded by arguing that "paramilitary punishment assaults and shootings thus violate the right to life, freedom from humiliating and degrading treatment, the right to due process and the guarantee of a fair trial as codified in Common Article 3".[32] Neither of these reports made reference to the broader contention advanced elsewhere by Human Rights Watch that paramilitaries should desist from the use of political violence per se in Northern Ireland.

[29] Helsinki Watch *ibid*. pp. 114–16. Protocol 1 refers to international armed conflicts including those "in which peoples are fighting against colonial domination and alien occupation". Article 37 notes that "It is prohibited to kill, injure or capture an adversary by resort to perfidy". Perfidy is defined in Article 37(c) as the feigning of civilian, non-combatant status. Helsinki Watch referred to the fact that paramilitaries in Northern Ireland do not bear arms openly and frequently kill by assassinations and claimed that therefore such activities may be properly characterised as being carried out "by resort to perfidy".

[30] See Human Rights Watch *World Report 1992: An Annual Review of Developments and the Bush Administration Policy on Human Rights World-wide* (1992); Helsinki Watch (1993) 5 *Northern Ireland: Human Rights Abuses by All Sides* (May, No. 6); Human Rights Watch Helsinki (1994) 6 *Northern Ireland: Continued Abuses on All Sides* (March, No. 4).

[31] Helsinki Watch *supra* n. 27 at p. 54.

[32] Human Rights Watch *supra* n. 16.

Amnesty International

Following its change of policy in 1991, Amnesty International began to monitor the activities of both republican and loyalist groupings in Northern Ireland. In July 1992 Amnesty International condemned the killing by the IRA of three alleged IRA "informers", drawing a parallel with the similar killings by the UFF and UVF in the same year. While Amnesty continued to be very active on allegations of state human rights abuses,[33] it was not until the publications of its major report on political killings in Northern Ireland in 1994 that the issue of paramilitary monitoring was given substantial consideration.

In that Report, Amnesty International "calls upon armed political groups to observe minimum humane standards". The Report cites norms of international humanitarian law which apply certain minimum limitations on all parties to internal conflict.[34] Unlike the equivalent Human Rights/Helsinki Watch reports, Amnesty do not cite specific instruments to support their assertion regarding the applicability of such standards to Northern Ireland. Rather they suggest that "above all international humanitarian law forbids governments and their opponents alike to torture any person, to deliberately kill civilians, to harm those who are wounded, captured or seeking surrender, or to take hostages. These acts can never be justified. It also forbids the passing of sentences and carrying out of sentences without due process of law. Amnesty International, of course, opposes executions without qualifications, under any circumstances". There is no discussion of the notion of "perfidy" as customary international humanitarian law in the Amnesty Report.

Amnesty lists a range of killings and injuries for which republican groups are responsible. Confusingly however, clear distinctions are not made by Amnesty between those military targets regarded as acceptable and civilian targets regarded as unacceptable under humanitarian law. For example, accounts are given of IRA bomb and sniper attacks on British soldiers manning checkpoints, police officers on patrol, attacks on off duty soldiers and police as well as the killing of civilians, including a nun caught up in a bomb attack, but no clear distinctions are suggested. The only clear assertion is where an IRA bomb attack on

[33] e.g. see Amnesty International *Fair Trial Concerns in Northern Ireland: The Right of Silence*. (London, Amnesty International, 1992).

[34] Amnesty International *Political Killings in Northern Ireland* (London, Amnesty International, 1994) p. 34.

a military hospital in which two soldiers are killed and a number of civilians are injured is quite indisputably described as "a blatant violation of humanitarian law".[35] Attacks in which civilians are either mistakenly or deliberately killed or injured are described *as* "in breach of minimum humane standards".[36] Amnesty also noted punishment beatings, shootings and banishments carried out by republican paramilitaries and condemned one such attack where a young man was shot in the legs three times for refusing to allow the IRA to use his car.

With regard to loyalist killings and injuries, Amnesty noted that ". . . the main victims of Loyalist killings are ordinary members of the Catholic Community"[37] and noted that loyalists too were responsible for punishment attacks. Amnesty concluded this section of their report by urging the leadership of armed political groups to take steps to ensure that their members "don't torture, don't kill prisoners, don't kill civilians, don't take hostages".[38]

In examining this important Report, it is difficult to conclude other than the failure by Amnesty to make distinctions between different types of attacks on military or security force personnel (other than a definitive statement regarding the unacceptability of the attack on a military hospital) is informed by an understandable political sensitivity regarding the notion of a "legitimate target" in Northern Ireland. Amnesty simply list a range of killings and injuries, acknowledge that loyalists kill predominantly Catholic civilians and conclude by urging that basic principles of humanitarian law are upheld. That vagueness was repeated the following year in the Amnesty Summary of Human Rights Concerns when after detailing the numbers of deaths and injuries, as well as a number of recent punishment attacks, the relevant section concluded by stating "Amnesty International opposes human rights abuses carried out by armed political groups, namely the torture or killing of prisoners, other deliberate and arbitrary killings and hostage taking".[39]

The political difficulties posed by observing more closely the requirements of humanitarian law have been highlighted by a number of other

[35] Amnesty International *ibid* p. 36.

[36] *Ibid*. p. 37.

[37] *Ibid*. p. 42.

[38] *Ibid*. p. 48.

[39] Amnesty International *Summary of Human Rights Concerns* (London, Amnesty International, 1995) p. 15. For a discussion on whether armed groups can be guilty of human rights abuses see T Meron "When Do Acts of Terrorism Violate Human Rights?" (1990) *Israel Yearbook of Human Rights* 271–9.

Amnesty International interventions. For example, following their resumption of violence after the 1994 cease-fire, an IRA car bomb at Thiepval Barracks Lisburn (the Headquarters of the British Army) killed one soldier and injured almost thirty civilians.[40] Amnesty released a statement condemning the injuries to the civilians but were immediately branded partial and biased by unionist Security Spokesperson, Ken Magginis, who noticed their failure to explicitly condemn the killing of the British solider. Such criticism mirrored those made by the former Secretary of State Sir Patrick Mayhew when he responded to Amnesty's 1994 Report by saying:

> "Why do you call on the paramilitaries only to desist from killing civilians? Are human rights denied by you, as well as by the terrorists, to police officers? . . . Will you now additionally call on the paramilitaries to stop killing police officers and the military who support them?" [41]

Before considering the impact of such interventions in Northern Ireland upon the paramilitaries, there are a number of issues of broader relevance which arise regarding this style of intervention.

The notion of a "legitimate" target

One key problematic regarding the extension of a monitoring role to paramilitaries in the Northern Ireland context is the distinction between military and civilian targets which is at the very core of humanitarian law principles.

Human Rights Watch has attempted to steer around this difficulty by (arguably) stretching the concept of "perfidy" as customary humanitarian law, to rule out all paramilitary violence whether it is directed against the security forces or civilians. In effect, Human Rights Watch collapsed humanitarian law into pacifism in their general reports on human rights in Northern Ireland. Such a view masks the difficult political reality that republican violence is more likely (although by no means universally) to be deemed permissible by humanitarian law than that carried out by loyalists. Amnesty on the other hand has oscillated somewhat between vague formulations which obscure the distinctions between civilian and military targets (e.g. condemning deliberate and

[40] "Blasts Rock Army HQ: Two Fight for Lives After Double Attack" *Irish News*, 8 October 1996.

[41] "Watchdog's Company Requested But Mixed Welcome is Expected" *The Irish Times*, 13 February 1999.

arbitrary killings) and more specific condemnations which have in turn attracted negative political reactions.

In a conflict which involves two sets of paramilitary protagonists one of whom generally targets military and security force personnel and the other civilians, the application of humanitarian law is inherently problematic. The very concept of a "legitimate" target is anathema to a sizeable section of the community. On the other hand to expand customary humanitarian law to such an extent that it levels all acts of political violence onto a single plain is both illogical and self-defeating. It leaves protagonists with a choice of either stopping political violence entirely or simply ignoring any international strictures since all violent activities are deemed to breach humanitarian standards.

International NGOs as "cease-fire monitors"

Even the condemnations of paramilitary punishment beatings and shootings have not been without their political difficulties in the Northern Ireland context. The increased political significance of punishments in the wake of the republican and loyalist cease-fires of 1994[42] brought its own pressures to Amnesty International and Human Rights Watch.

In February 1999, Unionist and Conservative politicians were seeking to link an end to punishment attacks to the decommissioning of paramilitary weapons and a "freezing" of the early release of prisoners. Amnesty International and Human Rights Watch were called upon for "help" by unionist leader David Trimble. Mr Trimble requested that they should "give us the help needed to ensure the conditions of non-violence they [Sinn Féin] signed up to in the Agreement".[43] The invitation (part of a carefully orchestrated exercise) was preceded by a similar editorial and commentary from a British Sunday newspaper, and was extensively covered in the British print and broadcast media.[44] While Human Rights Watch were able to reply that "we do not normally send a delegation to investigate one single aspect of a complex

[42] The first IRA cease-fire ended in February 1996 and was renewed in July 1997.

[43] David Trimble, "Letter from First Minister (Designate) to Secretary General of Amnesty International and Executive Director of Human Rights Watch" (Stormont Belfast, First Minister (Designate) Press Office, 1 February 1999).

[44] Mr Trimble had in fact failed to reply to a letter from Amnesty International six months previously suggesting a mission to cover the entire remit of Amnesty's human rights concerns.

human rights situation".[45] However, amnesty found that the public perception of their long planned mission to Northern Ireland had been totally skewed by the Trimble invite.

While all human rights NGOs carry out their work in a political environment, it was a deeply invidious position for major human rights organisations to be placed in the role of "cease-fire monitor". Amnesty and Human Rights Watch understandably resisted such a role. Nonetheless, their intervention was described to the author by one local human rights activist as "politically naive, playing into the hands of the most reactionary political forces in Britain and Ireland".[46] Critical human rights reports conducted by international NGOs are often utilised for propagandist purposes and NGOs cannot be held responsible for the political uses to which various groupings will put their work. Nonetheless, the Northern Ireland experience is a salutary reminder of the potential for the monitoring of non-state actors in particular to be used in such a fashion.

International NGOs as norm creators

The third key issue to consider with regard to the Amnesty International and Human Rights Watch remit, is that international weight and credibility afforded to such organisations is in itself norm-creating. As one human rights activist told the author:

> "Groups like Amnesty, Human Rights Watch and so on to a large extent define what human rights are to the public. For example, despite continuously stressing the narrowness of the organisation's remit, when Amnesty used to work almost solely on prisoners of conscience issues, people did not understand that economic, social and cultural rights were also human rights. Now Amnesty works on paramilitary abuses, therefore for a lot of people that is what human rights abuses are. These organisations define what human rights are wittingly or unwittingly, and local groups have to deal with that".[47]

The key aspect in this context is that international NGOs should recognise that there are implications at local levels for human rights NGOs from the policy decisions taken by the larger groupings.[48]

[45] "Rights Group Declines Trimble's Invitation" *The Irish Times*, 10 February 1999.

[46] Interview, 23 June 1999.

[47] Interview, Maggie Beirne, Research and Policy Officer CAJ, 28 June 1999.

[48] The author is unaware of any consultation with local human rights groups in Northern Ireland before the change to Amnesty's mandate in 1991 and has been unable to discern to what extent such consultation took place with groups in the other countries.

Clearly human rights organisations must have the freedom to develop organisational policies as they see fit. However, in a context of increasingly global NGO networks, that freedom must be exercised in a spirit which recognises the responsibilities which accompany hard won international respect and prestige to ensure sensitivity to local consequences by an ongoing process of consultation and discussion with local groups.

The impact of monitoring by international NGOs on paramilitaries in Northern Ireland

Based upon the interviews conducted with paramilitaries and former paramilitaries for this and other research,[49] it is my contention that the use of humanitarian law by NGOs to condemn "military" attacks carried out by republicans and loyalists on security forces or civilians had no discernible impact on the targeting policy of either set of protagonists. In both instances, such policy was dictated by the ideology, practices and operational capacities of the respective organisations. However, with regard to the monitoring of paramilitary abuses such as punishment beatings and shootings, it is arguable that the work of Amnesty and Human Rights Watch contributed to the increased public awareness and political importance of the phenomenon in the 1990s. In my view, it is possible to discern different impacts between the loyalist and republican paramilitaries.

As discussed above, with a looser organisational structure, differing range of reasons for such activities and less developed international political constituency, it is likely that humanitarian law monitoring had a less significant effect on loyalist paramilitaries. In addition, Loyalists may have been less sympathetic to interventions from such groupings as Amnesty International to begin with given their active and regular criticisms of state abuses.[50]

[49] e.g., K McEvoy *Resistance, Management and Power in Prisons: Paramilitary Imprisonment in Northern Ireland* 1969–2000 (Oxford, Oxford University Press, forthcoming 2001); K McEvoy and H Mika "Punishment, Politics & Praxis: Restorative Justice and Non-Violent Alternatives to Paramilitary Punishments in Northern Ireland" *Policing and Society* (forthcoming 2001); J Auld, B Gormally, K McEvoy and M Ritchie *Designing a System of Restorative Community Justice in Northern Ireland: A Discussion Document* (Belfast, 1997).

[50] "Amnesty historically never really had much credibility in relation to the loyalist community. They were seen as an arm of the republican movement with regard to human rights abuses, being used in a propaganda war. There was a major credibility gap

Republicans on the other hand may have been more sensitive to criticisms from such groupings. They have often drawn upon critical international human rights reports highlighting state abuses to underline their position about the illegitimacy of the British state in Ireland. Indeed as one republican spokesperson acknowledged, the IRA leadership appeared acutely aware of the change in Amnesty's position. Using the phrase "the monitoring of NGEs" (a technical phrase "non-governmental entity" usually associated with Amnesty International) he explained:

> "When Amnesty changed their line I think we had been expecting it. They had a certain amount of credibility because they had highlighted abuses in the past at Castlereagh [interrogation centre] and places and they were not seen as simply anti-republican . . .Their criticisms probably had an impact at the leadership levels because the leadership did not want to be dealing with pressure from large numbers of beatings. It probably added to a tightening up of procedures within the movement [IRA] further down the line".[51]

The lessons for broader applicability would appear to be that monitoring of non-state entities is likely to be most effective where credibility has been established, where there is a more politicised and more disciplined organisation and where the political expression of that movement has an eye to the nurturing of an international constituency.

Interventions by political lobby groups using a human rights framework

Throughout the 1990s in particular several groups emerged in Northern Ireland which, describing themselves as human rights groups, campaigned against abuses by paramilitary groupings and by the IRA in particular. These included groups which highlighted republican attacks on economic targets such as the cross-border railway (Peacetrain), attacks on Protestant security force members and their families in border areas (FAIR, Families Acting for Innocent Relatives) and a group called the "Long March" which invited "all sections of the Protestant and unionist population to march from Derry to Garvaghy

between Amnesty International and the loyalist paramilitaries": interview, former UVF prisoner, 29 June 1999.

[51] Interview, republican spokesperson, 1 July 1999.

Road in Portadown",[52] in effect combining a focus on republican terrorism with contested Orange marches through nationalist areas.

The best known such lobbying group was FAIT (Families Against Intimidation and Terror) which was operational for nine years before dissolving in 1999. It is FAIT which can best serve as a heuristic device to examine some of the broader themes concerning interventions by such groupings on paramilitary abuses. FAIT was established in 1990 by a former member of the Official IRA[53] and the mother of a petty criminal who had been the victim of an IRA punishment attack. Although initially focused upon punishment attacks by the IRA, it expanded its mandate to include criticism of loyalist violence as well. FAIT described themselves as: "an anti-sectarian, non political group which is committed to the preservation of human rights with their main focus being geared towards an end to all forms of terrorist beatings shootings and intimidation".[54] FAIT's principal strategy has been to use the media to embarrass the political wings of republicanism and loyalism by highlighting the abuses of the victims of punishment attacks. Their tactics included almost daily press releases, placarding political meetings, shadowing figures such as Sinn Féin President Gerry Adams on visits to the USA, bringing victims to major speaking engagements and generally creating maximum embarrassment for such figures by contributing to the "wall to wall coverage"[55] of the punishment beatings issue during the peace process era.

Although FAIT describes itself as a human rights grouping, there are clearly difficulties in this regard. First, they make no usage of international human rights or humanitarian law standards in their literature or public pronouncements.[56] FAIT were, for example, strongly opposed

[52] "Plans for Long March Unveiled" *Belfast Telegraph*, 12 June 1999.

[53] The Official IRA were a more Marxist-oriented republican grouping who were involved in a split with the Provisional IRA in 1970. The Provisional IRA quickly became the larger of the two groupings and over time inherited the mantle of "the IRA". While the officials declared a cease-fire in 1972, they continued to engage in armed actions including killings, kneecappings and robberies at least until the mid-1990s. The schism also lead to a vicious political struggle between the political wings of the two movements, the Workers Party (OIRA) and Sinn Féin (PIRA).

[54] FAIT Website (2000) Website of Families Against Intimidation and Terror http://www.fait.org.

[55] M Tomlinson "Walking Backwards into the Sunset: British Policy and the Insecurity of Northern Ireland" in D Miller (ed.) *Rethinking Northern Ireland: Culture, Ideology and Colonialism* (London, Longman, 1998) pp. 94–122.

[56] In an interview with author, it was clear that FAIT's Director who has been with the organisation from the outset was unaware of the legal detail of either set of standards, the differences between them or their respective usages or limitations. Interview, Sam Cushnahan, Director of FAIT, 1 July 1999.

to any notion of distinguishing between military and civilian targets.[57] Secondly, they did not work on state abuses of rights, the primary focus of international human rights and indeed humanitarian standards. Thirdly, their established international networks were not generally with the international human rights community but rather with other victims and anti-terrorist lobbying groups in Spain (Association for the Victims of Terrorism), Algeria (Algerian Collective) and France (SOS Attentats). Fourthly, they were almost entirely funded by government, a relationship which most non-governmental human rights organisations avoid to ensure maximum credibility and impartiality.

