

# Northern Ireland: Consolidating the Peace

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## SYNTHETIC OVERVIEW: CONSOLIDATING THE PEACE

In the ten years since the signing of the Good Friday Agreement, Northern Ireland has experienced a tenuous peace. While a consociational government has been established, a culture of power sharing has yet to take root. There are signs, however, that a shared future for Northern Ireland is within reach. This report seeks to provide recommendations that will consolidate the peace in Northern Ireland and nurture a culture of power sharing in the country (Kerr, 2009).

Northern Ireland has experienced thirty years of national unrest. Competing “multiple public identities” have sought to articulate a vision for the future of Northern Ireland (McGarry, O’Leary & Simeon 2008). Peace has been achieved between these identity groups—defined as unionist and nationalist—through the negotiation of both political and institutional solutions to their differences. Thus, the purpose of this report is threefold. First, it undertakes an assessment of the efficiency, effectiveness, and legitimacy of five institutional, political and civic features of this broader peace process. These features include the devolution process, executive, human rights legislation, policing and justice, and transitional justice. Second, it assesses whether to retain, replace, or supplement each feature of the process over the coming decade. These assessments are based on tailored criteria that reflect the need to consolidate the peace in Northern Ireland and to foster a culture of power sharing. Finally, it provides a series of positive recommendations for the retention, replacement or alteration of each of those features. These recommendations are “measured and judicious” (McGarry, 2010) and reflect incremental, cautious improvements to the consociational design of Northern Ireland’s peace agreements and political institutions.

Northern Ireland is a special case in the broader context of those presented at the symposium – a two-day session where constitutional design options for five divided societies were introduced and discussed. First, unlike the others, Northern Ireland is a post-conflict society. That is, an agreement has been signed (and revised) which has brought relative stability and a longer lasting peace. Second, Northern Ireland is a Western European country and is integrated into the European Union. Its position in this larger economic and constitutional system has created a unique set of circumstances under which peace has been negotiated. For example, human rights legislation must comply with minimum European standards and their enforcement is subject to European oversight (see Chapter Three). Finally, Northern Ireland is positioned in a political space between two sovereign countries (McGarry & O’Leary 2009). On the one hand, it is a component of the larger British state with a political and economic relationship to the United Kingdom. On the other hand, it has the potential to be unified with the Republic of Ireland. In this way, the peace process in Northern Ireland not only reflects the needs and preferences of the local population, but those of two other states.

The chapters contained in this report explore these issues through the examination of individual features of the peace process. The authors of this report adopt a consociational approach to peace in Northern Ireland. Each examines in its own way the development of a culture of power sharing and power division. The recommendations at times diverge somewhat from the consociational ideal and present integrationist approaches as a means of moving forward. The authors believe that consociationalism is but one tool to ensure a lasting peace in Northern Ireland and in fulfilling each national

bloc's vision of its future. However, each author adopts McGary and O'Leary's (2009) contention that "it is best to leave consociations to decay organically. Let the people change consociations within their own frames and rules" (p. 69). For the most part, the consociational approach remains the preferred option to maintain the peace. As such, the authors take a measured approach to the implementation of power sharing and a peaceful co-existence. The authors mirror Kerr's (2009) argument that the Northern Irish government should "make incremental change, which might signify a move from a phase of conflict regulation to one of conflict resolution" (p. 217).

### **Scope and Method**

This paper reviews the twelve-year period following the signing of the Good Friday Agreement. It takes a medium-term approach to its recommendations and reserves itself to a ten-year outlook. The authors agree with Kerr (2009) when he states that,

One of the major problems with the consociational debate regarding Northern Ireland is that politicians, academics, and journalists alike very often expect results overnight or within unrealistic time frames. The fact remains that it took the British and Irish governments over two decades to return to the Sunningdale formula, and a further decade attempting to implement the Agreement, before power sharing was publicly accepted and supported by all of Northern Ireland's parties (Kerr p. 218)

The authors seek to avoid a similar trap, and have tailored their chapters to this view. The report is structured as follows: The first two chapters examine the design of The Belfast Agreement's brokered political institutions. In his chapter, Maidwell examines the processes of devolution and appraises its implementation in terms of both form and process. Sabin explores the fostering of a culture of power sharing through the institutional and political design of the Northern Irish Executive Committee.

The last three chapters examine issues of peace, justice, and human rights. Ryan presents the Northern Irish experience in developing human rights legislation and its accompanying controversies. Sams explores topical issues implicating policing and justice, including devolution and its political leadership, workforce composition, and oversight and accountability mechanisms. Finally, Ahern examines the issues of transitional justice.

The remainder of this synthetic overview is comprised of three sections. First, it presents a discussion of consociational theory and its application in Northern Ireland. Second, it provides a brief history of Northern Ireland's "Troubles", explores the roots of its national divisions, and provides a set of terminology and definitions used throughout this report. Finally, it outlines the key recommendations of this report. Structured in the same order as the report itself, each provides a clear direction for movement forward in the consolidation of Northern Ireland's peace process and the creation of a culture of power sharing.

### **Theory: Consociation and Integration for Divided Societies**

Consociationalism is an empirically grounded normative theory of political representation. It stresses the need for the recognition of “multiple public identities” and the incorporation of ethnic representation within political processes as a precondition for successful institutions in the face of significant social diversity (McGarry, O’Leary, & Simeon, 2008). This approach to accommodationist politics argues that there is the need for ethnic recognition within both elected and unelected state institutions including executive power sharing (McGarry, O’Leary, & Simeon, 2008, p. 58). While much of the early literature on this approach to dealing with social diversity draws on the work of Lijphart, there have been significant modifications and alterations to the initial model in light of its application in differing contexts. Although the original cases were drawn from the experiences of northern continental Europe (Lijphart, 1968), subsequent experience in post-conflict societies has revised the model. In dealing with Northern Ireland, the theory has been more broadly expanded to deal with more deeply divided societies and has become the major case study in the literature (Taylor, 2009, p. 8).

Consociational theory can in this light be regarded as a pragmatic approach to significant diversity. O’Leary classifies consociationalism as a realist pursuit and argues that the focus on proportionality and power sharing offers a political compromise of last resort (2005, p. 9). Within this approach one significant internal division is between ‘corporatist’ and ‘liberal’ variants. The former represents a more structured division which confines ethnic votes within a prescribed block while the latter emphasizes the role of individual choice within a common electoral register (O’Leary, 2005). This distinction is important as each type offers different incentives to the electoral calculus of parties. While corporatist instruments may be politically necessary at certain points, the main thrust of recent scholarship has emphasized a move towards incorporating more liberal features (McGarry & O’Leary, 2009, p. 72). The preference for liberal arrangements is an attempt to introduce more political space for transformative processes within consociational institutional structures.

#### *When is Consociation Appropriate?*

Proponents of consociational or accommodationist approaches argue that these sorts of practices are largely appropriate in societies where a substantial minority population (usually an ethnic group) is most likely to be significantly underrepresented within normal political institutions if they were based on majoritarian principles and practices. Additionally, reasonable political mobilization along ethnic lines is assumed and this ideational attachment will tend to be durable (Choudhry, 2008, pp. 26-7). In the case of Northern Ireland, Lijphart has argued that power sharing was an inevitable outcome given that any form of majoritarianism would have resulted in a Protestant dominated government (Choudhry, 2008, p. 23).

#### *Risks and Limits?*

Consociational theory is not without its critics and indeed there are a number of concerns that are highlighted within the literature in general and with regards to Northern

Ireland specifically. One substantive critique of the consociational approach is that in reserving or setting aside minimums or quotas for minority groups it is to an extent ‘freezing’ a certain conception of what the social order looks like at a given time within the broader political institutions while underestimating the extent to which these ideational attachments can be either fluid or can mask other sources of significant social inequality and conflict (Taylor, 2001). In this reading of the theory, the substantive point of contention is the degree to which ethnic mobilization is a necessary and sufficient differentiating factor around which the political order should be constructed. One analytic distinction made is between “predeterminism” and “self-determinism” with the former being represented as executive power sharing, and the latter as essentially a neutral selection process (Choudhry, 2008, p. 19).

Another significant concern is that the focus on ethnic division masks other, more foundational matters of social inequality and material disadvantage. This line of attack comes from both committed liberals such as Barry (2001) who push for a vision of public life which is largely ‘neutral’ with cultural characteristics confined to the private sphere, and from those who can be loosely characterized as ‘left-libertarian’ including feminist perspectives and other progressivists committed to social transformation (Wilson, 2009; O’Flynn, 2009; Taylor, 2001; Morison, 2009). This latter group tends to stress the transformative potential of grassroots political engagement and deliberative processes and objects to what they see as the elite dominance of the consociational approach.

### *Transitions to Integration?*

In light of these criticisms, there is an effort within the literature to specify the ways in which a transformative process may be undertaken under such conditions and to further allow for a substantial degree of liberality and cross-ethnic pooling, although certainly not to the extent that integrationists advance. This line of thought divides the approach to consociational politics along a liberal-corporatist axis with the former attempting to allow for a greater degree of individual choice within the system to reduce the ‘freezing’ potential. McGarry and O’Leary place particular emphasis on this aspect of the Northern Ireland settlement, arguing against the corporate, although otherwise consociational aspects of power sharing (2009).

### *Integration*

A third strand of critique comes from those committed to specifically integrationist approaches to managing diversity. Scholars in this camp tend to regard the institutions of consociational politics as inimical to resolving severe ethnic tensions. This school of thought draws on the work of Donald Horowitz (2000; 1990) as the basis for developing a largely centripetal theory of political consolidation. The underpinnings of integrationist theory are premised on the idea that the optimal solution for overcoming social divisions is the creation and maintenance of a singular or common public culture. It is the commonality of the public sphere that allows differing individuals and groups access to the normal political process as co-equals, and establishes a broadly liberal conception of the way in which interests are aggregated. One of the most prominent vehicles for establishing this form of individual level connection to the state is through a constitutionally entrenched bill of rights that may include group-based provisions in

addition to individual guarantees (Simeon, 2007, p. 4).

In the context of divided societies, the electoral mechanism proposed for achieving this end is to design political institutions so that the incentive to appeal to strictly ethnic partisans is reduced and successful parties must appeal across groups. The rationale for this system is basically to discourage the use of partisan appeals and to increase moderate positions through mechanisms such as ‘vote-pooling’ that are potentially less fractious (Choudhry, 2008, p. 21).

While integrationist structures have largely lost out to consociational institutions in the context of Northern Ireland, there are those who offer an integrationist critique of the assumptions made with regards to the existing political structures. Wilson takes exception with the way in which consociational approaches ‘essentialize’ identity and entrench notions of ethnicity within institutional arrangements (Wilson, 2009) while Taylor makes the broader point that a consociational ‘solution’ misreads the basic ‘problem’ as an ethno-national one as opposed to a matter of social justice. In this he highlights the extent to which positive solutions should rest on more integrative aspects of socioeconomic restructuring than on ethnic divisions per se (Taylor, 2009).

## **History of the Conflict**

### *Definitions*

In the interest of clarity, this report will follow the political definitions used by McGarry and O’Leary (1999) to refer to the ethnic, religious and political groups within Northern Ireland:

*Catholic* is a shorthand expression for a believer in the doctrines of the Holy Roman Catholic and Apostolic Church; it is not a synonym for an Irish nationalist, although most Catholics are nationalists.

*Nationalist* ... refers to an Irish nationalist, usually a cultural Catholic. Although most Ulster unionists are British nationalists, for clarity we do not call them nationalists.

*Protestant* ... is shorthand expression for somebody who is a believer in the doctrines of one of the many Protestant churches in Northern Ireland, or for cultural Protestants, that is, those who have Protestant religious backgrounds. ‘Protestant’ is not a synonym for ‘unionist,’ although most Protestants are unionists.

*Unionist* with a capital ‘U’ refers to a member of one of the parties that bear this name, whereas with a lower-case ‘u’ it refers to anybody who believes in preserving the United Kingdom of Great Britain and Northern Ireland.

*Others* is the new official designation for those persons and parties that choose to register as neither nationalist nor unionist in the new

## Northern Ireland Assembly.

### *Origins*

The partition of Ireland into two jurisdictions, north and south, occurred in 1920, when the entire island was governed as a part the United Kingdom. The partition reflected the fact that the south was almost entirely Catholic and republican, while the majority in the north were Protestants with British identities inherited from their English and Scottish ancestors who arrived in the province of Ulster in the 17<sup>th</sup> century. While still under imperial rule, both Northern and Southern Ireland were given their own parliaments. Shortly thereafter, when the Irish Free State was established as a self-governing dominion subsequent to a civil war – still within the Commonwealth but separate from the UK proper – Northern Ireland used this newly established legislature to decline to join the rest of the island in separating from Britain (Hennessey, 1997).

While the political conflict in Northern Ireland was hardly settled, given the vocal Catholic minority and the stated goal of the Free State to re-unify the island after the violence of Irish secession ended, the divided society was in a state of relative peace – defined as the absence of continued violence, as opposed to actual harmony – for close to five decades. This “cold war” period lasted from partition to the beginning of the Troubles (Hennessey, 1997). Southern Ireland continued to reduce its links to the British Crown, remaining neutral during the Second World War and becoming a republic in 1949. Northern Ireland continued as a constituent component of the United Kingdom, with representatives in the Westminster Parliament. The United Kingdom vacillated depending on what was at stake, using the prospect of re-unification as a negotiating tool with the Free State during the war, but later entrenching its policy of not ceding Northern Ireland without a majority vote from its people.

### *The Troubles*

With the 1960s came an outbreak of political violence that would cost the lives of over 3,500 people and de-stabilize a pocket of Western Europe for close to three decades. The Troubles began with the emergence of a republican civil rights movement in Northern Ireland with the stated goal of ending what Catholics viewed as their unequal status with Protestants, with both violent and non-violent factions. Unionist leaders perceived this as an attack on British identity, and part of the continuing attempt to unify Ireland, which would in turn make Protestants a vulnerable minority. After the 1969 Stormont election, the Royal Ulster Constabulary was unable to contain sectarian rioting, and the unionist government requested that the British government deploy military troops to Belfast (Hennessey, 1997).

From this civil strife, society rapidly descended into a paramilitary conflict. The Irish Republic Army declared a national liberation front, and British security forces and unionist paramilitaries began counter-attacks. In 1972 the British government suspended the Northern Ireland legislature and imposed direct rule. From that point on, low-intensity warfare was the norm.

### *The Good Friday Agreement*

Over time both the British and Irish central governments began to see the Northern Ireland conflict as a liability and source of instability, as opposed to simply an opportunity to defend their respective factions. The “Anglo-Irish Process” in the early 1980s culminated in the Anglo-Irish Agreement of 1985, under which both countries agreed to co-operate in the interests of peace. Crucially, any change in the constitutional status of Northern Ireland would only come about with the consent of its people.

From the late 1980s onward, the political factions in Northern Ireland, importantly including Sinn Féin as the political wing of the IRA, began pursuing a negotiated settlement, with participation from the British, Irish and American governments (McGarry & O’Leary, 2004). Two ceasefires between opposing paramilitary factions in the early 1990s were ultimate failures, but represented a peace process that was gaining momentum.

This process culminated with the Good Friday Agreement in 1998, which was supported by the British government, the Irish government and most Northern Ireland political parties (with the notable exception of the Democratic Unionist Party), and approved by a public referendum. The Agreement included a commitment to decommissioning of paramilitary groups, the establishment of a Northern Ireland legislature with a power sharing executive and devolved legislative powers, and numerous other institutions designed to ensure the end of violent conflict.

### *Subsequent Developments*

While there have been significant challenges since the Good Friday Agreement, it is generally seen as the turning point that marked the end of the Troubles. When power sharing in the Legislature broke down in 2002, the UK government again suspended it and once again implemented direct rule. Intermittent political violence continued to occur, including internecine conflict between fringe and mainstream factions.

Despite another round of Stormont elections in 2003, a government was not formed, and the political parties and central governments returned to the negotiating table. This resulted in the St. Andrew’s Agreement of 2006, in which Sinn Féin accepted the legitimacy of the Police Service of Northern Ireland and a renewed commitment to power sharing, after which the British government ended direct rule and a power sharing government was again formed, and has functioned since then.

Most recently, the Hillsborough Agreement of March 2010 began the devolution of policing and justice issues, which was previously the most difficult issue on which to find political consensus. Notably, the British Conservative party, which could form government in the next election, supported this agreement (McDonald, 2010).

## **Recommendations**

The implementation of Northern Ireland’s peace process has produced mixed results. This paper sets out to take stock of the situation in Northern Ireland 12 years after the Good Friday Agreement. Each chapter considers whether features of the agreement should be retained, replaced or supplemented over the next decade. Their recommendations are intended to consolidate the peace and nurture a culture of power

sharing.

The meta-theory supporting these recommendations is the need to “normalize” some spheres of public activity, while leaving sectarian power sharing at the political level untouched. While this might suggest a shift toward integrationist strategies, the authors find that managing differences equally has been more effective than artificially eliminating them. It is unrealistic to wish these divisions away. The authors contend that the best way to achieve an impartial state is to create a state that is representative.

Bureaucratic independence and the professionalization of the civil service is a major theme that emerges in the report. The Westminster tradition includes a civil service that can act as a buffering or moderating influence on the political executive. The norms of bureaucratic independence serve as a check on the excessive politicization of policymaking by politicians. The recommendations address specifically the concern of creating an impartial civil service that equally represents the communities.

In making recommendations the authors have remained mindful of their political feasibility. In the context of Northern Ireland where success is occurring, radical change is not saleable. Most of the recommendations are incremental, and build on or focus effort in the direction of progress made to date. Careful consideration is given to the recommendations’ impediments to success and ways to overcome them. They have been revised, as appropriate, to address the suggestions and critiques raised at the symposium.

Each of the chapters more thoroughly explores the context of each feature and provides analysis of competing options in support of the recommendations. In summary they are as follows:

#### *Devolution and Northern Ireland’s Constitutional Future*

1. Using Urwin’s typology (1998), the strategy by which the conflict in Northern Ireland will be best contained is by ‘management through politics’.
2. In keeping with our commitment to ‘management through politics’, in the event of devolution being suspended, as it was between 1972 and 1998, we would advocate a system of ‘shared sovereignty’ as opposed to direct rule from Westminster.
3. Devolution is clearly the best constitutional option for Northern Ireland in the coming decade.
4. With regards to legislative powers, we consider the current split between reserved and devolved powers to be practical. That is, we see no reason to further legislative devolution to Stormont in the next 10 years.
5. The current funding arrangements for the Northern Ireland Assembly are highly unsatisfactory. The Barnett formula provides for a block grant funding mechanism for Stormont. This results in a lack of democratic and economic accountability as well as a lack of economic efficiency, as ministers are not accountable for spending decisions to the electorate and have no incentive to behave in a more efficient manner. An independent commission of experts should be established immediately to evaluate options for fiscal devolution in Northern Ireland. With fiscal powers, political debate would likely centre on competing visions of the way in which public money is best spent in important policy areas such as education and health. Fiscal devolution thus has the potential to alter the focus and

‘normalize’ politics as a whole in Northern Ireland.

*The Executive*

6. In 2017, or after two electoral cycles, an independent panel of experts should be convened to review the manner in which the Executive Council has worked since the onset of devolution. Its purpose would be threefold: first, to conduct a democratic audit of the Council; second, to review the operational capacity of the Council; finally, to present a series of recommendations for the consideration of the Assembly.
7. The Northern Ireland Executive should provide for a compulsory six-week consultation period between an election and the first day of Assembly. Doing so would: (i) provide for the negotiation of a legislative programme for government; (ii) facilitate negotiations for ministry selection; and (iii) enable the First Minister, deputy First Minister and other ministers to be fully briefed and prepared on what awaits them in government, thereby ensuring a smooth transition to government.
8. Opposition parties in the Northern Ireland Assembly that are not represented in the Executive Council should be provided with funding which would be directed towards research, public consultation and administrative support. In addition, greater joined-up scrutiny should be encouraged in the cabinet committee system for such assembly items as the Programme for Government and the budget. No official opposition party should be identified by such provisions.

*A Bill of Rights*

The authors firmly support the notion that any society should have a robust system of checks and balances to protect the human rights of its inhabitants. In the context of Northern Ireland, the proposals made by the Northern Ireland Human Rights Commission are, to a large extent, practical and viable. However, the following recommendations ought to be considered in the context of the Bill of Rights debate:

9. Convention Rights should not be included in the Bill of Rights.
10. Any publicly supported Supplementary Rights should be entrenched, regardless of whether they are unique to Northern Ireland. There is no need to wait for the UK to implement its own legislation in non-convention areas.
11. Judges should be allowed to hold invalid those Northern Ireland statutes which conflict with the Bill of Rights; in the case of Westminster statutes, the remedy should be a declaration of incompatibility.
12. The UK Supreme Court should continue to be the domestic court of last resort for Convention Rights
13. The Judicial Committee of the Privy Council should be the court of last resort for Supplementary Rights, with the requirement that ad hoc Irish, Northern Irish or international judges should sit on such claims.
14. The Judicial Appointments Commission should continue its work in appointing judges that reflect the diverse Northern Irish community.