Instead, it would be more accurate to locate their work in terms of a political lobbying group working in a human rights framework. The origins of FAIT (and other similar groups),[58] their work programmes, their operational methods and their objectives, clearly have a political objective—which is too put an end to all paramilitary activity. Human rights groups work within the political realm to promote human rights objectives and this requires that they not challenge the state, nor indeed government, per se but instead challenge any behaviour that is in violation of human rights standards. The category of groups that FAIT belongs to must, of logical necessity, challenge the very existence of paramilitaries and they are therefore operating to a preeminently political agenda, albeit addressing human rights or humanitarian concerns en route to that goal.

The impact of political lobby groups using a human rights framework

While FAIT has been highly successful in attracting media publicity to the issue of paramilitary punishment attacks, it too has been the object

[57] Interview, Sam Cushnahan *ibid*.

[58] Other actors have made similar interventions in Northern Ireland while describing themselves as human rights groups. For example, one prominent academic has run a number of campaigns directed primarily against violent punishment attacks carried out by republicans. His tactics have included criticising the policy of other human rights groups while eulogising the efforts of FAIT, standing in the general election against Gerry Adams after forming a group called "Human Rights 1997" focused on the sole issue of punishment attacks and calling for the exclusion of Sinn Féin and loyalist parties from negotiations under the rubric of another organisation called the Northern Ireland Human Rights Association. See L Kennedy "Nightmares within Nightmares: Paramilitary Repression within Working Class Communities" in L Kennedy (ed) *Crime and Punishment in West Belfast* (The Summer School, West Belfast, 1995) pp. 67–80 and "New Candidate Accuses Sinn Fein over Human Rights Abuses" *Irish News*, 26 July 1997.

of considerable negative publicity. As a state-funded lobbying group, it has been consistently criticised by nationalist and republican commentators in particular as being a propagandist organisation for the Northern Ireland Office.[59]

FAIT's high media profile has also ensured that the group's organisational and personnel difficulties have been extensively documented by the local media. As the organisation's last Director colourfully suggested: "if someone breaks wind in the FAIT office, you can guarantee some journalist is going to write about it".[60] Despite the groups ostensible non-political stance, several leading staff members have been dismissed because of explicitly political activities.[61] The group has also been accused of breaching the confidentiality of the victims of terrorist abuses.[62] When asked why the group had such a chequered

[59] As one Sinn Féin Councillor suggested after FAIT allegations of IRA involvement regarding a shooting incident in West Belfast in which a young man was shot in both legs: "It is clear from FAIT's comments that they are more interested in scoring cheap political points against republicans than in dealing with the issues of the attacks on the nationalist people by criminal elements. FAIT have made this claim without a single shred of evidence to substantiate it. Those genuinely involved in the real work on the ground within the community to alleviate problems arising out of a policing vacuum will question the sole aim and only purpose of this group, those behind it and those who fund it", cited in "FAIT Denies Scoring Points off Sinn Fein" *Irish News*, 16 February 1996.

[60] Interview with Sam Cushnahan, Director of FAIT, 1 July 1999. The group's cofounder Nancy Gracey was forced to resign from the executive after she allegedly used FAIT resources for a three week paid holiday in the USA, after which she promptly established a rival group initially called "United Against Intimidation and Violence" and later renamed "OUTCRY". See "Nancy Gracey Sets Up New Group" *Belfast Telegraph*, 14 May 1996; "Outcry to Tell First Lady of Attacks" *Irish News* 29 August 1997. Further financial and managerial irregularities also led to several investigations by their statutory funder the Northern Ireland Central Community Relations Unit and the RUC: "Union Asks for NIO to Investigate FAIT" *Belfast Telegraph*, 21 October 1998.

[61] Former Spokesperson Glyn Roberts, an Alliance Party activist, resigned after accusations that he was using the group to build a political platform for himself ("FAIT is Rocked by Former Director's Attack" *Belfast Telegraph*, 28 September 1998). His replacement, a controversial figure called Vincent McKenna who had himself previously stood as independent candidate, was in turn dismissed after he had explicitly aligned the group with the unionist anti-Agreement camp, campaigned against prisoner releases and named a number of suspects he claimed were responsible for the Omagh bombing ("Yes Voters Cheated: FAIT Man Could Not Back Deal" *Newsletter*, 1 January 1999). McKenna then also established his own lobby group "the Northern Ireland Human Rights Bureau", which, despite a highly critical BBC documentary focused on McKenna's credibility, still make sporadic interventions on paramilitary abuses in the media until his conviction for sexually abusing his daughter in late 2000.

[62] "FAIT Faces Breakup After US Scandal: Future is Bleak Say Members" *Irish News*, 29 July 1997. FAIT's Director Sam Cushnahan acknowledged that there was a tension between service provision to those under threat to paramilitaries and encouraging such individuals to criticise paramilitaries publicly at FAIT organised press conferences. However he argued that while ultimately it was for the victim themselves to

organisational and personnel history, Director Sam Cushenanan candidly linked its failings to the fixation with accessing the media:

> "There were two downsides to our success in gaining such access to the media. Firstly was that it encouraged an obsessive interest in us so that all of our mistakes were aired very publicly. Secondly that the guaranteed access attracted a certain kind of people to our staff, people on an ego trip or building their own political career, and they did a lot of damage to our credibility . . . We probably get more respect now internationally than we do at home".[63]

In sum, its interventions were often explicitly politically partial (e.g. in aligning themselves with the anti-Agreement lobby), almost entirely media focused and engendered a common scathing attitude regarding the group's lack of credibility in both republican[64] and loyalist communities. On the loyalist side, one former activist also highlighted their lack of credibility and suggested that FAIT may have exacerbated the situation in some instances with regard to the loyalist paramilitaries.[65] Despite such difficulties, they succeeded in their objectives of raising the political profile of punishment attacks and proving a political irritant to both Sinn Féin and the loyalist parties.

A number of lessons of more general applicability arise from the activities of groups such as FAIT in the Northern Ireland context. First, the lack of substantive engagement in the human rights or humanitarian law framework arguably removes a necessary anchor for any group which is operating in such a highly politically contentious arena. Without such an external reference point, any "human rights" group will be susceptible to the charge of being politically motivated, of

decide, he felt that often such publicity could provide "an extra suit of armour" around such victims: Interview, Sam Cushnahan, Director of FAIT, 1 July 1999.

[63] Interview, Sam Cushnahan, Director of FAIT, 1 July 1999.

[64] "They [FAIT] were only interested in anti-republican propaganda. Our ones [the IRA] would have thought they were a bit of a joke. They did not provide any realistic alternative to punishments other than saying support the RUC". Interview, republican spokesperson, 1 July 1999.

[65] Q. "How would the UVF have viewed FAIT ?" A. "They would laugh at them . . . They are sitting in a city centre office, generally middle class people that haven't experienced life in working class neighbourhoods, trying to moralise on issues that affect them without realising that it is the community people themselves who are approaching the paramilitaries . . . They did everything in a very public way. They used the media a lot for condemnations, but you are never going to get honest dialogue with the paramilitaries when you take that kind of approach. In actual fact some people would say that it had the opposite effect where the paramilitaries say stuff them, well shown them": interview, former UVF prisoner, 29 June 1999.

building alliances with the groups who are in opposition to the paramilitary groups, and this may diminish their own credibility as an impartial player in the political arena. Secondly, while the media will often happily reproduce criticisms of the activities of non-state groups, over-exposure to the media may have negative consequences on the quality of staff and the organisational image. Without an explicitly impartial framework such as international humanitarian law, journalists too will begin to question an organisation's motivation and political allegiances. Even with such a framework, any organisation which continuously find the media amenable to presenting their claims-making efforts can expect to pay a price in close media scrutiny of their own affairs. Thirdly, a *modus operandi* which means that all work is carried out through the media imposes obvious limitations on an organisation's effectiveness. The vast majority of individuals who came to FAIT for assistance were referred to another project BASE 2 (discussed below). No attempts at pragmatic dialogue with paramilitaries or their political wings were attempted. A refusal to engage in such a fashion may be indicative of a lack of organisational confidence.[66] FAIT's only engagement with Sinn Féin and the loyalist parties had been in a blatant attempt politically to embarrass those groupings, where the media were brought along with them to the meetings and the parties were invited to sign an anti-violence charter condemning punishment attacks.[67] While such interventions can have an impact upon the political context within which non-state entities operate, they provide little in terms of influencing the policies or practices of such groupings, nor indeed provide such groupings with viable alternatives to their abusive practices.

Direct engagement by humanitarian groupings seeking to change paramilitary behaviour

In the past thirty years a variety of community, voluntary and statutory services have developed policies and working practices around the contours of the political conflict and the material reality of paramilitaries

[66] When asked why FAIT had not tried such pragmatic engagement, FAIT's former Director suggested that the ability of paramilitary groups and their political representatives to "co-opt or usurp the focus of community or lobby groups" had been highlighted in other settings and FAIT did not wish to take such a risk. Interview, Sam Cushenhan.

[67] "Fait Urges Sinn Fein to Endorse New Charter" *Belfast Telegraph*, 23 March 1998.

in many working class areas. Indeed it has often been necessary for groups in such areas to have at least the acquiescence of the paramilitaries in order properly to carry out their functions. For example, those who work with offenders, in crime prevention projects, who provide diversionary services to young people and who work in a range of other community development initiatives inevitably come into contact with both paramilitaries, their supporters and those under threat from the paramilitaries. In such circumstances, a number of programmes have emerged to provide services to those under paramilitary threat and to seek to mitigate the nature and consequences of paramilitary behaviour. These have included cross-community programmes (aimed at republicans and loyalists simultaneously) as well as initiatives focused on republicans and loyalists respectively.

BASE 2: an intervention with both republicans and loyalists

In 1990 a programme called Base 2 was established by the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO), a largely state-funded voluntary agency. Base 2 was designed to intervene with those under threat from paramilitaries and to provide such individuals with a discreet and confidential service.[68] Regarding themselves as a "humanitarian crisis intervention response",[69] they have largely eschewed publicity or media focus upon their work. Base 2 handled an average of 200 clients a year up until 1994 and experienced a dramatic increase in numbers after the cessations as paramilitaries relied more upon banishments rather than physical punishments. Taking referrals from a variety of sources, Base 2's role has been to clarify with loyalist and republican groupings the nature of the threat, provide advice, transport and accommodation out of the community to those under threat and to serve as a reintegration service if a period of paramilitary banishment is time limited. While staff clarified the nature of a threat with paramilitaries, no negotiation with regard to tariffs (for example shooting in one leg as opposed to two) was permitted and all dealings were premised on the organisation's implacable opposition to punishment violence.

BASE 2's work has clearly had an impact in preventing well over 2,000 individuals from being beaten, shot or killed over the past nine

[68] P Conway "A Response to Paramilitary Policing in Northern Ireland" (1997) 8 *Critical Criminology* 109–22.

[69] Base 2 *Annual Report of the Base 2 Project* (Belfast, NIACRO, 1997) p. 1.

years.[70] The paramilitaries accept that they have increasingly come to view it as "a resource" which prevents them from otherwise carrying out punishment attacks.[71] For the range of statutory, voluntary and community organisations who work with those who are under threat, many suppressed their professional and ideological misgivings that such an initiative (funded largely by statutory monies) was colluding with a violent and unlawful system of paramilitary violence. The fact that the alternative was to leave many such individuals at the mercy of the paramilitaries has, until recently, proved a more persuasive argument.

Community restorative justice : an intervention with republicans

In 1996 three criminal justice practitioners and the current author[72] were approached by a number of republicans to provide a training programme on issues relating to "informal justice". That programme was conducted over a seven-week period and included international and historical examples of alternative and restorative justice, human rights, crime prevention, mediation and non-violence. It was premised on a continued emphasis by the trainers of their opposition to violent punishments. This training programme was followed by a residential course wherein the trainers and trainees drafted the outline of a model of non-violent and lawful community-based alternatives to punishment beatings and shootings. That model was written up into a draft report, circulated to a number of relevant bodies, and a revised version published in December 1997.[73]

That document was fully endorsed by Sinn Féin. Following publication of the report, funding for four pilot projects in republican areas and a coordinator position for three years was achieved in September 1998 under the management of NIACRO. The IRA has expressed its support for these community-based restorative justice projects as

[70] Base 2 *Annual Report of the Base 2 Project* (Belfast, NIACRO, 1999).

[71] A republican spokesperson interviewed for this research suggested that their willingness to engage with the project in 1990 happily coincided with a decision in the late 1980s that republicans should be more actively engaged with individuals and agencies outside the movement, reasoning (probably correctly) that such engagement probably carried significantly more professional risks for such bodies than for the republican movement: Interview, republican spokesperson, 1 July 1999.

[72] All of those involved were either then or had previously been employed by the Northern Ireland Association for the Care and Resettlement of Offenders.

[73] Auld *et al supra* n. 49.

mechanisms for their "responsible disengagement" from punishment attacks.[74] Sinn Féin stressed community restorative justice as one of their five key demands in their submission to the Patten Commission on Policing[75] and restorative justice is now invariably cited as the response to questions on punishment beatings and shootings. The pilot projects are now operational. Over 200 people have gone through the introductory six to seven week training course, and there are demands for further training as well as for the establishment of further pilot projects in ten to twelve areas across Northern Ireland.[76]

The "alternatives programme": an intervention with loyalists

In 1996 a former UVF prisoner was commissioned by NIACRO to carry out research on punishment attacks by loyalist paramilitaries in the Greater Shankill area of West Belfast.[77] The research was facilitated by EPIC, the Ex-Prisoners Interpretative Centre, a self-help reintegration project which works with UVF and Red Hand Commando (RHC) prisoners.[78] The researcher's position as an ex-prisoner and the support of the reintegration project facilitated crucial access to the UVF as well as their political wing, the Progressive Unionist Party.[79] The research revealed that there was a willingness by the UVF leadership and the Progressive Unionist Party to explore viable alternatives to

[74] "The IRA want these programmes to work because for almost 15 years now republicans have been saying that punishment shootings are not a solution to the problems of petty crime and anti-social behaviour . . . This is a community problem and while IRA action may arrest it temporarily, ultimately the community must take a lead in tackling anti-social behaviour . . . We want people to support the Restorative Justice approach by bringing their problems to the dedicated and highly trained workers operating the programmes rather than to the IRA": IRA spokesperson interviewed in "IRA Pledges Support For Community Justice Plan" *Andersontown News*, 29 March 1999.

[75] Sinn Féin *Sinn Fein Submission to the Independent Commission on Policing* (Belfast, Sinn Fein, 1998).

[76] For further critical reflection on these developments see K McEvoy and H Mika *supra* n. 49.

[77] T Winston "Alternatives to Punishment Shootings and Beatings in a loyalist Community in Belfast" (1997) 8 *Critical Criminology* 122.

[78] The Red Hand Commandos are a small loyalist paramilitary grouping who have always been closely aligned to the larger Ulster Volunteer Force.

[79] "An outsider couldn't have done it. Absolutely not. For a start they wouldn't have been talking to anyone, no one [from the UVF] would speak to them. It had to come from the ranks of former combatants of the organisation, it had to come from people who had credibility within the organisation, people who wouldn't have been seen as suspicious, whose motives were not in question": Interview, former UVF prisoner, 29 June 1999.

punishment attacks, albeit with certain exceptions imposed by the former. These included interfactional disputes or drug-related activities, internal disciplinary matters, sexual offences and particularly violent attacks.[80]

With those limitations, a project based on the principles of restorative justice has been established known as Greater Shankill Alternatives directed by the former prisoner who conducted the original research. With some differences, the project programme is not dissimilar to that in republican areas wherein complaints are investigated, mediation sessions established between victims, offenders and families, restitution or reparative work agreed, networking with available statutory and community provision (who are represented on the management committee) and a system of mentoring and support for offenders going through the system. The project liaises directly with the relevant paramilitary groups. This project is also now considering expansion to a number of other different venues across Northern Ireland.[81]

The impact of humanitarian groupings directly engaging with paramilitary groupings

Perhaps unsurprisingly, the impact of humanitarian groups that intervened in this fashion are the easiest of the intervention styles to assess. In each instance, material social structures have been developed which have directly and incontrovertibly prevented or mitigated human suffering at the hands of the paramilitaries. A number of features of broader interest is shared by the approach of these three programmes and are key to their obvious success in preventing humanitarian abuses by paramilitary groupings.

Pragmatic engagement with paramilitaries

One key feature which the BASE 2, Community Restorative Justice and Shankill Alternatives share is a willingness to engage pragmatically with paramilitary groupings. All such engagements have been done privately outside the glare of the media spotlight. While all the projects

[80] Interview, former UVF prisoner, 29 June 1999.
[81] Interview, former UVF prisoner, 29 June 1999.

have shared an opposition to punishment violence, and this has been made clear to the paramilitary groupings, dialogue has still taken place which accepts as a reality the place of such paramilitaries in local communities and the more complex dialectic between the paramilitaries and their communities. As noted earlier, such a relationship is not viewed simply as one of repression, control and fear (although such factors are clearly relevant in certain circumstances) but also acknowledges notions of "responsibility" amongst paramilitaries for protection of their communities and a parallel culture of dependency in the community that anti-social crime should be "sorted out" by the paramilitary organisations. They are also premised upon an acknowledgement to a greater or less extent, that formal state policing has been problematic in both loyalist and republican communities.[82]

Such engagement requires, particularly for professional organisations, a willingness to engage in politically sensitive and clear organisational "risk-taking" activities. NIACRO, which has directly managed two of the projects and has been an important player in the third, is a large NGO with most of it income coming from state sources. For any such group to engage directly with paramilitaries requires considerable organisational self-confidence (compared for example to FAIT), a clear rationale based on agreed principles for the engagement, and a willingness to counter any inevitable negative media or governmental comment in pursuit of those objectives.