15. The JAC's mandate should be expanded to include all judges in Northern Ireland, including the Court of Appeal. No judicial appointment should be the sole prerogative of the Office of the First Minister and Deputy First Minister (OFMDFM), nor the British Prime Minister.
16. The UK government should commit to not amending the Bill of Rights without super-majority support from the Legislative Assembly, including among the two political groups individually.
17. The Republic of Ireland should commit to upholding the Bill of Rights in any jurisdiction it has over Northern Ireland, ideally in a bilateral treaty with the UK. It should also sign and ratify the international conventions underlying the Bill of Rights.

#### *Policing and the Administration of Justice*

18. Cross-community consensus in the appointment of the justice minister should be maintained in the short term given the troubled history associated with capture of the post by unionists. However a concession should be negotiated with any party that would have been entitled to an additional post under the d'Hondt system as to minimize emergent conflict and the perception of injustice with regard to the new process. When trust improves sufficiently and it is demonstrated that further abuse cannot take place, the appointment process should be modified to conform with the d'Hondt system as is used for other posts on the executive.
19. Positive discrimination should be expanded from police officers to the entire justice portfolio until organizations are proportional to the national makeup of the community. Positive discrimination should apply both in hiring and promotion. In order to facilitate this recommendation, nationalists in turn, must be prepared to negotiate a concession to unionists.
20. The democratic deficit in oversight and accountability should be addressed during devolution. An integrated ombudsperson for the justice portfolio should be created.

#### *Transitional Justice*

21. Maintenance of the power sharing structure generated by the Good Friday Agreement and reaffirmed in the St Andrews Agreement ought to be considered as an absolute priority as such arrangements provide a stable background and context in which future transitional justice mechanisms can operate.
22. The creation of a Truth Commission, which would be tasked with systematically evaluating instances of past violence and having a mandate to try to draw together a larger macro-view of the past and the legacy of the conflict, is not something that we support. We feel that such a step would accentuate partisan divisions in the Assembly and only serve to alienate the Northern Irish public as there is little support for this largely elite driven mechanism to come into existence. Instead, for the time being, time and effort should be directed towards generating greater public support for the existing institutions in Northern Ireland.
23. Instead of a Truth Commission, a viable next step should be to focus on supporting the 'bottom-up' and community focused efforts at restorative justice, which have

already begun, with an aim to expanding their mandate beyond their original community environments.

23. There should also be an aim to pursue more narrowly focused event or institution specific enquiries along the lines of the Historical Enquiries Team and the Stevens 3 Report (2003) as a way of dealing with past acts of violence or oppression where appropriate.

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# 1. DEVOLUTION AND NORTHERN IRELAND'S CONSTITUTIONAL FUTURE – THOMAS MAIDWELL

The purpose of this chapter is to assess what represents the best constitutional settlement for Northern Ireland in the immediate future. The chapter will begin by outlining the manner in which states respond to ethno-national demands in divided societies. Urwin (1998) argues that management through control, management through largesse and management through politics represent the three possible strategies that states may use to counter ethno-national division. In the context of Northern Ireland, we will argue that management through politics is clearly the best strategy by which to respond to the conflict. The chapter then assesses in depth the provisions made by the Good Friday Agreement and the Northern Ireland Act 1998. This will be the basis by which the various constitutional options on offer will be assessed. The questions to be asked include: does this represent a correct division of powers? Would the devolution of other legislative competences allow the Northern Ireland Assembly to meet up to the challenges posed by the conflict in a more effective way?

Out of the constitutional options that we assess, we feel that devolution-max should be the constitutional option that Northern Ireland works towards in the long term. We view the split between devolved and reserved legislative powers as sensible and correct. We feel that gradual fiscal devolution has the potential to refocus the political debate in Northern Ireland in a manner which is conducive to a lasting and durable peace. With fiscal powers, the debate in Northern Ireland would likely focus on the efficient and effective use of public money as opposed to political debate which is focused primarily on debate and competing visions of where Northern Ireland's constitutional future should lie. As such, we recommend that a commission of independent experts on territorial finance be established immediately in order to identify fiscal powers that could be devolved to Stormont, which would in turn present recommendations to the United Kingdom (UK) government, which could then devolve the appropriate powers as it sees fit.

## **State Responses to Ethno-National Demands in Divided Societies**

In *Modern Democratic Experiences of Territorial Management*, Urwin (1998, p. 87) acknowledges that “one of the difficulties faced by comparative analysis in assessing regime responses [to ethno-national demands], is that each, far more so than in most areas of political life, is a product of its specific context.” That is, any comparative analysis of how central governments respond to the demands of ethno-national groups is made difficult by the role that specific and sometimes unique circumstances play in shaping the dynamics of the conflict in question. Nonetheless, Urwin (1998) created a typology which outlines three possible approaches that central governments can take when responding to ethno-national demands: management through control, management through largesse and management through politics.

The 1960s produced a series of political earthquakes in the UK which led some to deduce that the whole concept of the Union was a myth, as within the state boundaries, there lay plural identities (Carmichael, 1999, p. 135). The rise of the Scottish National Party, which culminated in the election of its first MP in the 1970 UK general election, brought the constitutional futures debate to the fore of British politics during that period. As noted by Carmichael (1999, p. 134) “until the 1960s, the conventional wisdom was that the drive for modernization would neutralize the territorial dimension

as an area of concern or a source of potential conflict within the state by vitiating ethno-national claims.” Indeed, Connor (1990, p. 15) asserted that during that period, “ethno-nationalism was viewed as little more than an epiphenomenon that became active as the result of relative economic deprivation that will dissipate with greater egalitarianism.” It was widely held that the notions of universal citizenship, equalization of rights and obligations of all individuals, and homogeneity would result in the existence of “Jacobin-like centralising states” which would all but absorb distinct ethno-national identities and cultures (Urwin, 1998, p. 82).

According to Urwin (1998), the typical responses taken by central governments, prior to the upsurge of ethno-national political movements in the 1960s, was to exercise *management through control*. One such means of exercising *management through control* was to dismiss outright and even ridicule ethno-national demands, as was the approach taken by the UK government in response to Scottish and Welsh nationalism in the first half of the twentieth century. Urwin (1998, p. 87) alleges that there has been a history of central governments blankly refusing to recognize minority group needs or demands. This is most evident in the historical treatment of minority languages following the establishment of standardised national education systems. The experiences of minority languages, for example, in Belgium, France and the UK are testimony to this. Put simply, “when faced with an upsurge in ethno-nationalism, the most immediate short-term, almost gut, reaction by Western regimes was to perceive it is a potential threat, and to adopt some form of rejectionist policy” (Urwin, 1998, p. 87).

As the demands made by ethno-national groups are often cultural and economic in nature, a further manner in which a state can respond is by *management through largesse*. Central governments may pursue a range of economic strategies in order to satisfy demands made by such groups. Urwin (1998, p. 91) claimed that regional policy was something of a standard element in the political repertoire of state practice. As stated by Urwin (1998, p. 90), “economic concessions may be costly in terms of money and future financial commitment, but in the long run they may entail less risk to the territorial imperatives of the state.” Central governments, particularly in the West, were more likely to use economic policies as a response, with the most common and widespread strategy being to expand and increase redistributive policies to a particular region. Indeed, the Barnett Formula, which determines annual levels of public spending across the UK, could be regarded as a tool by which to keep Scotland in the Union, as the formula provides for higher levels of public spending there than it does in England, Northern Ireland and Wales. Indeed, as noted by Urwin (1998, p. 91), taking away such economic incentives is “rarely considered only in the context of being a nostrum for ethno-national political agitation.”

Urwin (1998, p. 90) notes that public funding could also be used to realise specific cultural and linguistic goals; the establishment of a Welsh language channel by the UK government being just one example of such a concession. Yet, economic managerial strategies will “always be unsatisfactory where questions of roots, identity and the collective community loom large” (Urwin, 1998, p. 93). That is, in some cases, where a specific ethno-national group sees itself as fundamentally distinct and unique in character, the claims made will be inherently political and require a political, not economic response.

The final approach to territorial management in divided societies is referred to by

Urwin (1998) as *management through politics*. The list of ethno-national territories receiving or having been offered political concessions in recent years is a long one: the so-called ‘Celtic fringe’ of the United Kingdom, Quebec, Catalonia and the Basque territories to name but a few. Political strategies available to states may be reviewed in the context of two broad alternatives. Central governments can facilitate either group *or* territorial accommodation within existing boundaries. Federalism is the most popular form of territorial accommodation whilst devolution is another possibility. Reflecting on the sheer variety of territorial arrangements available to states, Urwin (1998, p. 95) contends “the spectrum of territorial options available to regimes ranges from limited administrative decentralization to...constitutional change and full-blown federalization across the whole of the state territory.”

It is worth noting that federalism or devolution can be asymmetrical. That is, specific regions may be granted powers and given competences that other regions do not have. For example, Scotland has a parliament with both substantive legislative and fiscal powers, whilst Wales has an assembly with fewer powers and England has not been given a devolved parliament. Group accommodation does not necessarily involve a geographical division and devolution of power. As stated by Urwin (1998, p. 93) “it is a kind of consociational approach involving a sharing or duplication of public goods – power, jobs, benefits – among conflicting ethno-national groups.” If a power sharing agreement is to work and bear fruit “competing ethno-national groups must be prepared to bargain and work for accommodation. They must not demand or expect the absorption of their rivals into their own culture and value system” (Urwin, 1998, p. 100).

### **The Good Friday Agreement and Northern Ireland Act (1998): Devolved Government is restored**

#### *Devolution Re-established: The Good Friday Agreement 1998*

The Good Friday Agreement, which was signed in Belfast on April 10<sup>th</sup> 1998, provided the framework for the return of devolved government to Northern Ireland for the first time since the collapse of the power-sharing executive that emerged in 1974, and using Urwin’s typology, was clearly an example of *management through politics*. The Good Friday Agreement was part of the wider constitutional change agenda that the Labour government, led by Tony Blair, embarked upon after returning to power following 18 years of Conservative rule: Scotland and Wales were also granted devolution settlements, albeit on very different terms. That is, asymmetrical devolution was the name of the game in the late 1990s. The Good Friday Agreement was also, in many respects, very different to the devolution settlements agreed to elsewhere in the UK.

Using Urwin’s (1998, p. 100) typology, the devolution settlements in Scotland and Wales were territorial; that is to say that the agreements sought to bring governance closer to the people. In Northern Ireland, the provisions of the Good Friday Act combined both territorial *and* group strategies. As Carmichael (1999, p. 147) acknowledges, “it is territorial insofar as the UK is experiencing the devolution and Northern Ireland might expect comparable treatment. It is group-orientated insofar as Northern Ireland’s ethno-national division demands an accommodation spanning both communities.”

After an overwhelming majority of Northern Irish voters endorsed the provisions of the Good Friday Agreement at a referendum on May 23<sup>rd</sup> 1998, and voters in the Republic of Ireland agreed to change their constitution in line with the Agreement on the same day, and devolved government returned to Stormont on December 2<sup>nd</sup> 1999. The actual Agreement stresses the need for a consensual approach to managing the devolution settlement, by recognising that a durable and lasting political solution rests on a three-stranded approach to managing Northern Ireland's geopolitical relationships: Strand One – reconciling internal relations between Unionists and Nationalists in Northern Ireland; Strand Two – bilateral relationships between Northern Ireland and the Republic of Ireland; Strand Three – multilateral relationships between Northern Ireland, the UK and the Republic of Ireland (Campbell et al, 2003, p. 318).

Any notions that the Good Friday Agreement would lead to a lasting peace, based on principles of power-sharing, were seriously undermined when the UK Government suspended the devolution settlement on October 14<sup>th</sup> 2002. The return to direct rule was triggered by the withdrawal of the two main unionist parties (the Democratic Unionist Party and the Ulster Unionist Party) from the Northern Ireland Executive after it was alleged that a number of employees of the largest nationalist party (Sinn Féin) had been gathering intelligence on behalf of the Irish Republican Army (IRA). Between 2002 and 2007, British Prime Minister Tony Blair and his Irish counterpart Bertie Ahern, failed to successfully negotiate an agreement which would see devolution restored to Northern Ireland. The St Andrews Agreement, which was reached in late 2006, did however provide a framework by which devolved governance could return to Northern Ireland. On 8<sup>th</sup> May 2007, direct rule over Northern Ireland by Westminster officially ended as devolution was re-implemented.

#### *The Northern Ireland Act 1998: A Closer Look*

The Northern Ireland Act 1998 classified 3 categories of legislative powers; excepted, reserved and devolved. Schedule 2 of the Northern Ireland Act 1998 specified those excepted matters – powers reserved to Westminster which will not be transferred to the Northern Ireland Assembly apart from by primary legislation (an act of the UK Parliament). Schedule 3 of the Northern Ireland Act 1998 detailed those reserved matters – policy areas currently reserved to Westminster which could be transferred by Order to the Northern Ireland Assembly at a later date providing there is cross-community support. As was the case in the Scotland Act 1998, those powers not explicitly listed as excepted or reserved, were devolved to Stormont through the provisions of the Northern Ireland Act 1998. Table 1 details the division of powers.

Table 1 The Provisions of the Northern Ireland Act 1998

Excepted matters	Reserved matters	Devolved matters
The Crown; parliamentary and assembly elections; international relations; defence; honours; nationality; national taxation; appointment and removal of judges; registration of political parties; coinage; national security; nuclear security; fisheries	Civil aviation; navigation; the Post Office; disqualification from membership of the Assembly of Northern Ireland; emergency powers; civil defence; consumer protection; telecommunications	Health; social services and public safety; education; agriculture and regional development; enterprise, trade and investment; environment; culture, arts and leisure; learning and employment; regional development; social development

Since the Good Friday Agreement was signed in 1998, there has been much dispute over whether or not Northern Ireland's Assembly should assume legislative responsibility for policing and justice powers. Indeed, the Agreement itself identified these as powers that should be considered for devolution at some point in the future, with the approval of political parties. The St Andrews Agreement proposed that Stormont should assume control of policing powers by 2008. There was clear tension between Sinn Féin and the Democratic Unionist Party on this very issue, with the former describing the transfer of policing and justice powers as a priority, whilst the latter provided some resistance to the devolution of these powers.

However, after months of deadlock, in March 2010 the Northern Ireland Assembly voted overwhelmingly in favour of devolving policing and justice powers to Stormont, which represents the last act of the Good Friday Agreement 1998. The Assembly will assume responsibility for these matters on April 12<sup>th</sup> 2010. Under the arrangements, the post of justice minister will be created on the Northern Ireland executive. The minister's department will take over responsibility for many functions and agencies currently controlled by the London-based Northern Ireland Office. As well as taking over responsibility for the police, the new ministry will oversee bodies such as the Northern Ireland Prison Service, the Public Prosecution Service, the Court Service, the Probation Board and the forensic science service. The justice minister will have to be elected by a cross-community vote in the Assembly.

### **Contingency Arrangements: Constitutional Options Should Devolution be suspended**

Since the re-establishment of devolution in 2007, Northern Ireland has been characterised by relative peace and stability. This is testament to both the comprehensiveness and effectiveness of the Northern Ireland Act 1998. However, looking at the past four decades, it is clear that this peace may only be temporary. It is plausible to envisage a situation in which the current devolution arrangements *may* be suspended. When evaluating the constitutional options for Northern Ireland's future, it is

important to take this into account. As such, in the paragraphs below we outline two possible constitutional options for Northern Ireland should such a situation arise.

### *Direct rule from Westminster*

As was stated earlier in the chapter, between 1972 and 1998, Northern Ireland was governed under direct rule from Westminster. For the purpose of assessing this option, it is worth outlining how these arrangements worked in practice. Following the prorogation of the Stormont in 1972, the legislative and executive powers of the political institutions of Northern Ireland were held by the Northern Ireland Office (NIO), a newly created UK Government department based in Whitehall and Belfast. Direct rule also resulted in the creation of a Cabinet post of Secretary of State for Northern Ireland, which directed the work of the NIO. During this period, the majority of Northern Ireland's primary legislation was brought into effect by means of Order in Council, with Direct Rule renewed annually.

Direct Rule was viewed by successive UK Governments as a temporary solution. The commitment of the UK Government to re-establish a devolved government in Northern Ireland was demonstrated by its role in securing unionist and nationalist support for the provisions of the Sunningdale Agreement in 1973, which led to the establishment of a power-sharing cross-community Northern Ireland Executive. Although this agreement collapsed only months later, and Westminster again assumed responsibility for the governance of Northern Ireland, it demonstrated, as noted by Carmichael (1999:145) that direct rule was seen as a "means of governing pending a durable and credible settlement." Even the Conservative Party, which governed for most of the period of Direct Rule, and was staunchly against devolution to Scotland and Wales, was in favour of a return to devolved government in Northern Ireland, so long as the conditions and circumstances were conducive to a lasting peace.

These arrangements resulted in a clear 'democratic deficit' in Northern Ireland; the system of public administration which developed in the wake of Stormont prorogation lacked a regional tier of government and the subsequent democratic input. The Secretary of State for Northern Ireland assumed responsibility of all major functions of the government, with a large number of executive quangos, advisory boards and tribunals forming an elaborative administrative system. In 1985, the British and Irish Governments signed the Anglo-Irish Agreement which was an attempt to end the troubles in Northern Ireland. Although the treaty did not bring an immediate end to the conflict in Northern Ireland, it did, as is acknowledged by O'Leary (1997:668) create "the conditions for the paramilitary cease-fires of 1994-96, and the more hopeful prospects for a political settlement and interethnic peace that remain[ed] features of the late 1990s."

This period was the bloodiest in Northern Ireland's history. Thousands of individuals lost their lives as a result of the violence that continued to escalate following the suspension of devolution. Direct rule from the UK government completely alienated republicans from the political process and acted as a catalyst for intensified ethno-national violence. The image of Westminster directly ruling over Northern Ireland underlined the sectarian divisions which typified the politics of Northern Ireland over the following four decades. In keeping with our commitment to management through politics, and in an attempt to preserve the consociational principles of cross-community working and consensual politics, should devolution be suspended, we feel that direct rule

from Westminster must be avoided at all costs. Such an approach to managing the conflict would undermine any progress which has been made since the Good Friday Agreement and repolarise the politics of Northern Ireland much in the same way as it did between 1972 and 1998.

### *Shared Sovereignty*

Mitchell and Wilford (1999, p. 276) argue “since the core of the problem is a clash of identities in which traditional partisans assert that Northern Ireland has to be exclusively British or exclusively Irish, then the only way out of this sovereignty trap is for Northern Ireland to become simultaneously British and Irish.” Put simply, another possible answer to the constitutional question in Northern Ireland may be for sovereignty to be shared by both the British and Irish governments. O’Leary and McGarry (1993) make the case for a system of essentially consociational arrangements (power sharing, proportionality, and community autonomy), within the context of joint British and Irish sovereignty. Some of the most interesting aspects of O’Leary and McGarry’s (1993) proposal are as follows:

- Constitution of Northern Ireland: Britain and the Republic of Ireland become co-sovereigns of the region, and citizens of Northern Ireland are free to choose British or Irish dual citizenship. Both the British monarch and the Irish president would be heads of state.
- Shared Authority Council of Northern Ireland (SACNI): Consisting of five members, three elected through STV in Northern Ireland, and two appointed by the British and Irish governments, this chief executive body would appoint ministers to run government departments and would have ultimate responsibility for defence and security.
- Assembly of the Peoples of Northern Ireland: An extensive committee structure would be established to closely watch and scrutinise the work of government departments. It would elect a Speaker and Deputy Speaker, one of which would be unionist, the other nationalist. Their central roles would be to determine whether or not any bills threatened national or religious rights or freedoms. If either official so finds, he or she can ask for a ruling by the Supreme Court, which would also be proportionally composed.

We regard this option as preferable should devolution be suspended once more. Unlike any prospective arrangements in which Northern Ireland was governed directly from Westminster, this arrangement would demonstrate further commitment to the consociational principles which have worked fairly well since the re-establishment of devolution in 2007. That is, we regard that central to a lasting peace in Northern Ireland is a commitment to cross-community working, consensual politics and proportionality in public institutions. An approach based on the principles outlined on the previous page would reaffirm and underline a commitment to such values. Unlike direct rule, shared sovereignty would not necessarily serve to alienate either unionists or nationalists. A shared sovereignty approach would demonstrate an appreciation of the fact that a lasting peace in Northern Ireland will be most likely secured through continuous involvement of both the British and Irish governments in the political process.

## Looking Towards the Future: Alternative Constitutional Options

### *Option 1: Maintaining the Status Quo*

Northern Ireland continues to operate on the basis of the provisions made by the Northern Ireland Act 1998. The devolution of policing and justice to Stormont in April 2010 represents the last act of the Good Friday Agreement 1998.

### *Option 2: Devolution-Max*

In *The Dynamics of Devolution*, Trench (2005, p. 5) delineates what a constitutional option referred to as 'devolution-max' would consist of in the context of Northern Ireland. His proposals are outlined in Table 2.

Table 2      The Dynamics of Devolution

	Minimal	Maximal
Devolution	Northern Ireland Assembly with legislative but no tax raising powers	Northern Ireland with legislative and tax raising powers

Bogdanor (1999, p. 235) contended "finance is the spinal cord of devolution for it is the financial arrangements which will largely determine the degree of autonomy enjoyed by the devolved administrations."