The localisation of the paramilitary constituency

Another key theme which emerges in the work of these projects is a more clear understanding of the nature of paramilitary constituencies. The most familiar methodology for human rights and humanitarian activists is to seek to embarrass governments about their human rights violations in the eyes of significant "stakeholders". Such stakeholders may include international fora, important trading nations, local and international media or oppositional groupings within the state in question.

While such a focus is important with regard to the political wings of paramilitary groups such as Sinn Féin who have developed a significant national and international constituency, it is important to remember that for paramilitary groupings those whose views are considered sig-

[82] See R McVeigh *Harassment by the Security Forces: Its Part of Life Here* (Belfast, CAJ, 1994).

nificant are often considerably more localised. Their primary interaction is with other paramilitaries and with members of their own community, many of whom may be supportive of their activities. Traditional techniques and strategies of embarrassment, encouragement or affirmation designed to moderate or alter paramilitary behaviour may have to be adapted to suit this much narrower and more localised canvas.

For example, one of the key strategies employed by the Community Restorative Justice project has been to utilise existing community fora, organisations, residents groupings and other community structures to explain the concepts of restorative justice and the content of the programmes. Literally hundreds of meetings have been held in community centres, parish halls and other local settings. A key concern for republicans, which has informed the work of the CRJ activities, has been to underline that they are not "abandoning" their responsibility to protect the community from anti-social or criminal activity[83] but rather empowering local communities to tackle these issues themselves.

To counter such concerns, numerous articles and features have appeared in local community newspapers, republican newsheets, housing association newsletters and other outlets explaining the republican movement's support for Restorative Justice and its usefulness in the community. In one of the project areas, every household of several thousand families were distributed with a copy of the *Community Charter*, an explanation of the project and an invitation to become involved. Such a strategy is a patient and time-consuming exercise which takes on board the concerns of the paramilitaries that they are seen to "disengage responsibly" and address those concerns by ensuring that their constituency is both encouraged along the same pathway and feels some sense of ownership over that process.

Similarly with regard to the notion of "embarrassment" amongst loyalist paramilitaries, criticisms focused solely on the brutality of punishments are less likely to be impactive in communities which support

[83] Republican dissidents opposed to the peace process have viewed the IRA's commitment to ending punishment violence as a vulnerable political flank of the mainstream movement. "Community Restorative Justice is British double speak for collaboration with Crown Forces . . . NIACRO is dedicated to recruiting ex-prisoners into a new police force which will serve as an auxiliary wing of the RUC. . .It is clear that the establishment of a new British police force in the guise of community justice is the initiative of a British colonial agency operating from Stormont": cited in "Blue Book for New British Police", *Saoirse*, September 1998. Saoirse is the magazine of republican Sinn Féin, the political wing of the Continuity IRA, a republican organisation not currently observing a ceasefire.

such actions. However, the involvement of their immediate paramilitary rival groupings, the UVF and RHC, in a project on the Shankill designed to intervene on paramilitary punishments, has clearly impacted upon the decision of the UDA also to begin the process of establishing a similar programme. All the paramilitary organisations are involved in a relationship with the same community in a relatively small area and clearly one organisation does not wish to be viewed as out of step with the activities of others, in particular when such a programme is gaining increased credibility at a local and national level.

In sum, by identifying in a cold-eyed and pragmatic fashion the needs and fears of the paramilitary groups in relation to their own very localised constituencies, more nuanced strategies can be developed to build upon humanitarian interventions.

The role of former prisoners in establishing and maintaining credibility

A third point which has been crucial in the development of the Community Restorative Justice and Greater Shankill Alternatives programme has been the involvement and support of former prisoners in such initiatives. After a thirty year conflict, there are literally thousands of formers prisoners in republican and loyalist communities in Northern Ireland.[84] Many such individuals are highly respected in their own communities, they have returned from prison with enhanced educational and organisational abilities and play a crucial role in the process of peace-building at both a community and political level.[85] Crucially, as outlined above, such former combatants also have credibility within the paramilitary organisations and have proved an invaluable resource in both gaining access to such groupings and lobbying within paramilitary circles for less violent forms of actions.

In sum therefore, a willingness to engage pragmatically with paramilitaries outside the glare of the media; a sensitivity to the complexity of the relationship between paramilitaries and their communities; and the utilisation of the skills and credibility of former combatants; these have been the key ingredients in the success of these interventions to date.

[84] Republicans estimate that there are over 15,000 ex-republican prisoners alone: *Cosite na n-iarchimí Annual Report 1999* (Belfast, Cosite na n-iarchimí, 1999).

[85] K McEvoy "The Agreement, Prisoner Release and the Political Character of the Conflict" (1999) 22 *Fordham International Law Journal* 145–81.

Creating a human rights culture

The fourth style of practical work which has arguably impacted on the behaviour of paramilitary groupings in Northern Ireland has been that carried out by human rights organisations which have, perhaps paradoxically, been primarily focused on the activities of the state. While opposed to the use of political violence, such groups have not prioritised paramilitary abuses and focused instead on the primacy of the state's responsibility to ensure the effective protection of human rights. Whether this can be properly described as an intervention is discussed below. While there are many groups who could be considered, the best example of this style of work is Northern Ireland's primary human rights NGO, the Committee on the Administration of Justice (CAJ).

CAJ was established in 1981 and has worked on a wide variety of rights issues including prisoners' rights, emergency laws, children's rights, gender equality, racism, disability, a campaign for a Bill of Rights, policing and the operation of the criminal justice system.[86] The debate regarding CAJ's role with regard to the behaviour of paramilitaries was initially located almost exclusively within the humanitarian law framework.

In 1991, in the context of Amnesty International's extension of their remit to non-state entities, CAJ underwent considerable internal debate as to whether it should follow the Amnesty example.[87] The

[86] CAJ has well developed relations with other domestic and international human rights groups such as Amnesty International, the Lawyers Committee for Human Rights and Human Rights Watch. CAJ has a cross-community membership of over 300, takes no position on the constitutional status of Northern Ireland and is unequivocally opposed to the use of political violence. The organisation has been awarded a number of international human rights prizes, including the Reebok Human Rights Award and the 1998 Council of Europe Human Rights Prize. The author has been involved on the management committee of CAJ since 1992 and served in a range of capacities including as Chairperson between 1997–9.

[87] The debate was reflected in the various positions argued in the Committee's newsletter *Just News*. Summarising for the sake of brevity, the case for a change in the remit was that CAJ should follow Amnesty's example; that the embarrassment of publicity might pin the blame on those guilty of hostage-taking and assassinations; that fewer people would be "put off" by the apparent one-sidedness of human rights groups; and that a sole focus upon abuses by the state was only part of the picture and therefore imbalanced. See, e.g., (1992) 7 *Just News* "Humanitarian Law: The Case for a Change of Remit" (February No 2). The case for retaining the CAJ position of non-monitoring was that humanitarian law could not be applied to the Northern Ireland conflict; that to do so would offer some legitimacy to some paramilitary protagonists and actions and that the notion of a "legitimate target" ran contrary to the organisation's essentially pacifist

issue was finally decided at an extraordinary general meeting of the CAJ membership in late 1991. After considering the respective arguments, the membership voted overwhelmingly to reiterate its opposition to political violence but to refrain from action on non-state abuses. CAJ's position has remained unaltered to the present day and its spokespersons remain convinced that that decision is the correct one for a human rights NGO in the Northern Ireland context.[88]

The impact of NGOs focused upon creating a human rights culture

Despite its position of non-monitoring paramilitary violence (other than condemning such violence when asked by the media), CAJ strongly dispute that its position represents an abdication of responsibility or that it had no impact upon the behaviour of paramilitary groupings in Northern Ireland.[89] Their experience also raises a number of thematic points of broader relevance to understanding how such groups may nonetheless have an impact.

Political transition and internalisation of rights discourses

In its attempts at creating "a human rights culture in Northern Ireland", CAJ argue that it has been very successful in developing networks and relationships with a wide variety of political parties, including the political representatives of republicanism and loyalism. It suggests that the adoption of human rights discourses by such group-

position of *complete* opposition to political violence; that the application of humanitarian law would lead to accusations of selective condemnation in accepting attacks on the security forces; and finally that an extension of the mandate would dilute CAJ's focus on the state and its culpability in the conflict in persistently eroding the rule of law. See, e.g., "Humanitarian Law; Not as Simple as it Seems" *Just News* (December 1991).

[88] "Applying humanitarian standards would mean that there were legitimate targets and there were illegitimate targets. That would have draw CAJ automatically into a situation where we would be criticising the killing of civilians but not those of soldiers or police officers. Because CAJ is opposed to all violence, we don't have to make those kind of distinctions. Furthermore, making those kind of distinctions would mean criticising loyalists much more that republicans . . . From the public perspective we would have been slating the loyalists and not the republicans, I can't really see how we could have continued to function. We would have ended up criticising the state and loyalist paramilitaries, and saying to republicans that it is OK to kill soldiers and police—it would have been crazy": interview, Maggie Beirne, Research and Policy Officer CAJ, 28 June 1999.

[89] Interview, Maggie Beirne *ibid*.

ings has not only altered the political landscape regarding human rights generally in Northern Ireland, but *may* also have had some impact on the behaviour of the paramilitary groups themselves:

> "Regarding the Good Friday Agreement, if it wasn't that Sinn Fein and the Loyalist parties had made such a big deal about human rights, then its difficult to believe that you would have got such strong human rights protection in the Agreement . . . it is difficult to say the extent to which it [the human rights debate concerning the agreement] may have influenced the behaviour of republicans and Loyalists on the ground".[90]

I have argued elsewhere that the assertion of the "rights and equality agenda" has become a defining characteristic of modern Irish republicanism.[91] That transition has seen Sinn Féin (and to some extent the loyalist parties) draw extensively upon materials produced by CAJ and similar groups in putting forward their respective positions on rights and equality.[92] The adoption of such political parties of the human rights agenda has arguably done much to both highlight the disparity between their own political rhetoric regarding such discourses and the practices of their military wings, as well as leaving such groupings more amenable to seeking alternative and more humane ways of conducting their affairs. While critics might argue that this is an overly slow process of internalising a respect for rights by osmosis, a view that republicans would strongly dispute,[93] it does represent a significant contribution to changing the paramilitary "environment" at least.

Other than their willingness to engage in the restorative justice initiatives in the area of punishment attacks, a further illustrative example of this point has been the question of the republican movement's position with regard to the "disappeared".[94] In urging the IRA to

[90] Interview, Maggie Beirne *ibid*.

[91] For a discussion on changes amongst paramilitaries with regard to legality see K McEvoy "Law, Struggle and Political Transformation in Northern Ireland" (2000) *Journal of Law and Society* 27, 4 542–571.

[92] See Mageean and O'Brien *supra* n. 3.

[93] Republicans argue that the desire for justice has always been part of their campaign. They point to the involvement of republicans in the 1960s civil rights campaign and argue that it was the unionist Government's violent reaction to peaceful protest for civil and political liberties which led to republicans being "forced" to engage in armed struggle: interview, republican spokesperson, 1 July 1999.

[94] This issue refers to a number of individuals, some of them members of the republican movement, who were abducted by the IRA in the 1970s and early 1980s, interrogated and murdered and their bodies buried and not returned to their families. Following a high profile campaign for the return of the bodies, legislation was introduced North and South of the border guaranteeing that the bodies would not be tested for forensic

respond to the plight of the families, albeit under severe political pressure, Gerry Adams and other Sinn Féin spokespersons began to refer to the matter as "a human rights issue".[95] For republican leaders (renowned for the care of their language) to suggest that the matter was "a human rights issue" was indeed significant. Normally abuses by republicans have been either justified, described as wrong, contextualised or otherwise explained by Sinn Féin leaders. To the author's knowledge, this is the first time that a senior republican figure has suggested that a republican act constituted a human rights abuse. This is not to suggest any careful distinction between human rights and humanitarian law per se, but rather that such language reflects some degree of genuine internalisation of human rights discourses beyond the rhetorical claims making process which Sinn Féin have so successfully pressed as part of their political struggle.

Acknowledging the limitations of the human rights paradigm

The experiences of an organisation like CAJ are also instructive in highlighting the need by human rights actors to acknowledge the limitations of the human rights paradigm. In a conflict situation, there is sometimes a tendency to conflate human rights with conflict resolution. While human rights abuses clearly may add to a political conflict, and creating a just and fair society is an intrinsic part of peace-building, it would be wrong to overstate the peace-making potential of the human rights framework.

For example, in the Northern Ireland context, many commentators felt that the early release of paramilitary prisoners was a crucial component to the conflict resolution process.[96] However CAJ did not take a position on the issue because it is not contained within international human rights standards. Similarly with regard to the issue of disputed marches, while it may be conceptually useful to remind both marchers

evidence and establishing a commission. The IRA announced that a specialist unit tasked with pulling together information on the matters had garnered knowledge on the whereabouts of nine bodies. At the time of writing, after a massive excavation operation at a number of sites in the Irish Republic, only three bodies have been uncovered so far. See "Nine Victims The IRA Admit To Taking And Killing" *Belfast Telegraph,* 28 May 1999; "Disappeared Legislation Within Weeks" *Belfast Telegraph,* 16 April 1999.

[95] "Alliance Slams Adams 'Human Rights' Remarks" *Irish News,* 31 May 1999.

[96] For an overview see K McEvoy "Prisoner Release and Conflict Resolution: International Lessons for Northern Ireland" (1998) 8 *International Criminal Justice Review* 33–61.

and residents groups that one element of their dispute is a clash of rights, the human rights framework can make no pretence to have all the answers in such a dispute.

Human rights actors tend by their very nature to be dynamic and energetic in seeking to resolve the problems of their and other societies. Such clear strengths need to be tempered and focused, however, by an acknowledgement that both human rights and humanitarian law are limiting frameworks within which to achieve those objectives. Many actors will understandably and laudably wish to focus their time and energy on peace-building or conflict resolution efforts beyond the human rights or humanitarian law framework. However, rather than stretching and expanding that framework to achieve a task for which it is at best only partially suited, consideration might be given to addressing such matters under the explicit rubric of peace or conflict resolution groupings and enjoying the considerably increased flexibility that such a move would bring.

CONCLUSION

Based upon the Northern Ireland experience, I would contend that humanitarian groupings which have engaged directly with paramilitary groupings have played perhaps the most significant role in affecting the behaviour of the latter. Clearly the most impactive of these interventions have occurred in a political context where both republicans and loyalists were actively seeking alternatives to political violence. That said, they have clearly saved lives and protected individuals from broken or mangled limbs. In terms of the other typologies of interventions discussed, their influence has been less directly tangible and perhaps more significant with regard to altering the political "environment" in which paramilitaries operated rather than their actual behaviour. Such a conclusion is perhaps to be expected.

The standard techniques of human rights groups involve campaigning work with the media, with civil society, with other political actors and with the international community. Except where it is necessary for the safety of the individuals involved (in extremely repressive situations), most human rights NGOs work in a very transparent and open way. Indeed human rights groups often secure their safety and their integrity by being deliberately open in their exchanges across the political spectrum. In contrast, for example, to mediation

and other groups, their work is one of using public avenues of influence and pressure, rather than confidential and intensely private lobbying. These latter techniques are normally foresworn for fear that they could be mis-used to challenge the *bona fides* and integrity of the criticisms made.

One could imagine, on the basis of the typologies discussed earlier, for example comparing the work of FAIT, to Base 2, that the techniques likely to be used by groups working on humanitarian principles may well be of a very different nature. The basis of intervention is one of humanitarianism; if it is not to be exploited for political gain by any of the parties to the conflict, it seems that interventions would be more effective if treated with absolute confidence. Looking back to all the interventions (often by individuals rather than groups) in the developments of the cease-fires, on the matter of the disappearances, or on the matter of punishment beatings, most success seems to be recorded when the avenues of influence are "back channels" or otherwise not subjected to intense public scrutiny.

The parallels (though obviously uneven) between the International Committee of the Red Cross and major international human rights organisations (Amnesty International, Human Rights Watch etc.) spring to mind. It is not accidental that the techniques used to promote humanitarian standards have been of a different order to those used to promote human rights. Perhaps we need to examine whether specific national parallels of the ICRC approach would be worth promoting to complement the work that local human rights groups are doing. Certainly the current emphasis, which appears to be on human rights groups extending their remit to work on humanitarian law, appears somewhat illogical, given that the skills, principles and tactics of engagement are of a different order. It might therefore be useful to consider what an effective "humanitarian" NGO could usefully do; what operating principles would be important; and how would/could work with others such as human rights NGOs. In the final analysis, humanitarian interventions may well require a distinctive philosophy and series of techniques and practices in encouraging non-state entities such as paramilitary groups to end or reduce their abuses.

10

Democracy, Governance and Governmentality: The Role of the Voluntary Sector in the Democratic Renewal of Northern Ireland

JOHN MORISON*

INTRODUCTION

This chapter seeks to explore the possibilities for constitutional renewal in Northern Ireland below the level of large-scale institutional settlement. It will draw upon the governmentality approach associated with the later writings of Michel Foucault,[1] to reinforce in the circumstances of Northern Ireland the general argument that:

> "if you try to analyse power not on the basis of freedom, strategies, and governmentality, but on the basis of the political institution, you can only conceive of the subject as a subject of law. One then has a subject who has or does not have rights, who has had those rights either granted or removed by

* Professor of Jurisprudence, School of Law, Queen's University Belfast. The author would like to acknowledge helpful advice and assistance from a range of figures in government and in the voluntary sector including particularly Seamus McAleavey and Jacqui Irwin of NICVA as well as from Don Harley and Anne O'Keeffe from the Voluntary Activity Unit. I am grateful also to Ray Geary with whom I have had useful discussions and to Tim Cunningham and to the editor, Colin Harvey. A version of the paper appears in 30 *Oxford Journal of Legal Studies* (2001).