The key difference between a devolution settlement that is maximal rather than minimal is that in the former, the devolved administration would have significant fiscal powers, whilst in the latter no such powers would be granted. Devolution-max is a term more frequently associated with Scotland and those who call for a new and improved settlement in which the Scottish Parliament would receive additional legislative competences as well as substantive tax raising powers.

Any changes to the funding arrangements of the devolved administrations across the UK would almost certainly result in an end to the Barnett Formula. The Barnett Formula is used within the course of an annual public expenditure survey to determine levels of public spending across the devolved administrations of Northern Ireland, Scotland and Wales to reflect changes in public levels allocated to England, England and Wales or Great Britain as appropriate. The formula ensures that a particular change in public expenditure in one geographical territory leads to a change in public expenditure in another. A change in levels of public expenditure in England on matters that are transferred to the devolved administrations will lead to a change in public expenditure there, proportionate to the size of the population. Indeed, one of the most heavily criticised aspects of the Barnett Formula is that it is not driven by a needs based assessment of public expenditure.

The *Final Report of the Commission on Scottish Devolution*, a UK Government-led initiative to review the devolution settlement and recommend any changes to the powers of the Scottish Parliament 10 years after devolution was delivered, is worth bringing into the debate for two reasons. First, it draws attention to

a number of substantive weaknesses inherent in the current funding arrangements for devolved administrations in the UK. The Commission alleged that the block grant funding mechanism results in both a lack of financial accountability and a lack of economic efficiency. Second, the final recommendations of the Commission on Scottish devolution, which are widely expected to be legislated on and devolved before the 2015 Scottish election, ought to be outlined as they may well provide an initial framework for fiscal devolution in Northern Ireland. The Commission recommended that the Scottish Parliament ought to be given substantially greater control over the raising of revenues that make up the Scottish budget. This would be done through sharing responsibility for setting income tax rates with the UK Government, and the full devolution of less significant tax powers (Air Passenger Duty, Landfill Tax, Aggregates Levy and Stamp Duty Land Tax) to the Scottish Parliament (Commission on Scottish Devolution, 2009, pp. 111-112).

Whilst there is much debate on fiscal devolution in Scotland, such a clamour does not exist in the context of Northern Ireland. Having said that, the Institute for Public Policy Research's paper *Fair Shares: Barnett and the Politics of Public Expenditure* (2008) demonstrates support for fiscal devolution to Northern Ireland. The arguments made in favour of fiscal devolution largely stem from the perceived inadequacies of the current system. As Stormont is given a block grant from Westminster no matter what it does, Maclean et al (2008) allege that the manner in which public money is spent in Northern Ireland is inefficient. If the Northern Ireland Assembly was given tax raising powers, the more incentives it would have to spend its money in an efficient way. Put differently, such arrangements would give politicians incentives to encourage growth; to tax and spend in a responsible manner; and it would also enhance the accountability and transparency of the Assembly as politicians would have to answer for their economic choices at the polls.

Maclean et al (2008, pp. 30-34) outline three alternative means of funding the devolved administrations across the United Kingdom. These are as follows:

- A new needs-based equalization system – like the Barnett formula, this would provide a block grant to the devolved administrations, but would be based on an assessment of need.
- Full fiscal autonomy – under such arrangements Stormont would assume revenue raising responsibility, which would increase its efficiency and accountability and ease political tensions by ensuring that the devolved administration was not dependent on a block grant from the UK Government as a means of funding.
- Hybrid model – combines the efficiency and accountability gains associated with fiscal autonomy with the equity of a new needs-based grant system. Stormont would be funded by a combination of devolved and assigned tax revenues. There would also be an equalization mechanism to ensure a rough parity in levels of public spending with other areas of the UK.

Out of those discussed above, Maclean et al (2008) argue that a hybrid model would be the best choice for the devolved administrations across the UK: its strength is that it “combines the efficiency gains of greater fiscal autonomy with the equity of a needs-based grant”, and the authors add that the “Calman Commission [Commission on

Scottish Devolution] and any further reviews of territorial finance in the UK, look at this option.” Interestingly, the authors note that hybrid models have been shown to work in other countries characterised by deep ethno-national divisions. For example, Belgium operates under a hybrid model in which regional governments collect devolved tax revenues whilst an equalisation mechanism guarantees a level of parity in public expenditures across the regions.

In the context of an ethno-nationally divided society, there is perhaps a more pressing reason to support fiscal devolution. The devolution of tax-raising powers has the potential to normalize the politics of Northern Ireland. If Stormont were to be responsible for raising most, if not all, of the revenue that it spends on the provision of public services in Northern Ireland, the political debate would surely centre on competing visions of how public money ought to be spent. That is, with fiscal devolution, the issues that both the political parties and general public would be most concerned with would be related to the efficient spending of public money in significant policy areas such as health, education, and so on. Fiscal devolution has the potential to refocus the political debate in Northern Ireland: instead of political debate which centres on identity and competing for Northern Ireland's constitutional future, the debate would likely shift to valence issues such as the performance of the Northern Irish economy, or competing visions of the amount of public money to be invested in hospitals, schools and infrastructure.

Put simply, fiscal devolution would not only enhance democratic and economic accountability, efficiency and transparency, it may also alter the politics of Northern Ireland in a profound way conducive to a lasting and durable peace. As such, despite the need of Stormont to develop legislative competences in devolved policy areas, we support the immediate establishment of an independent commission, made up of experts on territorial finance, to consider which tax powers could be devolved to Stormont over the next 12-18 months. We also believe that a gradualist approach should be taken to fiscal devolution. That is, whatever the recommendations of the prospective commission would be, it is our view that a second commission should be established in 2015 to review the settlement at that time with a view to strengthening the fiscal powers of Stormont. As time progresses, we expect the Northern Ireland Assembly to acquire new fiscal powers on a hybrid model such as the one proposed by Maclean et al.

### *Option 3: Independence*

In *The Case for Negotiated Independence*, Moore and Crimmins (1990, p. 243) argue that internal accommodation will be feasible once London and Dublin are removed from the conflict. However, Mitchell (1999) disputes this, and claims that arguments in favour of independence overestimate the exogenous roots of the conflict and underestimate the internal basis of antagonism. Mitchell (1999, p. 275) contends that “even if an independent Northern Ireland were financially viable, which is doubtful, it would not be stable.” The prospects for co-operation in such a situation look doubtful: given that the communities in Northern Ireland have shown little willingness to share power and authority in the past, there is no reason to believe that they would in the context of an independent Northern Ireland. With independence, stability and cohesion would be lacking as the minority would fear majority tyranny, unionists would lose their British links, and republican paramilitaries would be encouraged by the belief that with

British forces gone, their goals would now be realisable. In short, as Mitchell (1999) asserts, the likely consequence of independence in Northern Ireland would be ethnic conflict, not cross-community cooperation.

### **Final Recommendations**

*Management Through Politics as the Way Forward.* Using Urwin's typology (1998), the strategy by which the conflict in Northern Ireland will be best contained is by 'management through politics'.

*Shared sovereignty as the preferable contingency plan.* In keeping with our commitment to 'management through politics', in the event of devolution being suspended, as it was between 1972 and 1998, we would advocate a system of 'shared sovereignty' as opposed to direct rule from Westminster.

*Devolution is appropriate and has the potential to deliver a lasting peace.* We believe that devolution is clearly the best constitutional option for Northern Ireland in the coming decade.

*No need for further legislative powers for Stormont.* With regards to legislative powers, we consider the current split between reserved and devolved powers to be practical. That is, we see no reason to further legislative devolution to Stormont in the next 10 years.

*Fiscal devolution: Northern Ireland's future.* We judge the current funding arrangements for the Northern Ireland Assembly to be highly unsatisfactory. The Barnett formula provides for a block grant funding mechanism for Stormont. This results in a lack of democratic and economic accountability as well as a lack of economic efficiency, as ministers are not accountable for spending decisions to the electorate and have no incentive to behave in a more efficient manner. We believe that an independent commission of experts should be established immediately to evaluate options for fiscal devolution in Northern Ireland. With fiscal powers, political debate would likely centre on competing visions of the way in which public money is best spent in important policy areas such as education and health. Fiscal devolution thus has the potential to both alter the focus and 'normalize' politics as a whole in Northern Ireland.

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## 2. BUILDING A CULTURE OF POWER SHARING: THE EXECUTIVE – JERALD SABIN

This chapter assesses the institutional and political success of Northern Ireland's Executive Committee (EC) in normalizing elite political relationships, encouraging the development of a non-sectarian bureaucracy, and producing optimal policy outcomes for the peoples of Northern Ireland. This chapter is grounded in the normative claim that the culture of power sharing introduced by the consociational design of Northern Ireland's political institutions must be strengthened and nurtured. These institutions, including the EC, have provided a space where unionists, nationalists, and others can govern peacefully while ensuring the mutual recognition of their national communities and sovereignty claims (McGarry & O'Leary, 2009, p. 34).

The last twelve years have not been politically easy for Northern Ireland. The implementation of the Belfast Agreement has been slow and punctuated by periods of political discord. Wilford (2010) argues that any "appraisal of devolution in Northern Ireland over the past decade has first to acknowledge that it has been a disjointed affair, punctured by the renewal of direct rule, sometimes briefly but on other occasions over a much more extended period" (p. 134).<sup>1</sup> As such, when the power sharing agreement seemed stressed to a breaking point, Northern Ireland's political institutions were suspended indefinitely. It was not until changes in the political and security context of the country—including the full decommissioning of the Provisional Irish Republican Army's (PIRA) weaponry in 2005—that devolution could be revisited and restored in May 2007 (Kerr, 2009; Wilford, 2010).

At the centre of these political institutions rests the Northern Irish Executive. Gripped by political dysfunction during the first period of devolution, the EC was not stabilized politically until after reforms were introduced by the St Andrews Agreement negotiated in 2006. The political compromises reached in that agreement mark a clear division between the instability and episodic nature of the first devolved period and the relative stability and productivity of Northern Ireland's political institutions since 2007.

For this turning point to occur, both institutional and political reform was needed. On the one hand, creating the circumstances for a functioning executive required more than the implementation of a consociational model of shared government. The EC also needed clear procedural protections that could facilitate its successful operation. Regrettably, the absence of procedural controls obstructed the formation of an executive and the implementation of a Programme for Government (PfG), resulting in a protracted political crisis (O'Leary, 2004). Following the implementation of the reforms contained in the St Andrews Agreement, however, the EC was able to find "its organisational feet" and adopt "a more mature, even trusting, approach to the management of its business" (Wilford, 2010, p. 151).