[1] See, e.g., M Foucault "Governmentality" in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality* Hemel Hempstead, Harvester Wheatsheaf, 1991) pp. 87–104 and L Martin, H Gutman and P Hutton (eds) *Technologies of the Self: A Seminar with Michel Foucault* (London, Tavistock, 1988). As Rose expresses

the institution of political society; and all this brings us back to a legal concept of the subject. On the other hand, I believe that the concept of governmentality makes it possible to bring out the freedom of the subject and its relationship to others—which constitute the very stuff [matière] of ethics".[2]

The insights of this governmentality approach put less emphasis on ideas of high constitutionalism, where settlements are brokered and structures are imposed, and stress instead the importance of the active subject as the entity through which and by means of which power is actually exercised beyond traditional state boundaries. All of the work associated with the governmentality approach engages with the idea that, as Hunt and Wickham observe, there were dramatic changes in the techniques (and objectives) of government developed in the Western world from the eighteenth century onwards. As they see it, within Foucault's approach, "modernity . . . is marked by the emergence of 'government' and 'governmentality' ". Foucault is deploying "the term 'government' in a very different sense from the conventional idea of state executives and legislatures" and in a way that is consistent with his downgrading of the importance of the state.[3] Instead of state

it, "to analyse political power through the analytics of governmentality is not to start from the apparently obvious historical or sociological question: what happened and why? It is to start by asking what authorities of various sorts wanted to happen, in relation to problems defined how, in pursuit of what objectives, through what strategies and techniques": *Powers of Freedom: Reframing Political Thought* (Cambridge, Cambridge University Press, 1999) p. 20. The governmentality approach has had an impact across a whole range of social science research. See, for example, N Rose and P Miller, "Power Beyond the State: Problematics of Government" (1992) 43 *British Journal of Sociology*, 173; A Barry, T Osbourne, and N Rose (eds) *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalites of Government* (Chicago, University of Chicago Press, 1996); A Davidson (ed.) *Foucault and his Interlocutors* (Chicago, Chicago University Press, 1997); C O'Farrell (ed.) *Foucault: The Legacy* (Brisbane, Queensland University of Technology, 1997); G Pavlich *Justice Fragmented: Mediating Community Disputes under Post-modern Conditions* (London, Routledge, 1996); D Garland "'Governmentality' and the Problem of Crime: Foucault, Criminology and Sociology" (1997) 1 *Theoretical Criminology* 173; M Dean, *Governmentality: Power and Rules in Modern Society* (London, Sage, 1999).

[2] M Foucault "The Ethic of the Concern for Self as a Practice of Freedom" in P Rabinow (ed.), *Ethics: Subjectivity and Truth* (Harmondsworth, Penguin, 2000) p. 300.

[3] A Hunt and G Wickham *Foucault and Law: Towards a Sociology of Law and Governance* (London, Pluto Press, 1994) p. 52. Cf. V Tadros, "Between Governance and Discipline: The Law and Michel Foucault" (1998) 18 *Oxford Journal of Legal Studies* 75–103. Recently Rose has characterised the contribution of the governmentality approach as having "reframed the role to be accorded to the 'the state' in analyses of control and regulation. Centres of political deliberation and calculation have to act through the actions of a whole range of other authorities , and through complex technologies, if they are to be able to intervene upon the conduction of persons, activities, spaces and

action (or rather in addition to it), there is the important quality of the freedom of the subject. Governmental action by itself cannot attain its own ends; it requires the willing cooperation of the individual subject participating in their own governance. As Foucault expresses it, government is "not a matter of imposing laws on men, but rather of disposing of the laws themselves as tactics". This involves understanding how power is actually distributed and organised in a whole variety of networks and strategies beyond the formal structures of the state as traditionally conceived. Within this approach constitutionalism is about ethics – the way we live together – and not simply about legal structures. As Foucault puts it, "the concept of governmentality . . . cover[s] the whole range of practices that constitute, define, organize, and instrumentalize the strategies that individuals in their freedom can use in dealing with each other". Everyone who seeks to govern, "to control, determine, and limit the freedom of others", are themselves "free individuals" who have "at their disposal certain instruments they can use to govern others".[4] Government involves not just the forms of rule by which authorities govern populations but the "technologies of the self" through which people shape their own subjectivity. A proper understanding of power must acknowledge an idea of freedom, of individuals "making themselves up" as active subjects or as citizens capable of bearing a regulated freedom within complex chains of constraints, calculations of interests, patterns and habits, and obligations and fears. Without this, government is simply the imposition of the sovereign will on variously compliant or recalcitrant subjects.

The structures of the Belfast Agreement and Northern Ireland Act 1998 illustrate this general point supremely. While the motives of the various governments may be variously high-minded, the result is a settlement that is politically brokered by higher forces and imposed through a constitutionalism made up of conventional ideas of state executives and legislatures, assemblies and, most of all, laws passed by a sovereign Parliament. As the Northern Ireland Act 2000, which temporarily

objects far flung in space and time—in the street, the schoolroom, the home, the operating theatre, the prison cell. Such 'action at a distance' inescapably depends on a whole variety of alliances and lash-ups between diverse and competing bodies of expertise, criteria of judgement and technical devices that are far removed from the 'political apparatus' as traditionally conceived . . . 'The state' is neither the only force engaged in the government of conduct nor the hidden hand orchestrating the strategies and techniques of . . . all those others seeking to act upon conduct . . . and to shape it to certain ends": "Government and Control" in (2000) 40 *British Journal of Criminology* 323.

[4] Foucault *supra* n. 2.

suspended the Assembly, illustrates all too well, such a settlement can be revoked with a stroke of the same sovereign power that instituted it.

In many ways the Northern Ireland Act 2000 marks out the boundaries of British constitutionalism generally and the limits of even the modified, consocial version developed in Northern Ireland. The whole idea of building an ever more elaborate institutional edifice to include all political elements, while at the same time drawing upon the language of rights to reserve certain matters from the agenda of short-term politics as a method of resolving the problems arising from a wider politics of disagreement, comes to a natural conclusion in the difficulties that have surrounded the Northern Ireland Act 1998 and the Belfast Agreement. The fact that even this most sophisticated structure remains highly problematic suggests that an idea of constitutional regeneration at a much more profound level is probably necessary, at least as an additional underpinning of what has been achieved so far. Whatever the eventual political fate of the Good Friday Agreement, arguably what is required is a genuine *constitutive* change; a transformation at the ethical level where it is the conduct of conduct that is being agreed. Such an idea of constitutional regeneration must be different from and subtler than simply adding on new layers of representation or holding together what is already there through impasse-favouring or consensus requiring arrangements in an Assembly. While the institutions of formal government may not provide a full solution to the political/constitutional issue of "who governs?" they can at least provide a place to "park" the problem. Meanwhile, however, there is still the more deep-seated issue about *how* to govern. It is here that ideas of governance and in particular the role of the voluntary sector may be of interest. It may be that new forms of civil society involvement developing beyond the formal state and its institutions provides an indication of how the values behind the settlement can be developed in all the realities of governance as it actually takes place now.

In seeking to make this argument this account will review briefly the settlement structures and suggest that the role of government may have changed since last there was devolution in Northern Ireland. Next the history of involvement of the voluntary sector in governance in the Northern Ireland context will be outlined to indicate its particular potential for development. Finally, the positive advantages of opening up a new democratic space through developing the role of the sector in the processes of governance will be reviewed and the value of a constitutional renewal project will be considered.

THE STRUCTURES OF SETTLEMENT

The constitutional solution to the historic problem of Northern Ireland is in many ways unique but at the same time parts of it remain thoroughly traditional. It is a British solution *mutatis mutandis,* where the chief aim is to restore institutions of representative democracy in order to provide a democratic space where accountable, self-government can take place against a background of what will be hopefully an economy and society growing in stability and self-confidence in the absence of chronic conflict. The achievement of brokering agreement is generally viewed as a triumph of (British, American and Irish) political will in securing a deal in the unpromising circumstances of recalcitrant local politics. Achieving agreement has required a number of interesting additional structures, such as those for North-South cooperation, intergovernmental relations between Britain and Ireland and relationships among all the people of these islands. It has also necessitated an important human rights and equality agenda (and this is where the uniqueness of the settlement largely lies). A reading of the Belfast Agreement alongside the Northern Ireland Act 1998 also shows the novel feature of a constitutional settlement that recognises that issues of devolved government in Northern Ireland have an associated (and troublesome) additional political agenda of weapons decommissioning, prisoner release, and the reform of policing and criminal justice. However important and unique these features are (and the equality and rights agenda which will be returned to later are of particular value), it is undeniable that the main tangible result of the settlement is a structure—an Assembly and an extensive and expensive administrative structure for devolved government.

More important even than the cost of the elaborate new structures of government for a population of only 1.6 millon is the fact that what is now possible and what is expected of governments generally has changed. One of the more resonant contemporary descriptions of the Belfast Agreement and the structures it promised was that it amounted to "Sunningdale for slow learners".[5] The reference here is of course to the not dissimilar package of legislative assembly, power-sharing executive and all-Ireland bodies that had a very short life in 1974. But while the structures are redolent of that previous exercise in devolution, it is important to remember that the whole project of government generally has changed radically since the 1970s. No longer do governments anywhere

[5] This remark is generally attributed to the Deputy First Minister, Seamus Mallon.

expect to fund, plan and deliver the whole range of social goods to its citizens within its defined territory. The general move from government to governance, with its emphasis on globalisation and the hollowing out of the nation state, is well documented.[6] There is now not only multilevel governance but also multi-form (or multi-format) governance too where the actions of the state are augmented by interventions from elsewhere in the market or the voluntary sector. Government in a 1970s model of parliamentary institutions and departments of state who tax widely, spend high and make big choices has been replaced everywhere by notions of governance where opportunities for making significant changes are more limited and the emphasis is on "steering" rather than "rowing". Northern Ireland can not be expected to be exempt from world-wide changes. Indeed it has been argued elsewhere that although the structures of settlement may provide a more or less satisfactory answer to a political problem, they do not offer a very satisfactory solution to a governmental problem.[7]

The project and aim of government has changed, and although it is necessary to acknowledge an important distinction between devolved government and mere local government, a paragraph from the 1998 Green Paper on modernising local government captures well the new dispensation for government in Northern Ireland where it says:

> "The days of the all-purpose authority that planned and delivered everything are gone. It is in a partnership with others—public agencies, private companies, community groups, and voluntary organisations that local government's future lies. Local authorities deliver important services but their distinctive leadership role will be to weave and knit together the contributions of the various local stakeholders".[8]

This realisation of the facilitating, brokering role of government in circumstances where most of the budget is already pre-spent and

[6] See, e.g., G Majone "The Rise of the Regulatory State in Europe", (1994) 17 *West European Politics* 77–110; D Held *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Cambridge, Polity Press, 1995) and R Rhodes *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham, Open University Press, 1997) and A Gray and B Jenkins "From Public Administration to Public Management: Reassessing a Revolution?" (1995) 73 *Public Administration* 17.

[7] See further, J Morison "Constitutionalism and Change: Representation, Governance and Participation in the New Northern Ireland" (1999) 22 *Fordham International Law Journal* 1608.

[8] Department of the Environment, Transport and Regions Consultative Paper, *Modernising Local Government: Local Democracy and Community Leadership* (1998) para. 1.9.

choices are mainly about where exactly to enforce budgetary cuts, in turn brings us back to ideas of governmentality. We are returned to Foucault and his idea of the art of government not being about simply legislatures and executives but addressing questions of "How to govern oneself, how to be governed, how to govern others, by whom the people will accept to be governed, and how to become the best possible governor".[9] In particular this brings us to understanding how power is deployed through a whole series of networks and alliances, non-state and semi-state bodies, coalitions of influence and concentrations of power. Government is thus to be seen as, in the words of Rose and Millar, "a domain of strategies, techniques and procedures through which different forces seek to render programmes operable".[10]

This is the future of government—or rather governance as it might now be better termed to indicate how top-down, direct central government steering is being replaced by ideas of autonomous institutions and groupings at different levels and from different sites within the polity exercising self-responsibility and unforced cooperation within inter-organisational networks and concentrations of power that exist now within civil society and in the private sector as much as in state bureaucracies. Some parts of the new system in Northern Ireland seem ready for this new dispensation. Paradoxically it is in the area of policing, traditionally seen as one of the most basic functions of the classical state, that significant potential development can be seen. The Patten Report on policing is indicative of this new role for formal government. Although the Report is subtitled "Policing in Northern Ireland", it is not about operational policing, but rather a report on the structures that should be implemented in order to allow for policing. It is suffused with ideas of governmentality. The Report stresses that the police should be accountable within "a real partnership between the police and the community—government agencies, non-governmental organisations, families, citizens; a partnership based on openness and understanding; a partnership in which policing reflects and responds to the community's needs".[11] This involves, in the words of the Report, becoming "more decentralised; for the management style, which should become more open and delegated; and for the manner of policing down to beat level, which

[9] Foucault (1991) *supra* n. 1 at p. 87.

[10] Rose and Miller *supra* n. 1 at p. 183.

[11] *A New Beginning: Policing In Northern Ireland, The Report for the Independent Commission on Policing for Northern Ireland* (1999) (The Patten Report) 1:16. It should be noted that the Police (Northern Ireland) Act 2000 offers severely restricted version of the Report's recommendations.

should become more orientated towards active problem-solving and crime prevention, rather than more traditional, reactive enforcement".[12] At the same time the whole report is imbued with stressing the importance of human rights, community policing, partnership, neighbourhood and problem-solving. Management is to become more decentralised with an increased emphasis on ideas of efficiency, effectiveness and accountability. The use of information technology and techniques of audit are strongly endorsed. The Report not only offers a strategy for a radical transformation of policing but also a blueprint for how government generally might see its future role as a facilitator using a variety of forces from different sites in the public, private and third sectors to make things happen rather than seeking to power everything with purely public resources.

While arguing for a view of government that accommodates this more sophisticated understanding of the limits and potential of public power, this account will focus on the role of the voluntary sector in the governance of the new Northern Ireland. After considering the already highly developed nature of the sector in the context of pre-settlement mechanisms of rule, the capacity of the sector to provide an engine of renewal in addition to the Assembly and its various structures will be assessed.

THE EVOLUTION OF THE VOLUNTARY SECTOR IN NORTHERN IRELAND

There is a long history of voluntary activity in Ireland from the end of the eighteenth century.[13] Some have speculated that this degree of development was caused by a politics of exclusion from the formal state which had the result that alternative structures grew up among the nationalist community, and this in turn caused a response in the Protestant community.[14] Certainly there is now a belief that voluntary activity is highly developed in Northern Ireland with, for example, a former Secretary of State on record as estimating the sector to be 25 per cent larger than in Great Britain.[15] The Northern Ireland Council for

[12] *Ibid*.

[13] See further A Williamson "The Origins of the Voluntary Action in Belfast" in N Acheson and A Williamson (eds) *Voluntary Action and Social Policy in Northern Ireland* (Aldershot, Avebury, 1995) pp. 161–80.

[14] J Schense "Creating Space for Change: Can the Voluntary Sector Help End Northern Ireland's Troubles?" (1998) 11 *Harvard Human Rights Journal* 149–85.

[15] During a speech at the AGM and Conference of the Northern Ireland Council for Voluntary Action, Belfast, 20 June 1997, Dr Mowlam suggested that there are over 30,000 full time equivalent staff in Northern Ireland and more than 65,000 volunteers.

Voluntary Action (NICVA) maintains a list of some 5,000 organisations on their database.[16] Of course it is now customary everywhere for former opposition politicians in power to acknowledge links with the bodies who may have nurtured them at earlier stages and claim that the voluntary sector in their jurisdiction is particularly developed.[17] Nevertheless, it is probably true that in the recent past the voluntary and community sector performed a *different* and *wider* role in Northern Ireland than its counterparts in Great Britain and this ranges through service provision to a more engaged policy development role.

Voluntary sector as an adjunct to direct rule: "civil servants without ties"?

The system of "direct rule" which continued for more than twenty-five years, with only a limited interruption caused by the brief restoration of devolution in 1973–74, offered particular opportunities to the voluntary sector in Northern Ireland. Characterised as it was by an absence of a nexus between the local political process and mechanisms of government, direct rule in some ways allowed the sector to act as an alternative site of politics and as an unofficial opposition. In the absence of a local assembly and with only very limited local council involvement[18] direct

See <<http://www.nio.gov.uk/press/970620cc.htm>>. An economist estimates that the scale of government assistance exceeds £150 million per annum and that the services provided by the voluntary sector, in market terms, might be valued as over £200 million, nearly 2 per cent of GDP. See further J Simpson "Government Financial Support for Voluntary Sector Organisations: a Preliminary Analysis and Discussion" in N Acheson and A Williamson (eds) *supra* n. 13 at pp. 181–93.

[16] See also NICVA, *The State of the Sector II: Northern Ireland Voluntary Sector Almanac 1998* (1998) and Department for Social Development, *Consultation Document on Funding for the Voluntary and Community Sector* (April 2000) which suggests that the sector provides employment for 33,000 people and has a gross annual income of £500 million.

[17] In Wales the First Secretary has estimated that there are about 25,000 organisations directly employing some 13,000 people with 1.9 million volunteers contributing the equivalent of 15 per cent of gross domestic product in Wales: *The Official Report of the Welsh Assembly*, 21 July 1999, p. 59. In Scotland too there is a view that the voluntary sector has "a long and proud" tradition. The Deputy Minister for Communities suggests that there are more than 44,000 voluntary organisations and more than 50 per cent of the adult population volunteers on a regular basis with an overall contribution representing 3 per cent of Scotland's gross domestic product: *Scottish Parliament Official Report*, vol. 2, No. 8 (23 September 1999) col. 769.

[18] Local authorities, seen by civil rights campaigners of the 1960s as epitomising unionist domination and abuse of powers, were effectively stripped of all powers except for the most minor in areas of environmental health, tourism, recreation and refuse collection in the McCrory Review of 1972.

rule was characterised by a number of negative features. Legislation was made by orders in council with the effect that law that was primary in substance was made by means that were secondary in terms of the level of scrutiny and debate involved.[19] Much legislation was passed as a "read across" from Great Britain and arguably did not benefit from local input. Phrases like "helicopter rule" or "consular government" capture something of the flavour of a mechanism of government whereby a Secretary of State from the Westminster administration, holding a seat in an English Parliamentary constituency, was brought in to head up a governing structure that depended for local information on the Northern Ireland Civil Service rather than local politicians.

To counter these negative features, and the perceived democratic deficit that they brought, the voluntary sector was to some degree encouraged to become involved in government. In part the sector could bring a degree of local expertise and knowledge. To an extent also the sector may have brought a degree of legitimacy to state action, particularly in politically sensitive areas such as, for example, the work of the Northern Ireland Association for the Care and Resettlement of Offenders with regard to prisoners' families. From the sector's point of view, such a relationship with government had certain advantages. General efforts at depoliticising service delivery by removing it from both local government control and distancing it from direct rule mechanisms provided an opportunity for the sector to become involved in a service delivery role.[20] Some parts of the sector, particularly those staffed by individuals who might well elsewhere have entered political life but who were not attracted by the local political scene, may also have welcomed an opportunity to become more closely involved in a policy development role. Indeed there are suggestions that successive Secretaries of State, even those drawn from the Conservative Party, may have found voluntary sector personnel more familiar and easier to deal with than local party politicians.[21] Sweeney has argued that

[19] See further, B Hadfield "Legislating for Northern Ireland as Westminster" in M Connnolly and S Loughlin (eds) *Public Policy in Northern Ireland: Adoption or Adaptation* , (Belfast, Policy Research Institute, 1990) pp. 55–75.

[20] See, e.g., how provision for personal social services developed through statutory bodies, quangos and voluntary organisations (B Caul and S Herron, *A Service for the People: Origins and Development of the Personal Social Services of Northern Ireland* (1992). This was in line with more general trends (see, e.g., Central Personal Social Services Advisory Committee, *Report of the Sub-Committee on Support for Voluntary Organisation* (DHSS, 1979)) but arguably had particular application in Northern Ireland.

[21] Arguably the special circumstances of Northern Ireland meant that the although the Thatcher revolution did not by-pass the region, its impact there was reduced and uneven.

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political fall-out from the Anglo-Irish Agreement in 1985 provided an important additional opportunity for strategists from the community and voluntary sector to influence government and, he maintains, "a cadre of senior civil servants were equally determined to experiment with bold new approaches to tackling community differences".[22] The role of the sector was enhanced further through the establishment of structures to deal with urban disadvantage such as the Belfast Action Teams and Making Belfast Work in 1987 and The Londonderry Initiative in 1989 which were subsequently re-cast with even further voluntary sector involvement. The Department of Agriculture developed a community-based rural development programme in the early 1990s leading to the establishment of the Rural Development Council and, subsequently, a series of local area-based rural regeneration strategy groups. The sector itself initiated the Community Development Review Group in 1989 to review community action and development and this led to government responding through the publication in 1993 of a *Strategy for the Support of the Voluntary Sector and for Community Development in Northern Ireland*[23] and the establishment of a Voluntary Activity Unit to facilitate interdepartmental consideration of issues affecting the voluntary sector and those involved in community development.[24]

Of course it is important not to view the sector as a monolith, and in particular there are significant (if somewhat blurred) distinctions between the voluntary sector and the community sector. The voluntary sector can be viewed generally as being larger, more established and better organised and with closer links to government, even if only in terms of funding. In contrast to the more professionalised voluntary sector, the community sector tends generally to be more locally organised and oriented and run by volunteers. There are also perhaps distinctions between the community relations approach, stressing

(See further, F Gaffikin and M Morrissey *Northern Ireland: The Thatcher Years* (1990).) This greater willingness to spend money on various social problems so as not to exacerbate the effects of the Troubles may have had the effect of ensuring relatively good relations between the voluntary sector and successive direct rule administrations.

[22] P Sweeney, "A View from the Voluntary Sector" in *People and Government: Questions for Northern Ireland* (Belfast, Joseph Rowntree Foundation and Chief Executives' Forum, 1998) p. 60

[23] Department of Health and Social Services, *Strategy for the Support of the Voluntary Sector and for Community Development in Northern Ireland* (HMSO, 1993).

[24] See further, J Kearney "The Development of Government Policy and its Strategy towards the Voluntary and Community Sectors" in N Acheson and A Williamson (eds) *supra* n. 21 at pp. 11–32.

tolerance of difference and improving understanding between two communities, as opposed to the community development approach which emphasises the revitalisation of economic and social infrastructure.[25] It is important also not to view the relationship with government as always being one of mutual cooperation and satisfaction. Very positive features, such as for example the Targeting Social Need (TSN) initiative introduced in 1991 or the earlier introduction of the Department of Economic Development's Action for Community Employment (ACE) scheme which provided a significant fillip to the sector, must be balanced against more negative aspects such as criticism of how TSN was organised and the notorious Hurd Criteria where government sought to control those bodies to whom financial assistance was given via ACE on the basis of political vetting.[26]

However, expressing it at its strongest, direct rule presented parts of the sector with an opportunity to engage in a relationship with the Northern Ireland departments and other structures of direct rule. Government engaged in dialogue with non-governmental organisations about policy and empowered them to deliver services and advance conflict resolution strategies. Of course there always remained an imbalance in the relationship in so far as government generally was the funder and the sector was in the role of applicant. However, there were alternative funders too and a range of other arenas where politics could develop. A variety of other, non-domestic government bodies played a very significant role in allowing another politics to grow up by underwriting the role and development of the voluntary sector. European institutions and structures in particular afforded the voluntary sector opportunities to by-pass domestic government institutions and engage in politics on different terms. The role of various human rights non-governmental organisations in lobbying various international bodies around state infringements of the European Convention on Human Rights provides an example of this. The role of NICVA's European Affairs Unit in making recommendations as to the

[25] See further the analysis provided by the sources cited at *supra* n. 16.

[26] The then Secretary of State Douglas Hurd stated in a parliamentary written answer (Hansard, 27 June 1985) that it was not in the public interest to give grant aid to organisations that had "sufficiently close links with paramilitary organisations to give rise to a grave risk that to give support . . . would have the effect of improving the standing, or furthering the aims of a paramilitary organisation, whether directly or indirectly". This had the effect of cutting off grant aid from about thirty organisations including Irish language classes and pre-school playgroups and creating a suspicion of inept government vetting.

Structural Funds plan for 1995–99 which itself contained two Measures of Community Infrastructure in its Physical and Social Environment Sub-Programme provides another example of how the sector can bypass domestic state structures and become involved in using the "external constitution" to progress its agenda. The role of the sector in the District Partnerships established by the European Special Support Programme for Peace and Reconciliation with its budget of 44.2 million ecus with matching government funding indicates too how successful the sector became in enmeshing itself in governance at all levels.[27] At its very highest this may have amounted to a sophisticated form of governmental dialogue or a "communicative constitutionalism" where the sector was one important element among the many involved in governance in Northern Ireland.[28]

THE VOLUNTARY SECTOR AND THE NEW DEMOCRATIC SPACE OF REPRESENTATIVE POLITICS

It seems clear that the voluntary sector had a distinctive role and a particular opportunity during the time of direct rule. British Government strategy centred around policing the crisis while awaiting the moment of grand scale political agreement which could then be rendered into institutional form in a devolved assembly that simultaneously guarantees the Union and recognises and legitimates an all-Ireland dimension, while ameliorating the excesses of majoritarian government. Tactics varied around the key elements of security, economic support and community relations. While the security agenda could always trump the other elements there were nevertheless conditions where the voluntary sector (along with others) could have a particular role both in getting the business of government done in difficult circumstances and in developing new forms of governance and conflict resolution. The Agreement secured in April 1998 represented the historic achievement of British aims to resolve the (Northern) Irish issue and of course changed the agenda completely.

In the post-Agreement situation the voluntary sector is in a different position. The exact nature of the role that the sector will play in the

[27] See further J Hughes *et al Partnership Governance in Northern Ireland: The Path to Peace* (Dublin, Oak Tree Press, 1998).

[28] See further J Morison and S Livingstone *Reshaping Public Power: Northern Ireland the British Constitutional Crisis* (London, Sweet and Maxwell, 1995) pp. 138–49.

future remains unclear. For some, particularly those presently holding elected office, it may appear that now there is little need for a voluntary sector operating in an enhanced role: with the political process restored normal service has been resumed and the sector can be dismissed to the background.

Of course such a view is unrealistic. As has been argued already, it is not a 1970s-style government that has been restored. The project of government everywhere has changed. Government is now more of a project of governance and it is not only multilevel but also multi-form. Today the role of government involves drawing upon a whole range of forces and operating through a variety of complex networks, pro grammes, techniques and devices. The commands of parliaments (sovereign or devolved) and the budgetary mandates of political administrations now make up only part of what is involved in present day governance. As ideas of governmentality demonstrate, just as the concept of "a unified solitary social domain . . . is displaced by images of multiple communities, plural identities, and cultural diversity", so too has there been a recasting of the role of national governments who "no longer aspire to be the guarantor and ultimate provider of security" but instead should "be a partner, animator and facilitator for a variety of independent agents and powers, and should exercise only limited powers of . . . [their] . . . own".[29] It is no longer possible, even if it were desirable, that "big government" look after its "citizens" (or "subjects") from cradle to grave. Today information comes from many sources. Issues are framed by many perspectives with citizens being "responsibilised" in relation to a wide range of schemes, modalities and rationalities ranging from individual morality and organisational rationality to more formal audit and legal controls. Individuals have multiple identities, the state has been rolled back and the complex consequences of globalisation and localisation, privatisation and marketisation, as well as consumerisation and a host of other re-designations have the effect of altering the whole project of government and what is to be governed.

This realisation of the limits of traditional representative democracy may not yet have quite come in the early excitement of restored devolved government. However, in some ways it should not be a surprise. Not only are the seemingly wide powers and resources of the new government constrained by the need (familiar to the old Stormont regime) to replicate standards elsewhere in the United Kingdom, but

[29] Rose *supra* n. 3 at pp. 323–4.

there are other, newer limits. If the newly installed politicians now occupying the offices of government were to look at developments in governance elsewhere they would notice a reduction in capacity that comes both from a rolling back of the state that now manifests itself in multilevel and multi-form governance, and from attempts to involve others in the operation of governance in an effort to, in the words of Anthony Giddens, "democratize democracy".[30] Furthermore, a proper understanding of the past and present role of the voluntary sector in Northern Ireland itself, combined with an accurate reading of the full implications of the Agreement and Northern Ireland Act 1998, would show the centrality of ideas of consultation and participation and suggest that the sector's role as an alternative democratic space beyond formal politics is more likely to increase than diminish. Each of these elements must be considered in turn.

New patterns of governance

The hollowing out of the state everywhere has been expressed in terms of reduced capacity and competence as well as in the involvement of a variety of other bodies from the private and voluntary sectors in dealing with a whole range of issues from social services, education, housing and homelessness, and leisure. Even local government in Great Britain has increasingly reoriented itself around the idea of the voluntary sector being significant in terms of service delivery.[31] Indeed, ideas about "best value" in providing services not only mean that the sector will be involved in competition to provide services but may be involved in the consultation to determine exactly what best value actually is in any given situation and in devising the performance indicators to ensure that it has been delivered.[32] With low turnouts for local elections in Britain diminishing arguments about legitimacy from formal

[30] A Giddens *The Third Way: The Renewal of Social Democracy* (London, Polity Press 1988) pp. 70–8.

[31] See I Leigh "The Legal Framework for Community Involvement" in A Dunn (ed.) *The Voluntary Sector, the State and the Law* (Oxford, Hart Publishing, 2000). Leigh details how, for example, one metropolitan borough council distributed grants to the voluntary sector amounting to £5.9 million from twenty-one different council budgets for a whole variety of services and initiatives (at p. 13).

[32] See the White Paper entitled *Modern Local Government: In Touch with the People* (Cm 4014, 1998), ch. 7 which sets out how best value differs from compulsory competitive tendering by widening the idea of quality means and involving consultation with local users and their representatives.

democratic mandates, there is an increasing role for voluntary sector organisations in local policy networks too.[33] Interest in developing "joined up" government has led to increased voluntary sector involvement in statutory plans and in community plans which seek to factor in all local stakeholders and providers from the public, private and voluntary sectors.[34] Similar interest in new formats of governance have led to not only a series of policy initiatives ranging from New Deal for Communities to Health Action Zones but also to the development of local authority companies, suggestions for Public Partnership Limited Companies which can formally take on council business' and the development of ideas of "beacon councils" which can be allowed greater freedom because of strong existing performance.[35] The role of the voluntary sector in partnership with government and the private sector is enhanced in many of these new formats. Partnerships are needed too to bid for certain additional moneys from, for example, the Single Regeneration Budget.

Beyond experimentation with new formats for governance to fill in the spaces left by the rolling back of the state, there is a genuine interest in using the voluntary sector as an important part of a "third way" between reliance on the state and wholehearted dependency on market forces.[36] The voluntary sector is thought especially appropriate to deal with some issues, such as particularly social exclusion, which are beyond the reach of government and outside the interest of the private sector. In recognition of the important potential of the sector, government is attempting to build a new relationship with the voluntary and community sector. This involves both recognition of its increasing role and the formalising of the association between parts of the sector and the state through the development of a series of compacts in all four constituent parts of the United Kingdom.[37]

[33] The average turnout in the 1999 local council election was 29 per cent. For discussion of local policy networks see further D Wilson, C Game, S Leach and G Stoker *Local Government in the United Kingdom* (Basingstoke, Macmillan, 1994) ch. 16; W Kickert, E Klijin and A Koopenhan (eds) *Network Management in the Public Sector* (London, Sage, 1997.)

[34] See the White Paper *Modern Local Government: In Touch with the People*, *supra* n. 32 at ch. 8.

[35] See Leigh *supra* n. 31.

[36] See Giddens *supra* n. 38 and T Blair *The Third Way: New Politics for the New Century* (London, The Fabian Society, 1998) especially chs 4 and 5.

[37] See further J Morison "The Government-Voluntary Sector Compacts: Governance, Governmentality, and Civil Society" (2000) 27 *Journal of Law and Society* 98–132.

Many of these things, like the compacts, have a direct equivalent in Northern Ireland. Although the state was never rolled back as far in Northern Ireland as elsewhere, the public sector was subject to similar changes within the general trend.[38] Of course, for the reasons mentioned earlier, the impact of these changes was more uneven. Nevertheless, new forms of governance do exist in Northern Ireland and do afford particular opportunities to the voluntary sector.

For example, there is the Northern Ireland version of the "best value" initiative that is to replace compulsory competitive tendering there sometime after 2001. It provides perhaps an important opportunity for the sector to develop a double role both as provider and a standard-setting body within the context of government spending programmes. As mentioned already, the idea of best value generally is about not only delivering services to clear standards, covering familiar principles relating to cost and efficiency, but also about meeting standards reflecting *quality*. While aspects of the idea of quality are nationally defined by central government, and underpinned through key national performance measures, there is an opportunity for elements of it to be discovered by local authorities in a participatory and consultative process at local level. District Councils in Northern Ireland (and perhaps other authorities spending public money) must, like local authorities in Great Britain, consult with local people as to what they want, and devise a corporate plan which sets out objectives and resources and contains mechanisms for measuring performance against stated objectives. 25 per cent of expenditure will be reviewed each year and emerging performance indicators will be subject to external scrutiny and audit. The duty to consult with users and user groups is itself of particular value and importance in creating a democratic space of real involvement beyond the formal halls of the Assembly. However, there is also clearly potential for "quality" to be defined to include more democratic elements requiring, for example, further consultation, fair employment practices, improved community relations, more transparent and accountable organisation and so on. The role of the sector here, and indeed in monitoring that quality is delivered, is potentially significant and may allow it to assist in mainstreaming a democratic agenda within elements of basic service delivery.

[38] See further J Morison "The Public Sector in a Divided Society" in *People and Government: Questions for Northern Ireland* (Belfast, Joseph Rowntree Foundation and Chief Executives' Forum 1998) pp. 109–26.