On the other hand, political actors also had to adopt a measure of maturity in their approach to devolution and power sharing. Political strife and distrust, at times fuelled by large personalities, had to be overcome by unionists and nationalists alike in order to maintain political and civic peace. The emergence in 2007 of the Paisley-McGuinness partnership—described in the media as the "Chuckle Brothers" for their warm and agreeable relationship—demonstrated that political cooperation is as

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<sup>1</sup> The first attempt to transfer devolved powers to Northern Ireland only lasted three months, from December 2, 1999 to February 11, 2000. From May 30, 2000 until October 14, 2002 devolution was attempted again, but disrupted by two twenty-four hour restorations of direct rule, before devolution was suspended indefinitely (Wilford, 2010). Devolution was finally restored in May 2007.

important to cultivating a culture of power sharing as institutional design (Kerr, 2009; Wilford 2009; Wilford 2010).

This chapter utilizes both perspectives in its assessment of Northern Ireland's Executive Committee. Indeed, it reflects Kerr's (2009) view that given enough time, the consociational model implemented in Northern Ireland has "provided the institutional framework within which a culture of power sharing can be nurtured and which enables unionists, nationalists, and others to peaceably inhabit the same contested space without recourse to political violence" (p. 219). Institutions alone cannot ensure a peaceful transition to a culture of power sharing—political humility and cooperation are needed as well. If the changes seen in the last twelve years are any indication, then Northern Ireland's consociational political and institutional arrangements will continue to facilitate peaceful governance of the country for the foreseeable future.

### **Purpose and Scope**

The purpose of this chapter is to assess the institutional and political success of Northern Ireland's Executive Committee in fostering a culture of power sharing. The assessment will be completed using three criteria, each of which is concerned with both the institutional and political features of the Executive.

First, to what extent does the Northern Irish EC encourage the normalization of elite political relationships? I will consider the EC's capacity to foster peaceful and productive political relationships between unionist and nationalist leaders. I will then evaluate the EC's effect in moderating unionist and nationalist political extremes and in encouraging the development of a common vision for the governance of Northern Ireland.

Second, does the institutional and political formation of the EC create a space for the development of a non-sectarian bureaucracy? I will consider whether the EC contains sufficient controls to enable this to occur, including whether it demonstrates the "cohesion, direction and a collectivist style" necessary to allow for this critical distance (Wilford, 2010, p. 144). The devolution of powers to Northern Ireland was designed to benefit all communities and interests, and ministries should not be co-opted by either unionists or nationalists for realizing their own agendas. Indeed, a fully non-sectarian bureaucracy may itself provide an institutional constraint on political discord between the two national blocs.

Finally, is the Northern Irish EC capable of delivering optimal policy outcomes for the peoples of Northern Ireland? This is perhaps the most difficult criteria to assess, and I will do so by considering the ability of the EC to put forward a cohesive PfG which sets out its goals, priorities, and policy directions. Trust in the devolved government will increase if the population sees an appreciable positive impact by government activity in their daily lives (Wilford, 2010). Until this occurs, however, it will remain an open question as to the success of the consociational model in Northern Ireland.

Using these criteria, I will argue that the EC should be retained with only minor adjustments. Institutionally, the EC was last reformed in 2007 and has only been in place for three years. Politically, adjustments in political strategy by both moderates and hardliners have taken time, and the overall shift to a more centrist approach on all sides has only just been realized. Indeed, the Northern Irish Assembly has yet to undergo a

general election and executive formation process since reforms were implemented in 2007. It is too early to recommend significant change. The EC should be allowed at least ten years of functional operation, or two electoral cycles, before a formal review and reform process could be initiated.

This chapter examines the first twelve years of the EC, and limits its consideration of possible trajectories and reforms to ten years in the future. A longer view is outside the scope of this assessment. This chapter adopts the view of McGarry and O’Leary (2009) presented in the introduction of this report that: “it is best to leave consociations to decay organically. Let the people change consociations within their own frames and rules”. (p. 69) Whether Northern Ireland eventually replaces its consociational Assembly and EC with a Westminster parliamentary system, as some have suggested, is beyond the ten year horizon used in this chapter (Wilford, 2010).

I will argue this chapter in five parts. First, I will outline the provisions contained in the Belfast Agreement for the creation of consociational political institutions in Northern Ireland. In doing so, I will demonstrate their potential to encourage a power sharing culture between unionists and nationalists. Second, I will examine the implementation of the EC during the first period of devolution. Here, I will assert that the disjointed and episodic nature of the implementation was the result of both institutional and political failings. Third, I will briefly outline the reforms introduced in the St Andrews Agreement and discuss how each was designed to address the dysfunction of the first Assembly and its executive. Fourth, I will review the performance of the EC since devolution was restored in 2007 and I will demonstrate how institutional and political reforms have ensured its relative stability and productivity. Finally, I will provide an overall assessment of the EC during the last twelve years and provide four recommendations to ensure its continued stability and operation for the next ten years.

### **The Belfast Agreement: Designing a Consociational Executive**

Northern Ireland’s Executive Committee can be understood as consociational in two ways. First, the EC incorporates and recognizes “multiple public identities” within its institutional framework, and enables identity groups to enter into a power sharing arrangement with a highly structured institutional environment (McGarry, O’Leary, & Simeon, 2008; McGarry and O’Leary, 2009). In Northern Ireland, these public identities take the form of national communities—that is, nationalists, unionists, and ‘others’ (McGarry and O’Leary, 2009). Institutions such as the EC enable both national communities to share power peacefully without fear of majoritarian dominance and control by either national group. Second, the Northern Irish EC fulfils the first of four key features of a consociational political system: executive power sharing (O’Leary, 2004). Both national blocs, unionists and nationalists, participate equally in governing the country. In addition, the EC fulfils the other three features of a consociational political system, including proportionality, communal autonomy and equality, and minority veto rights (O’Leary, 2004). Each of these consociational elements will be demonstrated in the discussion below.

The Belfast Agreement (hereafter, the Agreement) presented a set of democratic institutions designed with incentives to encourage power sharing and power division between unionist and nationalist blocs. As such, the Agreement (1998) proposed the

creation of 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” (1.1). This section will outline the central features of executive authority contained in the Agreement and relate their design to the development of a power sharing political culture in Northern Ireland.

The institutional design of executive authority in the Northern Irish Assembly can be divided into three categories: a) the dyarchy; b) ministers and committees; and c) shared governance in Northern Ireland. The Agreement’s approach to the design of these features demonstrates two key assumptions. On the one hand, the Agreement provides predominantly institutional solutions for the implementation of power sharing and assumes—or hopes—that institutional features alone will be sufficient to enable the creation of a culture of power sharing. On the other hand, the designers of the EC assumed the political cooperation of the Agreement’s signatories and the participants destined to inhabit the newly created executive.

### *The Dyarchy*

The Agreement established the positions of First Minister and deputy First Minister, who were to be “jointly elected into office by the Assembly voting on a cross-community basis” (1.15). O’Leary (2001) asserts that the cross-community voting requirement provided a strong incentive for unionists and nationalists to nominate candidates who were acceptable to the majority of the other community’s Assembly representatives. The Agreement was clear that both positions were charged with equal executive authority, including “dealing with and co-ordinating the work of the EC and the response of the Northern Ireland administration to external partnerships” (1.18). The Agreement locked both officials into their respective positions, and as they are assigned to the two largest parties based on their strength, each national bloc was guaranteed one of the positions (O’Leary, 2001).

The capacity and willingness of each official to set aside differences and cooperate in the execution of their duties was largely left to chance. The *Northern Ireland Act of 1998* (hereafter, the *Act*), reinforced the interdependence of the officials and the need for cooperation by requiring that “if either the First Minister or the Deputy First Minister ceases to hold office, whether by resignation or otherwise, the other shall also cease to hold office” (O’Leary, 2004, 264). As such, the institution could only take the political actors so far, with its success ultimately determined by those actors’ ability to cooperate and set aside their differences.

### *Ministers and Committees*

In addition to the First Minister and deputy First Minister, the Northern Irish EC was designed to have up to ten ministers.<sup>2</sup> These positions would 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” (The Agreement, 1998, 1.16). According to O’Leary (2004), the d’Hondt rule “means that parties get the right to nominate Ministers according to their respective

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<sup>2</sup> This was set out in the *Act*.

strength in seats, and there is no vote of confidence required by the Assembly. It also means that parties get to choose, in order of their strength, their preferred ministries". (p. 265) Both national blocs were represented proportionally in the EC's ministers and no individual portfolio could be dominated by a single party. The potential for change in the composition and form of the Executive exists with each electoral cycle and this represented a starting point for creating the space needed to foster a fully non-sectarian bureaucracy.

McEvoy (2006) argues that the "design for executive formation under d'Hondt evolved in line with proposals that would include the extremes rather than just the parties in the moderate middle" (p. 453). The British and Irish governments were seeking a comprehensive solution to power sharing that encapsulated the entirety of the unionist and nationalist movements—not just the palatable middle (McEvoy, 2006). Indeed, as McGarry (2004) suggests, excluding radical factions on either side could only result in more political violence and the destabilization of power sharing institutions.

Three additional features are of significance. First, the EC is a voluntary body in which parties are free to exclude themselves from the process of ministry selection and executive formation (O'Leary, 2001). Even if a party were guaranteed a position within the EC, the party is not obliged to take the position or positions. Therefore, far from being a mandatory "grand coalition", political actors must give their consent to participate in the EC (McGarry and O'Leary, 2009).

Second, the Agreement (1998) states that "Ministers will have full executive authority in their respective areas of responsibility, within any broad programme agreed to by the Executive Committee and endorsed by the Assembly as a whole" (1.24). While the Agreement appears to place ministerial responsibility within a larger structure of cabinet responsibility, this is not the case. Ministerial positions are guaranteed to a party and a particular minister can only be reprimanded or fired by their respective party. Under the executive design set out in the Agreement, ministers in the EC were able to operate independently of one another with only passing accountability to their own parties and leadership and not the EC or Assembly as a whole (Wilford, 2010).

Third, the Assembly enjoyed a set of statutorily created committees with "legislative, scrutiny, advisory, and consultative roles in relations to their associated departments" (Wilford, 2010, p. 140). These committees also had the ability to observe departmental budgets, consider secondary legislation, and initiate inquiries. These committees, while saddled with a considerable amount of responsibility, represented a strong check on executive power and were designed to be both a site of legislative innovation and executive oversight. As the Assembly was designed without an official opposition, the committee system was a necessary component for ensuring a measure of executive accountability (McEvoy, 2006; Wilford, 2001).