Another example of a heightened role for the sector within new governance structures relates to the local commissioning arrangements which are due to replace aspects of the internal market within the system of integrated health and personal social services in Northern Ireland. This perhaps illustrates the limited role of government as a direct provider (and also, the reduced scope for any new devolved administration to effect real change, independent of what is occurring in Great Britain) as well as new possibilities for the sector to become further involved in partnership and consultation. The original report announcing the end of the existing Fundholding Scheme offered a choice between only two variations: one involving the existing Health and Social Services Boards and one with new Local Care Agencies—but both involving the new local commissioning arrangements.[39] Although the final decision is to be left to the new Assembly, government has made it clear that the preferred option is a system of five new Health and Social Care Partnerships supported by community based Primary Care Co-operatives. These are to act in partnership with "local communities and other organisations which have a role to play in improving health and well-being" in order to commission health and social services.[40]

The idea of partnership government generally, which is gaining rapidly in popularity in Great Britain, is in fact more developed in Northern Ireland than elsewhere.[41] There is a version of partnership providing one of the basic tenets of the Belfast Agreement.[42] Other developments of the

[39] See *Fit for the Future: A Consultation Document on the Government's Proposals for the Future of the Health and Personal Social Services in Northern Ireland* (April 1998) at <http://www.dhssni.gov.uk/the_department/publications/fitforthefuture/fulldoc.html> which develops the general approach of the White Paper, The New NHS—Modern and Dependable (Cm 3807, 1997) setting out the future for the Health Service in England.

[40] See Department of Health and Social Services, *Fit for the Future—A New Approach* (March 1999) at <http://www.dhssni.gov.uk/hpss/publications/fftf/FFTF proposals.htm> at p. 9.

[41] See Morison *supra* n. 45 at pp. 103–8 for discussion of how partnership and civil society involvement fits in to third way political development in a general UK context. See Hughes *et al supra* n. 35 for a discussion of partnership in Northern Ireland.

[42] See the foundational "Declaration of Support" that appears at the beginning of The Belfast Agreement where it states "we are committed to partnership, equality and mutual respect as the basis for relationships" (para. 3). Indeed partnership ideas can be observed all over structures in Northern Ireland. North, South, West and Greater East Belfast all have partnerships for development and there are Rural Development Partnerships and numerous Local Action Partnerships. As has been noted already, even the Patten Report on policing *supra* n. 11, contains ideas about "a real partnership between the police and the community government agencies, non-governmental organisations, families and citizens" (at para. 1.16).

idea build upon the District Partnerships mentioned above. These structures were established as a result of structural funding (of some £1 billion) that came to Northern Ireland from the European Union. The basic structure for disbursing parts of this money was reproduced in twenty-six District Partnership Boards (and in the central Northern Ireland Partnership Board) whereby eight politicians, seven representatives from the voluntary sector and five from business, three trade unionists and one representative each from the Rural Development Council and the former equivalent to what is now the Department of Regional Development joined together. Partnerships operated with some basic concepts including customer focus, participation, collaboration, innovation, transparency and local resources (in terms of materials and expertise). Interestingly, partnerships were required to meet Policy Appraisal and Fair Treatment (PAFT) and Targeting Social Need (TSN) criteria which effectively ensured that their decisions were gender and community proofed. There is some debate about whether partnerships were simply at the end of a long funding chain or whether they were something extra and different. At their least they were perhaps a means of service delivery that reached parts that more formal government could not, although officious audit and financial checks reduced their scope. At their most, they were an embryonic form of participatory decision-making with considerable potential to enrich formal, representative democracy.

There is now further money (400 million euros) in a second round of the Special Support Programme for Peace and Reconciliation and significant Structural Fund money for Northern Ireland (given despite the fact that the region no longer has "Objective One" status). These monies (known colloquially as Peace II) will be available from 2000 to 2006 and they have significant potential to develop further the sorts of structures and practices of partnership governance that grew up with the earlier funding. However, there have been concerns expressed that the monies are targeted narrowly at ideas of economic regeneration rather than at also developing the social infrastructure and processes of reconciliation that might be thought necessary to underpin any such reconstruction.[43] Nevertheless, the potential for newer

[43] See, e.g., NICVA, *NICVA Response to the Government Consultation Paper on Northern Ireland Structural Funds Plan 2000–2006* (Belfast, NICVA, March 2000) and the Democratic Dialogue Briefing Paper, *Structurally Unsound: The Northern Ireland Bids for Further EU Monies* (Belfast, Democratic Dialogue, March 2000). There are also concerns that the partnership element whereby business, politics and the voluntary

participatory forms of governance to exist alongside restored representative government remains.

Governance and the Agreement: developing a new democratic space

Having characterised the Agreement and the Northern Ireland Act 1998 as being mainly about institutions and restoring traditional representative democracy, it must also be admitted that suffusing the whole structure are the elements of human rights, equality and indeed partnership. While some of this is about creating further institutions, such as the Human Rights Commission and the Equality Commission—and there may be an element of ritualistic obeisance to the new totem of rights and equality—there are significant features too. Important aspects of these may involve the voluntary sector in creating and operating within a new participatory space.

It has been mentioned already how partnership is described as being central to the Agreement[44] and, indeed, it is present in some form in the consocial aspects of the formal arrangements for government. Again, as already mentioned, partnership (in the more developed sense of working with civil society and others) is an important element in proposals on policing, and it is there too, up to a degree, in relation to criminal justice.[45] However, it is in pursuit of equality values and human rights that partnership and participation can be seen as having most application to the voluntary sector and its role in developing a forum beyond traditional politics where many voices can be heard in a participatory act of genuine *constitution*.

In addition to the other consultation requirements discussed above that relate to governance structures everywhere, there are clearly some that are unique to the Northern Ireland settlement. Building upon the earlier PAFT scheme, section 75 of the Northern Ireland Act 1998 imposes a statutory duty on public authorities to promote equality of opportunity.[46] In contrast to the Human Rights Act 1998 where the

sector were more or less equally represented will be replaced by ideas of District Councils "taking the lead" which may also undermine the participatory dimension.

[44] See *supra* n. 42.

[45] In a rather thin section on "Rights and Principles", the Criminal Justice Review Group identify as one of the "common values" of the criminal justice system an idea of "partnership between the criminal justice system, the community, and other external bodies", see *Review of the Criminal Justice System in Northern Ireland* (Belfast, Stationary Office, 2000) p. 30.

[46] See C McCrudden, "Mainstreaming Equality in the Governance of Northern

definition of a public body is potentially problematic, public authorities are listed in Schedule 2 to the Northern Ireland Act 1998 and Schedule 9 to that Act requires bodies on the list to submit to the Equality Commission a scheme showing how it proposes to fulfil its obligations. Voluntary sector bodies are not included in these requirements. However, paragraph 5 of Schedule 9 to the 1998 Act requires public authorities to consult with persons likely to be affected by the scheme and with representatives of such persons. This brings the voluntary sector into the heart of the consultation process. Early evidence suggests that many public authorities will not stint in sending out draft equality schemes for comment.[47] It is likely that voluntary sector bodies will be involved too in consultation with regard to enforcement. This mainstreaming not only meets best practice guidelines from the Council of Europe[48] but, as the Equality Commission *Guide to the Statutory Duties* puts it, it "should enhance the crucial link between government and 'civil society', encouraging greater participation in government and leading to greater accountability in government decision making".[49]

Perhaps an indication even more illustrative of the potential of the Agreement to deliver democratic process (as opposed to only structure) lies with the debate about the bill of rights for Northern Ireland. It is here that the vital importance of the voluntary sector contribution in augmenting the traditional political institutions can be seen very clearly. Strand Three of the Agreement, where it relates to Rights, Safeguards and Equality of Opportunity, envisages in paragraph 4 that the Human Rights Commission will consult widely and advise on rights appropriate to Northern Ireland and supplementary to those in

Ireland" (1999) 22 *Fordham International Law Journal* 1696, for discussion of the origins and development of this initiative.

[47] The Equality Commission guidelines detail what each element of an equality scheme should include and it refers to the need for consultation that is "timely, open and inclusive" (Equality Commission for Northern Ireland, *Guide to Statutory Duties: A Guide to the Implementation of the statutory duties on public authorities arising from Section 75 of the Northern Ireland Act 1998* (Belfast, Equality Commission, 2000) at para. 4.1(2)(c)). For many public authorities this has entailed simply asking everyone. For example, in April 2000 the Royal Hospitals placed advertisements in daily papers and circulated their draft equality scheme to a circulation list of some 335 bodies nearly all of whom are in the voluntary sector: see the Royal Hospitals, *Promoting Equality of Opportunity and Good Relations: Draft Equality Scheme* (2000) Appendix 1.

[48] Council of Europe *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices* (Strasbourg, Council of Europe, 1998).

[49] Equality Commission for Northern Ireland *supra* n. 47 at para. 1.7.

the European Convention of Human Rights such as should be included in Westminster legislation. In one sense this involves simply adding to the burden of participation and overstretches the patience of those being continually consulted. In this way it may contribute to the danger of consultation becoming merely a matter of form rather than an aspect of a genuinely participatory process. However, it does in reality reveal and illustrate the vitally important role that the voluntary sector has in both establishing, and then operating within, an additional democratic space.

It is important that rights, and the use that they will be put to within the new Northern Ireland, is not something that is decided by the political parties alone (or even by elite groups of activists and scholars drawing upon international best practice). Rights must be fully constitutive of the new society. They must be the foundation for participation on an equal basis and by all groups and individuals within society with an equal voice that is worthy of respect. Rights must not be seen as belonging to one or other tradition or even as something of short-term value in smoothing over the aftermath of the conflict. Rights emphasising participation, as well as the usual safeguards against arbitrary power, are an important foundation for a proper civic dialogue about the way in which people in Northern Ireland wish to live together. If political discourse is to be widened beyond the debating chambers of the Assembly, where politicians register their tribal affiliation and must struggle to act in ways that transcend it,[50] then a widening of the political space is required. This can be achieved in part by defining a rights base that provides the foundation on which individual citizens can take part in dialogue within safe limits and where their voice will be guaranteed to be heard in a deliberative process.[51] The voluntary sector, who are largely outside the traditional limits of politics, are central in ensuring that the sort of rights considered appropriate are those that guarantee real and effective participation. They are also of course important in themselves in conducting this participatory

[50] Under the standing orders of the Assembly each member must formally declare him or herself as a unionist, nationalist or Other. This has particular importance with regard to certain "key decisions" where cross-community support is required.

[51] Of course, while there will be participation by many in the debate, and arguments for a rights base that enhances further participation, there will also be those who, tired of consultation and politics, seek simply what Unger characterises as an extended social democracy that ensures the "efficiencies, the equities and decencies making individual action effective". See R Unger, *What Should Legal Analysis Become?* (London, Verso, 1996) p. 138. Rights must protect their position too: their role is not solely to promote participation.

discourse through the means mentioned already and in other, as yet unknown, ways.

In general the creation of this new democratic space will mean consultation along the lines outlined already with regard to the Bill of Rights process. It will mean hearing voices from outside traditional politics, perhaps, as suggested, from the voluntary sector itself in its role as champion of various unheard interests in all the best value consultation exercises and partnership mechanisms. Indeed, there is evidence that the voluntary sector may well have a particular role to play on a number of issues such as gender equality, social exclusion and rural development where otherwise affected groups might have to struggle too hard to get their voice heard.[52] Participatory democracy will involve the voluntary sector more generally in more long-term projects of planning and peace-building. The short-termism and problem fixing of politicians, although necessary, is not particularly suited for addressing issues such as what the new society should look like in twenty years time. Civil society is particularly important in times of transition and there are jobs which, arguably, belong there most of all.[53] Even within the limits of more traditional forms of democracy, participatory rights must mean transparency in the operation of the Assembly so that those who represent us and spend our money are subject to a proper accountability based on an informed civic discourse between the governors and the governed.

More generally there is the main argument that democracy cannot work effectively without alternative spaces. The general project of reviving politics and democratising democracy factors in an important role for civil society and the voluntary sector. Ideas from a whole range of theorists relating to the way in which a revived participatory politics can be developed open up possibilities for an enhanced role for the

[52] See for example the role of the voluntary sector already in this regard in M Smyth "Women, Peace, Community Relations and Voluntary Action" in N Acheson and A Williamson (eds) *supra* n. 13 at pp. 145–60 and J Armstrong and A Kilmurray "Voluntary Action, Rural Policy and Social Development" in *ibid.* at pp. 115–34. The strategic framework for the next decade that is presently being devised for the Northern Ireland Voluntary Trust (NIVT) indicates a continuing, enhanced role for the sector in tackling the agenda for social inclusion and peace-building: see NIVT, *Driving Social Change: A Strategy for Inclusion* (Belfast, NIVT, April 2000).

[53] Walzer argues "no state can survive for long if it is wholly alienated from civil society . . . The production and reproduction of loyalty, civility, political competence, and trust in authority are never the work of the state alone, and the effort to go it alone—one meaning of totalitarianism—is doomed to failure": M Walzer, "The Civil Society Argument" in R Beiner (ed.) *Theorizing Citizenship* (New York, State University of New York Press, 1995) p. 153, at p. 168.

voluntary sector both within Blairite "third way" thinking and beyond it. Thus, for example, accounts range from those who require simply a more participatory form of politics—where the sector with its links to groups that are not perhaps adequately given voice in the sectarian politics of traditional representative politics can have a particular role—to those theories which identify wider ideas of community, sympathy and compassion as being necessary. In this way ideas of participatory politics[54] shade into more fundamental notions of a politics of association. Here, for example, Unger refers to ideas of "solidarity" and the deeper sense of belonging that people must develop in order to foster an idea of sympathy that is necessary to constitute community.[55] Richard Rorty argues that post-modern politics involves restoring an ethic of "human solidarity"[56] while theorists such as Nussbaum maintain that new ideas of citizenship will require an education in sensitivity and compassion for others in order to produce an idea of social justice founded on a "compassionate imagination".[57] Even Jacques Derrida has developed ideas about "friendship" as the non-foundational foundation for a post-modern politics, arguing that democracy is essentially "a community of friends".[58]

Whichever basis is adopted as underlying the new democratic space, or whatever route taken towards reviving politics and democratising democracy, the role of the voluntary sector and civil society generally is clearly a potentially important one beyond the placid limits of formal politics.[59] Indeed it would seem to involve much more even than the

[54] For an overview of the range of approaches in this context see Richard Blaug "New Theories of Discursive Democracy: A User's Guide" (1996) 22 *Philosophy and Social Criticism* 49; J Morison "The Case Against Constitutional Reform?"(1998) 25 *Journal of Law and Society* 528–34.

[55] See, in particular, *Knowledge and Politics* (New York, Free Press, 1975) pp. 3–5, 220–1 and *Passion: An Essay on Personality* (New York, Free Press, 1984).

[56] R Rorty, *Contingency, Irony and Solidarity* (Cambridge, Cambridge University Press, 1989).

[57] N Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard, Havard University Press, 1997). See also Drucilla Cornell who argues that politics now requires us to identify "a common good" which is beyond the reach of a simple application of reason and can be found instead by individuals actively participating together in compassion and sympathy: see "Towards a Modern/Postmodern Reconstruction of Ethics" (1985) 113 *University of Pennsylvania Law Review* 345; Drucilla Cornell *The Philosophy of the Limit* (New York, Routledge, 1992).

[58] J Derrida *The Politics of Friendship* (London, Verso, 1997).

[59] Although of course even if one is thinking only about how to revive traditional representative politics in Northern Ireland, there is clearly a need to establish a dynamic of rotation within the political structures. With almost every conceivable political figure already occupying one or more of the many offices available, the voluntary sector may appear as a potentially productive source of new political blood.

planned Civic Forum envisages, where the First Minister must make arrangements "for obtaining from the Forum the view of the community on social, economic and cultural matters".[60] Rather than being a formal institutional component, this element will be a space or process. Arguably the bill of rights debate will both usher in and be the foundation of this new participatory space where the voluntary sector will be involved with many others in giving democratic voice to a range of groups at the most appropriate level. With participation as a basic right it opens the door to a whole range of other rights from consultation and veto rights, through equality rights to information and minimum consensus rights. It also suggests a whole range of new mechanisms for giving voice, from preferenda and citizens' juries through to consensus conferences and new uses of information technology.[61] In short it opens up the potential for a re-invigoration of democracy.

CONCLUSIONS: GOVERNMENTALITY AND RENEWAL

It is perhaps odd that this account which began by suggesting that the elaborate structures of formal representative structure were perhaps a little overblown should end by arguing for the further development of another, albeit informal, democratic space. Of course part of the argument here is that although devolved government may have been restored, the project of government has changed such that the elected Assembly and new government departments can not hope to carry out all the functions involved in present day governance. Another part of the argument is that the voluntary sector in Northern Ireland, having played a particular and important role during the period of direct rule, is simply too important a resource to be lost, even if such disentanglement from multi-form governance were possible. It would seem wrong if the democratic deficit of the pre-devolution period where there was little representative democracy were to be replaced by a new democratic deficit where the quantity of traditional, institutional democracy crowds out the participatory democratic life that grew up in the shadow of direct rule. Fortunately, such a possibility seems remote no

[60] See the Belfast Agreement and the Northern Ireland Act 1998, s. 56.

[61] See further Morison *supra* n. 54 at pp. 528–35 for discussion of how participatory models challenge the conflation of the state apparatus with the public sphere of discourse and association, and suggest not only a different foundation for existing rights but also a variety of new rights and ways of achieving them.

matter what some of the new political representatives might wish for. Changes in governance everywhere, and in Northern Ireland in particular with regard to consultation requirements and the equality and human rights agenda, mean that the role and influence of the sector will persist, and may increase in the longer term.

But beyond arguments about the changing nature of the state and the multi-level and multiform nature of modern governance, there is a particular need for the voluntary sector in the new Northern Ireland. The voluntary sector have an already established role in giving voice to various groups and individuals who might otherwise be marginalised by the political process. This occurs through the various consultation roles with which they are increasingly involved. Such processes provide an embryonic version of a new democratic space, beyond formal politics, where real renewal can take place. The bill of rights debate, where the sector should play an important role in securing both traditional protections and mechanisms for further participation, provides an important illustration of the general renewal and reconstitutive debate that must now go on in the shadows of the big institutional "fix". A properly rooted settlement must involve people working out the details of how they want to live among themselves and establishing the basis of participation and democracy. It must be properly *constitutive* in fundamental and ongoing sense.