### *Shared Governance in Northern Ireland*

Finally, the Agreement sets out a vision for the shared governance of Northern Ireland. First, ministers were obliged to take a Pledge of Office and to guarantee "to discharge effectively and in good faith all the responsibilities of their office" (The Agreement, 1998, 1.23).<sup>3</sup> Second, the EC was charged with seeking to agree "each year,

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<sup>3</sup> This Pledge of Office was in lieu of an Oath of Allegiance to the Crown or the Union, signaling the bi-nationalism at the centre of the Agreement (O'Leary, 2004).

and review as necessary, a programme incorporating an agreed budget linked to policies and programmes...on a cross-community basis” (The Agreement, 1998, 1.20). No institutional protections were put in place to guarantee that either of these measures was followed, and there were few if any foreseeable political consequences given the relative security of political actors’ executive positions (Wilford, 2010). While the Pledge and programme for government provided an opportunity to present an image of cooperative power sharing, they also highlighted the political and national tensions resting beneath the surface.

The Agreement provided a foundation for creating a consociational assembly and executive in Northern Ireland. To ensure its full implementation, the Agreement included both institutional and political incentives for unionists and nationalists to participate. The next section will demonstrate, however, that these incentives proved incapable of securing the full cooperation of all parties to the Agreement. As such, negotiating the architecture of power sharing was more successful than Northern Ireland’s first attempt at devolution.

### **Stormont in Practice: 1999 – 2002**

Devolution to Northern Ireland occurred on December 2, 1999. From the beginning, the implementation of Northern Ireland’s power sharing institutions was fraught with risk and uncertainty. McGarry and O’Leary (2009) argue that this instability centred on “rival self-determination perspectives” (p. 35). Unionists maintained that the Agreement leaned too far in a nationalist direction, and that the Agreement was not a long-term solution but a step in a process towards ending the Union and unifying both Irelands (McGarry & O’Leary, 2009). Conversely, while nationalists were angered by Sin Féin’s (SF) temporary exclusion from the negotiation process of the Belfast Agreement, they were willing to set aside their doubts in order to realize the opportunity afforded to them under the new system of government (Farry, 2009).

The first Assembly election held in June 1998, returned the unionist Ulster Unionist Party (UUP) and the nationalist Social Democratic and Labour Party (SDLP) at the top of their respective voting blocs (Mitchell, 2001). The UUP could nominate the First Minister and was guaranteed three ministerial positions under the d’Hondt nomination system (O’Leary, 2004). The SDLP earned the position of deputy First Minister based upon their electoral results, and were also guaranteed three ministerial positions (O’Leary, 2004). These results led to a crisis of the executive formation process, the outcomes of which will be explored in this section.

#### *The Dyarchy*

Following the cross-community parallel consent procedure, the UUP nominated David Trimble as the First Minister and the SDLP nominated Seamus Mallon as deputy First Minister (Mitchell, 2001). This arrangement failed to work both institutionally and politically. First, the Office of the First Minister and Deputy First Minister (OFMDFM) was an administratively burdened ministry that lacked the manoeuvring capability to be a strategic centre for policy direction and elite political negotiation. According to Wilford (2010):

[T]o be effective in integrating and coordinating the Executive, the OFMDFM needed both coalescent leadership, a hall mark of

consociationalism, and a strategic focus: it possessed neither. The sheer number of responsibilities allocated to the OFMDFM frustrated any strategic potential it may have commanded (p. 187).

Instead of being a centre for strategically guiding the government's direction, the OFMDFM became a sprawling department with approximately four hundred public servants (McGarry & O'Leary, 2009). The department was too large to be effectively managed by two individuals still learning to trust one another. As one observer close to the EC stated: "it had far too much ministerial business to do: it couldn't devote itself to strategising and coordinating the Executive. We were not functioning as a department of the centre, in fact it was dysfunctional". (Wilford, 2010, p. 187)

Politically, the arrangement functioned poorly. Wilford (2010) notes that in Mallon's view, the root of the dysfunction was Trimble's inability to commit fully to the Agreement's programme of shared power. Without that commitment to "jointedness", the OFMDFM was destined to function poorly, if at all. Indeed, as O'Leary (2004) asserts, the relationship between Trimble and Mallon demonstrated that the success of the new dyarchy critically depended upon the personal cooperation of the two individuals occupying the posts.

### *Ministers and Committees*

The first Assembly's EC was also beset by operational and personal difficulties. Wilford (2010) describes the first executive as lacking in "cohesion, direction, and a collectivist style" (p. 144). While ministers agreed to abide by their Pledge of Office, there were no censure procedures to ensure that they actually did. Ministers were free to enact their own policy decisions within their departments and could operate their ministries as "silos", at times diverging from the PfG and going on "solo runs" (McGarry and O'Leary, 2009). Wilford (2010) cites one early commentator on the state of the Executive as remarking: "The Executive Committee looks little more than a holding company for a collection of ministers with different party affiliations than a collective decision-making body" (p. 144). This situation affected the ability of Northern Ireland to develop a truly non-sectarian bureaucracy, whose policies and programs could benefit the whole population and not just the political purposes of an individual minister.

The problems with the structure of ministerial responsibilities were not only operational, but also political. During the first Executive, the Democratic Unionist Party (DUP) agreed to take their two member allotment in the EC, but then proceeded to boycott cabinet committee meetings. This created problems in coordinating the governing programme of the EC, and resulted in retaliatory action by the other parties towards the DUP (Wilford, 2010). As such, the actions of the DUP inhibited "collective government", and strained the culture of power sharing that Northern Ireland needed to develop in the wake of the Agreement (Adshead and Tonge, 2009).

Conversely, the first Assembly saw the development of a committee *system*, which facilitated joined-up and cooperative scrutiny of executive decisions (Wilford, 2010). As Wilford (2010) describes it, the committee system "quickly established procedures to inform one another of legislative and policy proposals that cut across departmental boundaries, inviting one another to supply inputs into the scrutiny of such proposals and there were occasional joint committee evidence-taking sessions for the

same purpose” (p. 140). Thus, while no official opposition existed in the Assembly, MLAs who were not in the EC could oversee executive decisions, providing the oversight function necessary to any democratic system.

### *Shared Governance in Northern Ireland*

Despite this dysfunction, the first Assembly and its executive did secure some modest policy achievements. For example, the ministers managed to agree to a joint PfG, a budget, and were successful in passing thirty-one pieces of legislation (Wilford, 2010). Thus, the EC was “by no means paralysed” (Wilford, 2010, p. 143). The political wrangling of these policy directives largely overshadowed the EC’s work in the eyes of the public and both the governments of Ireland and the United Kingdom. Unfortunately, the Northern Ireland’s executive proved to be a centre that could not hold, and in October 2002 direct rule was restored in the hopes that a renegotiated Agreement could improve the functionality and stability of the fledgling EC and the Northern Irish Assembly.

### **The St Andrews Agreement: Revisiting the Executive**

The years following the restoration of direct rule in October 2002 saw several failed attempts to negotiate a return to devolution. (McGarry & O’Leary, 2009)<sup>4</sup> Wilford (2010) argues that success was only possible in a context where the outstanding political and security issues preoccupying unionists and nationalists were resolved. The time it took to establish the PIRA decommissioning, a timetable for the transfer of policing and criminal justice powers, amongst other issues, led to a four-year deadlock in negotiations. Once these issues were resolved in late 2005, all parties, including the DUP, returned to the negotiating table.

This renewed negotiation period resulted in the St Andrews Agreement of October 2006. According to Farry (2009), the “institutional changes to the Good Friday Agreement arising out of the St Andrews Agreement were essentially limited to those changes necessary to achieve the consent of the DUP”. (Farry, 2009, 169) In the years following the collapse of the first Assembly, the DUP had become a political force to be reckoned with and had come to dominate the unionist vote (Wilford, 2009). For the purposes of this report, only two of these concessions negotiated to secure the “tacit” support of the DUP will be outlined: reforms to the First Minister/deputy First Minister selection process and the scope of ministerial powers (Farry, 2009).

### *The Dyarchy*

The first change introduced in the St Andrews Agreement was to the appointment process for the First Minister and deputy First Minister. DUP MLAs had been reluctant to engage in a direct vote for the selection of a SF deputy First Minister, and requested a change to a system which awarded the top two posts to the nominees from the two largest parties (Farry, 2009). The positions were also decoupled, and could not be held hostage

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<sup>4</sup> These include the Joint Declaration in May 2003 and the Comprehensive Agreement in December 2004 (McGarry & O’Leary, 2009).

by a threat from one of the officials to resign and force the resignation of the other. As such, the St Andrews Agreement (1996) stipulates that “[w]here a vacancy arose later in the office of the FM or DFM, the nominating officer(s) of the party(ies) entitled to nominate as above for the office(s) would do so and the nominee would take up office once he had taken the pledge of office”. (St Andrews Agreement, 2006,9)

These changes had the potential to improve the operation of the EC in two ways. First, it enabled non-executive MLAs to voice their dissatisfaction with the other bloc’s executive nominees without jeopardizing the EC as a whole. Second, it created a situation where cooperation, as opposed to fear, had to be the guiding principle of the OFMDFM’s work.

### *Ministers and Committees*

The second set of significant changes introduced in the St Andrews Agreement was the passage of a statutory ministerial code and the creation of a mechanism for referring unsatisfactory ministerial decisions by the Assembly for collective executive review. First, the statutory code placed a duty upon ministers to “ensure that all sections of the community could participate and work together successfully in the operation of these institutions and that all sections of the community [are] protected” (St Andrews Agreement, 2006, 2). This put an end to ministerial “silos” and “solo runs” that had been of concern during the first Assembly. Ministers would have a statutorily enforceable duty to work constructively within the EC—no more boycotts—and with the Assembly.

Second, the St Andrews Agreement created a mechanism for the review of ministerial decisions. A review could be instigated by the agreement of thirty members of the Assembly, within seven days of a ministerial decision (St Andrews Agreement, 2006). This reform was introduced on the one hand to address the ministerial solo runs observed during the first Assembly and its executive, while on the other hand to address some of the academic critiques about the democratic nature of the EC (Farry, 2009; McGarry & O’Leary, 2009; Wilford, 2009; Wilford, 2010). By allowing for Assembly oversight, a degree of collective responsibility by the consociational executive was created. Controversial decisions would have to be made by a majority of ministers, and this fact has produced a space for the development of a non-sectarian bureaucracy. Ministries belong to all communities and now cannot be made into small sectarian fiefdoms for individual ministers.

### **Stormont in Practice: 2007 – Present**

The 2007 Assembly election demonstrated how much had changed institutionally and politically since power sharing was implemented in Northern Ireland in 1999. The most striking shift was the political ascendancy of the DUP and SF, each of which became the largest party in their national blocs. This change, in conjunction with the reforms introduced by the St Andrews Agreement, resulted in greater stability for the EC and the third Assembly.<sup>5</sup> In the preceding ten years, a culture of power sharing had developed despite the political crises and protracted institutional negotiations that

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<sup>5</sup> The second Assembly was elected in 2003, but never sat (O’Leary, 2004).

marked the period. The DUP and SF entered office on good terms—a political turn no one would have predicted a year earlier (Wilford, 2010). Thus, in May 2007, the second period of devolution began on an optimistic note. This section will trace its successes before turning to a discussion of ways forward for the Northern Irish EC.