The governmentality approach which downgrades the importance of the state and looks instead at how power is actually constituted through society offers a better way to approach the issue than does a formal constitutionalism emphasising state and structure. It recognises that real constitutional agreement cannot be imposed or conferred. It must be facilitated in a maieutic process. It must be seen to be "natural" with notions of sharing power and acknowledging rights coming from the individual rather than from being merely legal rights. If one sees only a legal right then it is capable of being taken away by law. If, as Foucault says, we understand only "the political institution" and the "legal subject" rather than a concept of governmentality which allows us to "bring out the freedom of the subject and its relationship to others"[62] we have only a formal, and ultimately formally revocable, settlement. Instead we must follow through on Foucault's account and seek to analyse power "on the basis of freedom, strategies and governmentality".[63] It is only in this way that we can see and recognise the

[62] Foucault *supra* n. 2.
[63] *Ibid*.

basis of the way in which we live with each other, and are variously involved in the project of governmentality which is, after all, the “very stuff of ethics”.

ANNEX

Agreement Reached in the Multi-Party Negotiations

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DECLARATION OF SUPPORT

1. We, the participants in the multi-party negotiations, believe that the agreement we have negotiated offers a truly historic opportunity for a new beginning.

2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.

3. We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands.

4. We reaffirm our total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and our opposition to any use or threat of force by others for any political purpose, whether in regard to this agreement or otherwise.

5. We acknowledge the substantial differences between our continuing, and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements. We pledge that we will, in good faith, work to ensure the success of each and every one of the arrangements to be established under this agreement. It is accepted that all of the institutional and constitutional arrangements—an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference and any amendments to British Acts of Parliament and the Constitution of Ireland—are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other.

6. Accordingly, in a spirit of concord, we strongly commend this agreement to the people, North and South, for their approval.

CONSTITUTIONAL ISSUES

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on

the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

2. The participants also note that the two Governments have accordingly undertaken in the context of this comprehensive political agreement, to propose and support changes in, respectively, the Constitution of Ireland and in British legislation relating to the constitutional status of Northern Ireland.

ANNEX A

Draft clauses/Schedules for incorporation in British legislation

1. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

2. The Government of Ireland Act 1920 is repealed; and this Act shall have effect notwithstanding any other previous enactment.

SCHEDULE 1
Polls for the purpose of section 1

1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

4. (Remaining paragraphs along the lines of paragraphs 2 and 3 of existing Schedule 1 to 1973 Act.)

ANNEX B

Irish Government draft legislation to amend the Constitution

Add to Article 29 the following sections:

7\. 1. The State may consent to be bound by the British-Irish Agreement done at Belfast on the day of 1998, hereinafter called the Agreement.

2. Any institution established by or under the Agreement may exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person or organ of State as aforesaid.

3. If the Government declare that the State has become obliged, pursuant to the Agreement, to give effect to the

amendment of this Constitution referred to therein, then, notwithstanding Article 46 hereof, this Constitution shall be amended as follows:

i. the following Articles shall be substituted for Articles 2 and 3 of the Irish text:

"2. [Irish text to be inserted here]

3. [Irish text to be inserted here]"

ii. the following Articles shall be substituted for Articles 2 and 3 of the English text:

"Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3

1. It is 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, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island."

iii. the following section shall be added to the Irish text of this Article:

"8. [Irish text to be inserted here]"

and

iv. the following section shall be added to the English text of this Article:
"8. The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."
4. If a declaration under this section is made, this subsection and subsection 3, other than the amendment of this Constitution effected thereby, and subsection 5 of this section shall be omitted from every official text of this Constitution published thereafter, but notwithstanding such omission this section shall continue to have the force of law.
5. If such a declaration is not made within twelve months of this section being added to this Constitution or such longer period as may be provided for by law, this section shall cease to have effect and shall be omitted from every official text of this Constitution published thereafter.

STRAND ONE

Democratic Institutions in Northern Ireland

1. This agreement provides for a democratically elected Assembly in Northern Ireland which is inclusive in its membership, capable of exercising executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community.

The Assembly

2. A 108-member Assembly will be elected by PR(STV) from existing Westminster constituencies.
3. The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.
4. The Assembly—operating where appropriate on a cross-community basis—will be the prime source of authority in respect of all devolved responsibilities.

Safeguards

5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:

(a) allocations of Committee Chairs, Ministers and Committee membership in proportion to party strengths;
(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;
(c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland;
(d) arrangements to ensure key decisions are taken on a cross-community basis:
   (i) *either* parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting;
   (ii) *or* a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.

   Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108).
(e) an Equality Commission to monitor a statutory obligation to promote equality of opportunity in specified areas and parity of esteem between the two main communities, and to investigate individual complaints against public bodies.

Operation of the Assembly

6. At their first meeting, members of the Assembly will register a designation of identity—nationalist, unionist or other—for the pur-

poses of measuring cross-community support in Assembly votes under the relevant provisions above.

7. The Chair and Deputy Chair of the Assembly will be elected on a cross-community basis, as set out in paragraph 5(d) above.

8. There will be a Committee for each of the main executive functions of the Northern Ireland Administration. The Chairs and Deputy Chairs of the Assembly Committees will be allocated proportionally, using the d'Hondt system. Membership of the Committees will be in broad proportion to party strengths in the Assembly to ensure that the opportunity of Committee places is available to all members.

9. The Committees will have a scrutiny, policy development and consultation role with respect to the Department with which each is associated, and will have a role in initiation of legislation. They will have the power to:

- consider and advise on Departmental budgets and Annual Plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee stage of relevant primary legislation;
- call for persons and papers;
- initiate enquiries and make reports;
- consider and advise on matters brought to the Committee by its Minister.

10. Standing Committees other than Departmental Committees may be established as may be required from time to time.

11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights. The Committee shall have the power to call people and papers to assist in its consideration of the matter. The Assembly shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure.

12. The above special procedure shall be followed when requested by the Executive Committee, or by the relevant Departmental Committee, voting on a cross-community basis.

13. When there is a petition of concern as in 5(d) above, the Assembly shall vote to determine whether the measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis, as in 5(d)(i) above, the special procedure shall be followed.

Executive authority

14. Executive authority to be discharged on behalf of the Assembly by a First Minister and Deputy First Minister and up to ten Ministers with Departmental responsibilities.

15. The First Minister and Deputy First Minister shall be jointly elected into office by the Assembly voting on a cross-community basis, according to 5(d)(i) above.

16. Following the election of the First Minister and Deputy First Minister, the posts of Ministers will be allocated to parties on the basis of the d'Hondt system by reference to the number of seats each party has in the Assembly.

17. The Ministers will constitute an Executive Committee, which will be convened, and presided over, by the First Minister and Deputy First Minister.

18. The duties of the First Minister and Deputy First Minister will include, *inter alia*, dealing with and coordinating the work of the Executive Committee and the response of the Northern Ireland administration to external relationships.

19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships).

20. The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.

21. A party may decline the opportunity to nominate a person to serve as a Minister or may subsequently change its nominee.

22. All the Northern Ireland Departments will be headed by a Minister. All Ministers will liaise regularly with their respective Committee.

23. As a condition of appointment, Ministers, including the First Minister and Deputy First Minister, will affirm the terms of a Pledge of Office (Annex A) undertaking to discharge effectively and in good faith all the responsibilities attaching to their office.

24. Ministers will have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole.

25. An individual may be removed from office following a decision of the Assembly taken on a cross-community basis, if (s)he loses the confidence of the Assembly, voting on a cross-community basis, for failure to meet his or her responsibilities including, inter alia, those set out in the Pledge of Office. Those who hold office should use only democratic, non-violent means, and those who do not should be excluded or removed from office under these provisions.

Legislation

26 The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to:

(a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void;
(b) decisions by simple majority of members voting, except when decision on a cross-community basis is required;
(c) detailed scrutiny and approval in the relevant Departmental Committee;
(d) mechanisms, based on arrangements proposed for the Scottish Parliament, to ensure suitable co-ordination, and avoid disputes, between the Assembly and the Westminster Parliament;
(e) option of the Assembly seeking to include Northern Ireland provisions in United Kingdom-wide legislation in the Westminster Parliament, especially on devolved issues where parity is normally maintained (e.g. social security, company law).

27. The Assembly will have authority to legislate in reserved areas with the approval of the Secretary of State and subject to Parliamentary control.

28. Disputes over legislative competence will be decided by the Courts.

29. Legislation could be initiated by an individual, a Committee or a Minister.

Relations with other institutions

30. Arrangements to represent the Assembly as a whole, at Summit level and in dealings with other institutions, will be in accordance with paragraph 18, and will be such as to ensure cross-community involvement.

31. Terms will be agreed between appropriate Assembly representatives and the Government of the United Kingdom to ensure effective co-ordination and input by Ministers to national policy-making, including on EU issues.

32. Role of Secretary of State:

(a) to remain responsible for NIO matters not devolved to the Assembly, subject to regular consultation with the Assembly and Ministers;
(b) to approve and lay before the Westminster Parliament any Assembly legislation on reserved matters;
(c) to represent Northern Ireland interests in the United Kingdom Cabinet;
(d) to have the right to attend the Assembly at their invitation.

33. The Westminster Parliament (whose power to make legislation for Northern Ireland would remain unaffected) will:

(a) legislate for non-devolved issues, other than where the Assembly legislates with the approval of the Secretary of State and subject to the control of Parliament;
(b) to legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland;
(c) scrutinise, including through the Northern Ireland Grand and Select Committees, the responsibilities of the Secretary of State.

34. A consultative Civic Forum will be established. It will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. It will act as a consultative mechanism on social, economic and cultural issues. The First Minister and the Deputy First Minister will by agreement provide administrative support for the Civic Forum and establish guidelines for the selection of representatives to the Civic Forum.

Transitional arrangements

35. The Assembly will meet first for the purpose of organisation, without legislative or executive powers, to resolve its standing orders and working practices and make preparations for the effective functioning of the Assembly, the British-Irish Council and the North/South Ministerial Council and associated implementation bodies. In this transitional period, those members of the Assembly serving as shadow Ministers shall affirm their commitment to non-violence and exclusively peaceful and democratic means and their opposition to any use or threat of force by others for any political purpose; to work in good faith to bring the new arrangements into being; and to observe the spirit of the Pledge of Office applying to appointed Ministers.

Review

36. After a specified period there will be a review of these arrangements, including the details of electoral arrangements and of the Assembly's procedures, with a view to agreeing any adjustments necessary in the interests of efficiency and fairness.

ANNEX A

Pledge of office

To pledge:

(a) to discharge in good faith all the duties of office;
(b) commitment to non-violence and exclusively peaceful and democratic means;
(c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination;
(d) to participate with colleagues in the preparation of a programme for government;
(e) to operate within the framework of that programme when agreed within the Executive Committee and endorsed by the Assembly;

(f) to support, and to act in accordance with, all decisions of the Executive Committee and Assembly;
(g) to comply with the Ministerial Code of Conduct.

Code of Conduct

Ministers must at all times:

- observe the highest standards of propriety and regularity involving impartiality, integrity and objectivity in relationship to the stewardship of public funds;
- be accountable to users of services, the community and, through the Assembly, for the activities within their responsibilities, their stewardship of public funds and the extent to which key performance targets and objectives have been met;
- ensure all reasonable requests for information from the Assembly, users of services and individual citizens are complied with; and that Departments and their staff conduct their dealings with the public in an open and responsible way;
- follow the seven principles of public life set out by the Committee on Standards in Public Life;
- comply with this code and with rules relating to the use of public funds;
- operate in a way conducive to promoting good community relations and equality of treatment;
- not use information gained in the course of their service for personal gain; nor seek to use the opportunity of public service to promote their private interests;
- ensure they comply with any rules on the acceptance of gifts and hospitality that might be offered;
- declare any personal or business interests which may conflict with their responsibilities. The Assembly will retain a Register of Interests. Individuals must ensure that any direct or indirect pecuniary interests which members of the public might reasonably think could influence their judgement are listed in the Register of Interests.

STRAND TWO

North/South Ministerial Council

1. Under a new British/Irish Agreement dealing with the totality of relationships, and related legislation at Westminster and in the Oireachtas, a North/South Ministerial Council to be established to bring together those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland—including through implementation on an all-island and cross-border basis—on matters of mutual interest within the competence of the Administrations, North and South.

2. All Council decisions to be by agreement between the two sides. Northern Ireland to be represented by the First Minister, Deputy First Minister and any relevant Ministers, the Irish Government by the Taoiseach and relevant Ministers, all operating in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly and the Oireachtas respectively. Participation in the Council to be one of the essential responsibilities attaching to relevant posts in the two Administrations. If a holder of a relevant post will not participate normally in the Council, the Taoiseach in the case of the Irish Government and the First and Deputy First Minister in the case of the Northern Ireland Administration to be able to make alternative arrangements.

3. The Council to meet in different formats:

(i) in plenary format twice a year, with Northern Ireland representation led by the First Minister and Deputy First Minister and the Irish Government led by the Taoiseach;
(ii) in specific sectoral formats on a regular and frequent basis with each side represented by the appropriate Minister;
(iii) in an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement.

4. Agendas for all meetings to be settled by prior agreement between the two sides, but it will be open to either to propose any matter for consideration or action.

5. The Council:

(i) to exchange information, discuss and consult with a view to

co-operating on matters of mutual interest within the competence of both Administrations, North and South;

(ii) to use best endeavours to reach agreement on the adoption of common policies, in areas where there is a mutual cross-border and all-island benefit, and which are within the competence of both Administrations, North and South, making determined efforts to overcome any disagreements;

(iii) to take decisions by agreement on policies for implementation separately in each jurisdiction, in relevant meaningful areas within the competence of both Administrations, North and South;

(iv) to take decisions by agreement on policies and action at an all-island and cross-border level to be implemented by the bodies to be established as set out in paragraphs 8 and 9 below.

6. Each side to be in a position to take decisions in the Council within the defined authority of those attending, through the arrangements in place for co-ordination of executive functions within each jurisdiction. Each side to remain accountable to the Assembly and Oireachtas respectively, whose approval, through the arrangements in place on either side, would be required for decisions beyond the defined authority of those attending.

7. As soon as practically possible after elections to the Northern Ireland Assembly, inaugural meetings will take place of the Assembly, the British/Irish Council and the North/South Ministerial Council in their transitional forms. All three institutions will meet regularly and frequently on this basis during the period between the elections to the Assembly, and the transfer of powers to the Assembly, in order to establish their modus operandi.

8. During the transitional period between the elections to the Northern Ireland Assembly and the transfer of power to it, representatives of the Northern Ireland transitional Administration and the Irish Government operating in the North/South Ministerial Council will undertake a work programme, in consultation with the British Government, covering at least 12 subject areas, with a view to identifying and agreeing by 31 October 1998 areas where co-operation and implementation for mutual benefit will take place. Such areas may include matters in the list set out in the Annex.

9. As part of the work programme, the Council will identify and

agree at least 6 matters for co-operation and implementation in each of the following categories:

(i) matters where existing bodies will be the appropriate mechanisms for co-operation in each separate jurisdiction;
(ii) matters where the co-operation will take place through agreed implementation bodies on a cross-border or all-island level.

10. The two Governments will make necessary legislative and other enabling preparations to ensure, as an absolute commitment, that these bodies, which have been agreed as a result of the work programme, function at the time of the inception of the British-Irish Agreement and the transfer of powers, with legislative authority for these bodies transferred to the Assembly as soon as possible thereafter. Other arrangements for the agreed co-operation will also commence contemporaneously with the transfer of powers to the Assembly.

11. The implementation bodies will have a clear operational remit. They will implement on an all-island and cross-border basis policies agreed in the Council.

12. Any further development of these arrangements to be by agreement in the Council and with the specific endorsement of the Northern Ireland Assembly and Oireachtas, subject to the extent of the competences and responsibility of the two Administrations.

13. It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other.

14. Disagreements within the Council to be addressed in the format described at paragraph 3(iii) above or in the plenary format. By agreement between the two sides, experts could be appointed to consider a particular matter and report.

15. Funding to be provided by the two Administrations on the basis that the Council and the implementation bodies constitute a necessary public function.

16. The Council to be supported by a standing joint Secretariat, staffed by members of the Northern Ireland Civil Service and the Irish Civil Service.

17. The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are

taken into account and represented appropriately at relevant EU meetings.

18. The Northern Ireland Assembly and the Oireachtas to consider developing a joint parliamentary forum, bringing together equal numbers from both institutions for discussion of matters of mutual interest and concern.

19. Consideration to be given to the establishment of an independent consultative forum appointed by the two Administrations, representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues.

ANNEX

Areas for North-South co-operation and implementation may include the following:

1. Agriculture—animal and plant health.
2. Education—teacher qualifications and exchanges.
3. Transport—strategic transport planning.
4. Environment—environmental protection, pollution, water quality, and waste management.
5. Waterways—inland waterways.
6. Social Security/Social Welfare—entitlements of cross-border workers and fraud control.
7. Tourism—promotion, marketing, research, and product development.
8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.
9. Inland Fisheries.
10. Aquaculture and marine matters
11. Health: accident and emergency services and other related cross-border issues.
12. Urban and rural development.

Others to be considered by the shadow North/ South Council.

STRAND THREE

British–Irish Council

1. A British–Irish Council (BIC) will be established under a new British–Irish Agreement to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.

2. Membership of the BIC will comprise representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and, if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Man and the Channel Islands.

3. The BIC will meet in different formats: at summit level, twice per year; in specific sectoral formats on a regular basis, with each side represented by the appropriate Minister; in an appropriate format to consider cross-sectoral matters.

4. Representatives of members will operate in accordance with whatever procedures for democratic authority and accountability are in force in their respective elected institutions.

5. The BIC will exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues. Suitable arrangements to be made for practical co-operation on agreed policies.

6. It will be open to the BIC to agree common policies or common actions. Individual members may opt not to participate in such common policies and common action.

7. The BIC normally will operate by consensus. In relation to decisions on common policies or common actions, including their means of implementation, it will operate by agreement of all members participating in such policies or actions.

8. The members of the BIC, on a basis to be agreed between them, will provide such financial support as it may require.

9. A secretariat for the BIC will be provided by the British and Irish Governments in co-ordination with officials of each of the other members.

10. In addition to the structures provided for under this agreement, it will be open to two or more members to develop bilateral or multilateral arrangements between them. Such arrangements could include, subject to the agreement of the members concerned, mechanisms to enable consultation, co-operation and joint decision-making on matters of mutual interest; and mechanisms to implement any joint decisions they may reach. These arrangements will not require the prior approval of the BIC as a whole and will operate independently of it.

11. The elected institutions of the members will be encouraged to develop interparliamentary links, perhaps building on the British–Irish Interparliamentary Body.

12. The full membership of the BIC will keep under review the workings of the Council, including a formal published review at an appropriate time after the Agreement comes into effect, and will contribute as appropriate to any review of the overall political agreement arising from the multi-party negotiations.

British-Irish Intergovernmental Conference

1. There will be a new British–Irish Agreement dealing with the totality of relationships. It will establish a standing British–Irish Intergovernmental Conference, which will subsume both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Agreement.

2. The Conference will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments.

3. The Conference will meet as required at Summit level (Prime Minister and Taoiseach). Otherwise, Governments will be represented by appropriate Ministers. Advisers, including police and security advisers, will attend as appropriate.

4. All decisions will be by agreement between both Governments. The Governments will make determined efforts to resolve disagreements between them. There will be no derogation from the sovereignty of either Government.

5. In recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern

Ireland matters, on which the Irish Government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border co-operation on non-devolved issues.

6. Co-operation within the framework of the Conference will include facilitation of co-operation in security matters. The Conference also will address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration) and will intensify co-operation between the two Governments on the all-island or cross-border aspects of these matters.

7. Relevant executive members of the Northern Ireland Administration will be involved in meetings of the Conference, and in the reviews referred to in paragraph 9 below to discuss non-devolved Northern Ireland matters.

8. The Conference will be supported by officials of the British and Irish Governments, including by a standing joint Secretariat of officials dealing with non-devolved Northern Ireland matters.

9. The Conference will keep under review the workings of the new British-Irish Agreement and the machinery and institutions established under it, including a formal published review three years after the Agreement comes into effect. Representatives of the Northern Ireland Administration will be invited to express views to the Conference in this context. The Conference will contribute as appropriate to any review of the overall political agreement arising from the multi-party negotiations but will have no power to override the democratic arrangements set up by this Agreement.

Rights, Safeguards and Equality of Opportunity

Human rights

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;

- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.

United Kingdom legislation

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

3. Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.

4. The new Northern Ireland Human Rights Commission (see paragraph 5 below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and—taken together with the ECHR—to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment,

the identity and ethos of both communities in Northern Ireland; and

- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

New institutions in Northern Ireland

5. A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so.

6. Subject to the outcome of public consultation currently underway, the British Government intends a new statutory Equality Commission to replace the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Disability Council. Such a unified Commission will advise on, validate and monitor the statutory obligation and will investigate complaints of default.

7. It would be open to a new Northern Ireland Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality.

8. These improvements will build on existing protections in Westminster legislation in respect of the judiciary, the system of justice and policing.

Comparable steps by the Irish Government

9. The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional

protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland. In addition, the Irish Government will:

- establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland;
- proceed with arrangements as quickly as possible to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK);
- implement enhanced employment equality legislation;
- introduce equal status legislation; and
- continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland.

A Joint Committee

10. It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.

Reconciliation and victims of violence

11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the

development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes.

13. The participants recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement. Accordingly, they pledge their continuing support to such organisations and will positively examine the case for enhanced financial assistance for the work of reconciliation. An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing.

RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY

Economic, Social and Cultural Issues

1. Pending the devolution of powers to a new Northern Ireland Assembly, the British Government will pursue broad policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life.

2. Subject to the public consultation currently under way, the British Government will make rapid progress with:

(i) a new regional development strategy for Northern Ireland, for consideration in due course by the Assembly, tackling the problems of a divided society and social cohesion in urban, rural and border areas, protecting and enhancing the environment, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages

and resources of rural areas and rejuvenating major urban centres;

(ii) a new economic development strategy for Northern Ireland, for consideration in due course by the Assembly, which would provide for short and medium term economic planning linked as appropriate to the regional development strategy; and

(iii) measures on employment equality included in the recent White Paper ("Partnership for Equality") and covering the extension and strengthening of anti-discrimination legislation, a review of the national security aspects of the present fair employment legislation at the earliest possible time, a new more focused Targeting Social Need initiative and a range of measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.

3. All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.

4. In the context of active consideration currently being given to the UK signing the Council of Europe Charter for Regional or Minority Languages, the British Government will in particular in relation to the Irish language, where appropriate and where people so desire it:

- take resolute action to promote the language;
- facilitate and encourage the use of the language in speech and writing in public and private life where there is appropriate demand;
- seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the language;
- make provision for liaising with the Irish language community, representing their views to public authorities and investigating complaints;
- place a statutory duty on the Department of Education to encourage and facilitate Irish medium education in line with current provision for integrated education;
- explore urgently with the relevant British authorities, and in co-operation with the Irish broadcasting authorities, the scope for achieving more widespread availability of Teilifis na Gaeilige in Northern Ireland;

- seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland; and
- encourage the parties to secure agreement that this commitment will be sustained by a new Assembly in a way which takes account of the desires and sensitivities of the community.

5. All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.

Decommissioning

1. Participants recall their agreement in the Procedural Motion adopted on 24 September 1997 "that the resolution of the decommissioning issue is an indispensable part of the process of negotiation", and also recall the provisions of paragraph 25 of Strand 1 above.

2. They note the progress made by the Independent International Commission on Decommissioning and the Governments in developing schemes which can represent a workable basis for achieving the decommissioning of illegally-held arms in the possession of paramilitary groups.

3. All participants accordingly reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and 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.

4. The Independent Commission will monitor, review and verify progress on decommissioning of illegal arms, and will report to both Governments at regular intervals.

[5.]

6. Both Governments will take all necessary steps to facilitate the decommissioning process to include bringing the relevant schemes into force by the end of June.

Security

1. The participants note that the development of a peaceful environment on the basis of this agreement can and should mean a normalisation of security arrangements and practices.

2. The British Government will make progress towards the objective of as early a return as possible to normal security arrangements in Northern Ireland, consistent with the level of threat and with a published overall strategy, dealing with:

(i) the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland to levels compatible with a normal peaceful society;
(ii) the removal of security installations;
(iii) the removal of emergency powers in Northern Ireland; and
(iv) other measures appropriate to and compatible with a normal peaceful society.

3. The Secretary of State will consult regularly on progress, and the response to any continuing paramilitary activity, with the Irish Government and the political parties, as appropriate.

4. The British Government will continue its consultation on firearms regulation and control on the basis of the document published on 2 April 1998.

5. The Irish Government will initiate a wide-ranging review of the Offences Against the State Acts 1939–85 with a view to both reform and dispensing with those elements no longer required as circumstances permit.

Policing and Justice

1. The participants recognise that policing is a central issue in any society. They equally recognise that Northern Ireland's history of deep divisions has made it highly emotive, with great hurt suffered and sacrifices made by many individuals and their families, including those in the RUC and other public servants. They believe that the agreement provides the opportunity for a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole. They also believe that this agree-

ment offers a unique opportunity to bring about a new political dispensation which will recognise the full and equal legitimacy and worth of the identities, senses of allegiance and ethos of all sections of the community in Northern Ireland. They consider that this opportunity should inform and underpin the development of a police service representative in terms of the make-up of the community as a whole and which, in a peaceful environment, should be routinely unarmed.

2. The participants believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms. The participants also believe that those structures and arrangements must be capable of maintaining law and order including responding effectively to crime and to any terrorist threat and to public order problems. A police service which cannot do so will fail to win public confidence and acceptance. They believe that any such structures and arrangements should be capable of delivering a policing service, in constructive and inclusive partnerships with the community at all levels, and with the maximum delegation of authority and responsibility, consistent with the foregoing principles. These arrangements should be based on principles of protection of human rights and professional integrity and should be unambiguously accepted and actively supported by the entire community.

3. An independent Commission will be established to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed framework of principles reflected in the paragraphs above and in accordance with the terms of reference at Annex A. The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than Summer 1999.

4. The participants believe that the aims of the criminal justice system are to:

- deliver a fair and impartial system of justice to the community;
- be responsive to the community's concerns, and encouraging community involvement where appropriate;

- have the confidence of all parts of the community; and
- deliver justice efficiently and effectively.

5. There will be a parallel wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others. The review will commence as soon as possible, will include wide consultation, and a report will be made to the Secretary of State no later than Autumn 1999. Terms of Reference are attached at Annex B.

6. Implementation of the recommendations arising from both reviews will be discussed with the political parties and with the Irish Government.

7. The participants also note that the British Government remains ready in principle, with the broad support of the political parties, and after consultation, as appropriate, with the Irish Government, in the context of ongoing implementation of the relevant recommendations, to devolve responsibility for policing and justice issues.

ANNEX A

Commission on Policing for Northern Ireland

Terms of reference

Taking account of the principles on policing as set out in the agreement, the Commission will inquire into policing in Northern Ireland and, on the basis of its findings, bring forward proposals for future policing structures and arrangements, including means of encouraging widespread community support for those arrangements.

Its proposals on policing should be designed to ensure that policing arrangements, including composition, recruitment, training, culture, ethos and symbols, are such that in a new approach Northern Ireland has a police service that can enjoy widespread support from, and is seen as an integral part of, the community as a whole.

Its proposals should include recommendations covering any issues such as re-training, job placement and educational and professional development required in the transition to policing in a peaceful society.

Its proposals should also be designed to ensure that:

- the police service is structured, managed and resourced so that it can be effective in discharging its full range of functions (including proposals on any necessary arrangements for the transition to policing in a normal peaceful society);
- the police service is delivered in constructive and inclusive partnerships with the community at all levels with the maximum delegation of authority and responsibility;
- the legislative and constitutional framework requires the impartial discharge of policing functions and conforms with internationally accepted norms in relation to policing standards;
- the police operate within a clear framework of accountability to the law and the community they serve, so:
  - they are constrained by, accountable to and act only within the law;
  - their powers and procedures, like the law they enforce, are clearly established and publicly available;
  - there are open, accessible and independent means of investigating and adjudicating upon complaints against the police;
  - there are clearly established arrangements enabling local people, and their political representatives, to articulate their views and concerns about policing and to establish publicly policing priorities and influence policing policies, subject to safeguards to ensure police impartiality and freedom from partisan political control;
  - there are arrangements for accountability and for the effective, efficient and economic use of resources in achieving policing objectives;
  - there are means to ensure independent professional scrutiny and inspection of the police service to ensure that proper professional standards are maintained;
- the scope for structured co-operation with the Garda Siochana and other police forces is addressed; and
- the management of public order events which can impose exceptional demands on policing resources is also addressed.

The Commission should focus on policing issues, but if it identifies other aspects of the criminal justice system relevant to its work on policing, including the role of the police in prosecution, then it should draw the attention of the Government to those matters.

The Commission should consult widely, including with non-governmental expert organisations, and through such focus groups as they consider it appropriate to establish.

The Government proposes to establish the Commission as soon as possible, with the aim of it starting work as soon as possible and publishing its final report by Summer 1999.

ANNEX B

Review of the Criminal Justice System

Terms of reference

Taking account of the aims of the criminal justice system as set out in the Agreement, the review will address the structure, management and resourcing of publicly funded elements of the criminal justice system and will bring forward proposals for future criminal justice arrangements (other than policing and those aspects of the system relating to emergency legislation, which the Government is considering separately) covering such issues as:

- the arrangements for making appointments to the judiciary and magistracy, and safeguards for protecting their independence;
- the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence;
- measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system;
- mechanisms for addressing law reform;
- the scope for structured co-operation between the criminal justice agencies on both parts of the island; and
- the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.

The Government proposes to commence the review as soon as possible, consulting with the political parties and others, including non-governmental expert organisations. The review will be completed by Autumn 1999.

Prisoners

1. Both Governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.

2. Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire will not benefit from the arrangements. The situation in this regard will be kept under review.

3. Both Governments will complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community. In addition, the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point.

4. The Governments will seek to enact the appropriate legislation to give effect to these arrangements by the end of June 1998.

5. The Governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or re-skilling, and further education.

VALIDATION, IMPLEMENTATION AND REVIEW

Validation and implementation

1. The two Governments will as soon as possible sign a new British–Irish Agreement replacing the 1985 Anglo-Irish Agreement, embodying understandings on constitutional issues and affirming their solemn commitment to support and, where appropriate, implement the

agreement reached by the participants in the negotiations which shall be annexed to the British–Irish Agreement.

2. Each Government will organise a referendum on 22 May 1998. Subject to Parliamentary approval, a consultative referendum in Northern Ireland, organised under the terms of the Northern Ireland (Entry to Negotiations, etc.) Act 1996, will address the question: "Do you support the agreement reached in the multi-party talks on Northern Ireland and set out in Command Paper 3883?". The Irish Government will introduce and support in the Oireachtas a Bill to amend the Constitution as described in paragraph 2 of the section "Constitutional Issues" and in Annex B, as follows: (a) to amend Articles 2 and 3 as described in paragraph 8.1 in Annex B above and (b) to amend Article 29 to permit the Government to ratify the new British–Irish Agreement. On passage by the Oireachtas, the Bill will be put to referendum.

3. If majorities of those voting in each of the referendums support this agreement, the Governments will then introduce and support, in their respective Parliaments, such legislation as may be necessary to give effect to all aspects of this agreement, and will take whatever ancillary steps as may be required including the holding of elections on 25 June, subject to parliamentary approval, to the Assembly, which would meet initially in a "shadow" mode. The establishment of the North–South Ministerial Council, implementation bodies, the British–Irish Council and the British–Irish Intergovernmental Conference and the assumption by the Assembly of its legislative and executive powers will take place at the same time on the entry into force of the British–Irish Agreement.

4. In the interim, aspects of the implementation of the multi-party agreement will be reviewed at meetings of those parties relevant in the particular case (taking into account, once Assembly elections have been held, the results of those elections), under the chairmanship of the British Government or the two Governments, as may be appropriate; and representatives of the two Governments and all relevant parties may meet under independent chairmanship to review implementation of the agreement as a whole.

Review procedures following implementation

5. Each institution may, at any time, review any problems that may arise in its operation and, where no other institution is affected, take

remedial action in consultation as necessary with the relevant Government or Governments. It will be for each institution to determine its own procedures for review.

6. If there are difficulties in the operation of a particular institution, which have implications for another institution, they may review their operations separately and jointly and agree on remedial action to be taken under their respective authorities.

7. If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British–Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction.

8. Notwithstanding the above, each institution will publish an annual report on its operations. In addition, the two Governments and the parties in the Assembly will convene a conference 4 years after the agreement comes into effect, to review and report on its operation.

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF IRELAND

The British and Irish Governments:

Welcoming the strong commitment to the Agreement reached on 10th April 1998 by themselves and other participants in the multi-party talks and set out in Annex 1 to this Agreement (hereinafter "the Multi-Party Agreement");

Considering that the Multi-Party Agreement offers an opportunity for a new beginning in relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands;

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union;

Reaffirming their total commitment to the principles of democracy and non-violence which have been fundamental to the multi-party talks;

Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions;

Have agreed as follows:

Article 1

The two Governments:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as

they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

Article 2

The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:

(i) a North/South Ministerial Council;
(ii) the implementation bodies referred to in paragraph 9(ii) of the section entitled "Strand Two" of the Multi-Party Agreement;
(iii) a British–Irish Council;
(iv) a British–Irish Intergovernmental Conference.

Article 3

(1) This Agreement shall replace the Agreement between the British and Irish Governments done at Hillsborough on 15th November 1985 which shall cease to have effect on entry into force of this Agreement.

(2) The Intergovernmental Conference established by Article 2 of the aforementioned Agreement done on 15th November 1985 shall cease to exist on entry into force of this Agreement.

Article 4

(1) It shall be a requirement for entry into force of this Agreement that:

(a) British legislation shall have been enacted for the purpose of implementing the provisions of Annex A to the section entitled "Constitutional Issues" of the Multi-Party Agreement;
(b) the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the

Multi-Party Agreement shall have been approved by Referendum;

(c) such legislation shall have been enacted as may be required to establish the institutions referred to in Article 2 of this Agreement.

(2) Each Government shall notify the other in writing of the completion, so far as it is concerned, of the requirements for entry into force of this Agreement. This Agreement shall enter into force on the date of the receipt of the later of the two notifications.

(3) Immediately on entry into force of this Agreement, the Irish Government shall ensure that the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement take effect.

In witness thereof the undersigned, being duly authorised thereto by the respective Governments, have signed this Agreement.

Done in two originals at Belfast on the 10th day of April 1998.

For the Government of the United Kingdom of Great Britain and NorthernIreland

For the Government of Ireland

ANNEX 1

The Agreement Reached in the Multi-Party Talks

ANNEX 2

Declaration on the Provisions of Paragraph (vi) of Article 1 in Relationship to Citizenship

The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

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