### *The Dyarchy*

The most surprising outcome of the return to devolution in 2007 was the warmth and cooperation demonstrated by the leaders of the DUP and SF, Ian Paisley and Martin McGuinness. While their good working relationship was not fully realized once Paisley departed in 2008, later replaced by Peter Robinson, the foundation laid in the first year of the third Assembly was critically important. Wilford (2010) proposes that Paisley's motivation for cooperating with the SF—something that the DUP had refused to do for most of the first and second Assemblies—in his own words, “was the fear that the alternative was ‘curtains for this country’, and that their relationship would be a ‘work-in, not a love-in’ ” (p. 135). This good working relationship allowed for elite negotiation of terms for governing prior to the opening of the third Assembly, and this set the stage for a more cohesive and cooperative EC. Institutionally, moreover, a reduced number of responsibilities has ensured that the OFMDFM has become a more nimble and strategic body for the coordination of policy at the Executive level.

### *Ministers and Committees*

Adshead and Tonge (2009) argue that the electoral dominance of the DUP and SF also led to a much more cohesive executive, which combined, held eight of the ten departmental ministerial posts in the new Assembly. This cohesion was certainly reinforced by both parties' shift towards moderation in order to increase their electoral returns (Garry, 2009). Kerr (2009) echoes this sentiment, arguing that the electoral success of SF and the DUP does not represent a movement to the extremes by the Northern Irish electorate, but rather the “majority of both communities opting for the lowest political common denominator available to them” and the promise of more stable governance (p. 215).

Garry (2009) argues that the long-term incentive structure of the consociational power sharing executive has decreased the significance of the “ethno-national conflict cleavage” and drawn the hard-line parties closer to the moderate middle to increase their vote share. Therefore, not only was there more cohesion in the EC because of the DUP and SF's numerical dominance, but also because both parties had adopted more centrist and conciliatory positions to appeal to the Northern Irish electorate.

The committee system continued to function well under the third Assembly. Indeed, the system was also reformed and more extensive joined-up committees were introduced to oversee larger cross-cutting policies (Wilford, 2010). While not replacing an official opposition, the committees do provide some critical space for holding the executive to account.

### *Shared Governance in Northern Ireland*

Finally, while some commentators have noted that the second Assembly has not been as productive as might have been hoped, there was at the beginning a greater effort

to produce a substantive and cohesive PfG (Kerr, 2009). Unfortunately, this has not held. Robinson's appointment as First Minister in 2008 has led to "dearth" of successful policy initiatives (Wilford, 2010). As a result, Wilford (2010) asserts that "keeping the consociational bicycle upright *and* moving forward have proved difficult, certainly at the Executive level" (p. 147). Thus, while incredible movement has been made in the OFMDFM and in reforming ministerial accountability, politics is still an issue and continues to obstruct optimal policy results for the population of Northern Ireland. In the next section, I will suggest several reforms which might enable better political relationships and nurture a culture of power sharing in the Northern Irish EC.

### **Assessment and Recommendations**

I will now return to the criteria developed earlier in this chapter to assess the institutional and political success of Northern Ireland's Executive Committee. First, following the political and institutional changes of 2006-2007, the EC has proven to be a useful site for the normalization of elite political relationships. The structure and incentives presented by the EC has moderated unionist and nationalist positions, and has prevented a return to violence. I agree with Kerr (2009) when he states that consociationalism is an "imperfect system that has clear drawbacks and limitations but it is the system that has come to be seen by the [UK and Irish] governments, a majority of the Northern Ireland parties, and a majority of the people as the least unattractive realistic model for regulating the conflicting national aspirations of unionists and nationalists" (p. 220). Early reliance on institutional protections to encourage the development of a culture of power sharing has given way to an understanding of the importance of *political* negotiation and cooperation. Parties on both sides, despite tensions and disagreements, appear to have made a genuine commitment to facilitating the continued operation of the EC.

Second, the EC post-St Andrews has created the necessary protections and distance to enable the development of a non-sectarian bureaucracy. Ministries will not be fiefdoms, and ministers will adhere to the shared Programme for Governing developed by the Executive (when one is in place). Finally, the EC has not been as successful at producing optimal policy outcomes for the peoples of Northern Ireland. Their record to date has been paltry. Over its two phases, its "episodic existence has clearly hamstrung its policy achievements and constrained the extent to which devolution has made a difference to the daily lives of its population" (Wilford, 2010, p. 134). This can be overcome, however, with more time and patience. As was argued elsewhere in this report (see introduction), consociationalists, academics, and journalists often expect too much, too fast from these institutions (Kerr, 2009). More time is required to allow for these normalization processes to do their work—only then can optimal policies be produced.

Given the recent success of the EC, I would argue that it is too early to recommend sweeping reforms of the Executive. While alternative systems have been proposed, such as the Westminster parliamentary system (Wilford, 2001; Wilford, 2009; Wilford, 2010), these have been deemed inappropriate in the Northern Irish case for their majoritarian and competitive features (McGarry & O'Leary, 2009).

The reforms negotiated in the St Andrews agreement, along with the maturity demonstrated by the DUP and SF, have addressed many of the dysfunctions observed during the first Assembly. As such, the EC must be allowed at least ten years of

functional operation, or two electoral cycles, before a formal review and reform process could be initiated.

This chapter will make three minor recommendations. Each addresses the institutional *and* political features of the EC. They are meant to consolidate the culture of power sharing which already exists, and ensure the continued peaceful governing of Northern Ireland by unionists and nationalists. These recommendations include:

1. **Independent Review of the Executive Council.** In keeping with the above assessment, an independent panel of experts should be convened in 2017, or after two electoral cycles. The panel would be charged with:
  - a) Conducting a democratic audit;
  - b) Reviewing the operational capacity of the EC; and,
  - c) Presenting recommendations for its retention or reform to the Northern Irish Assembly. These findings would be non-binding.
  
2. **Consultation Period.** Implementation of a compulsory six-week period between an election and the first day of Assembly would enable a smoother transition to governing for the consociational government. As Wilford (2010) argues, “the fact that in the wake of the 2007 election, unlike between 1998 and 1999, the four major parties engaged in a series of direct negotiations prior to Executive formation and the convening of the first session of the new Assembly, to decide the allocation, *via* d’Hondt, of both the ten ministerial portfolios and the chairmanships and deputy chairmanships of the Assembly’s statutory and standing committees” was highly constructive (p. 136). This period would allow for:
  - a) The negotiation of a Programme for Government;
  - b) The negotiations for ministry selection; and,
  - c) A briefing period for First Minister, deputy First Minister, and ministers to enable a smooth transition to governing.
  
3. **Opposition.** Provide opposition funding to official parties not represented in the Executive Council. This addresses some of the democratic concerns raised by Farry (2009) and Wilford (2001, 2009, 2010). Two conditions should be attached, however:
  - a) Funds should be allocated only for research, public consultation, and administrative support; and,
  - b) No official opposition should be named. Parties should not be encouraged by this support to exit the EC, but this measure should facilitate a more active debate within the Assembly about the direction and policy decisions of the EC.
  
4. **Committee System.** The Assembly’s current committee system should be encouraged and provided with greater resources to ensure the continuation of its oversight function.

## **Conclusion**

As Kerr (2009) argues, if the relationship between unionists and nationalists “can be regulated successfully for a number of years with a turnover of successive Northern Irish governments, dominated by different parties, and supported internationally through strong central governments in London and Dublin, there may be good cause for optimism regarding the Agreement’s long-term chance of success” (p. 219). The complete turnaround in the functioning and operational capacity of Northern Ireland’s EC is testament to this assertion. It must not be forgotten, however, that politics are just as important as institutional design to the long-term success of the EC. Governing parties must use their positions responsibly and understand the opportunity that so many in Northern Ireland have worked hard to create. As Kerr (2009) concludes in his discussion on the importance of a culture of power sharing: “We may be hopeful then, that through this process a new shared, syncretistic identity may be fostered through the culture of power sharing, which is slowly eroding the older Northern Irish traditions of division and mistrust” (p. 220).

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### 3. REALIZING A BILL OF RIGHTS FOR NORTHERN IRELAND – PADRAIC RYAN

There is a need for any society to have a robust system of checks and balances to protect the human rights of its inhabitants. In the case of a fragile and politically divided post-conflict society such as Northern Ireland, this need is only greater. This chapter will examine how a bill of rights can be a crucial component of normalizing Northern Irish politics, and ensure that every person in Northern Ireland enjoys the rights that are hallmarks of a peaceful and prosperous society.

In the history of Northern Ireland, human rights violations are ubiquitous. Whether in the name of national unity, religious identity, anti-terrorism or national liberation, rights have been trampled in this place, much like many conflict areas. However, now that Northern Ireland is transitioning from a conflict society to a post-conflict society (and some day, perhaps a simply peaceful divided society), the time is ripe to consider what kind of legal regime is best-suited to protecting rights – both those rights recognized around the world as essential to a modern polity, but also those rights which are specifically needed as a result of the Northern Irish experience.

This chapter will give a brief background of the developments that have led to current proposals for a bill of rights, and discuss what rights such a bill would protect. It will go on to assess the enforcement measures for these rights, and how the bill of rights ought to be entrenched to provide a long-term framework for the protection of rights in Northern Ireland.

#### **Background**

Much like in the UK and other Commonwealth jurisdictions, there have been various proposals for a bill of rights in Northern Ireland for decades (Northern Ireland Human Rights Commission, 2008). However, given the general political dysfunction of Northern Ireland during the Troubles, and the obvious need to focus on short-term priorities; little progress was made on this issue until the very end of the 20<sup>th</sup> century. However, two key events in 1998 created a significant opportunity for entrenching a rights protection regime: first, the Belfast Agreement, which put Northern Ireland on the beginning of the long road to peaceful politics, and second, the British implementation of the European Convention on Human Rights in domestic law, creating for the first time a bill of rights regime in the North American mould, and ending the long-standing British insistence that Parliament was best suited to protect the rights of citizens.

#### *The Belfast Agreement*

While the Belfast Agreement was a device to end a long, violent conflict, that does not mean it was a mere ceasefire pact; instead, it created institutions designed to ensure permanent peace in Northern Ireland. Human rights were one such institution: “It is not disputed by anyone that better human rights protection was a central promise of the Agreement” (O’Leary, 2004, p. 352). While human rights protection can come in many forms, namely political, legal, social, the Agreement specifically envisaged an entrenched legal regime known as a “Bill of Rights”.

Specifically, the text of the Agreement shows that the British government took on the responsibility to legislate in the areas of rights protection:

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 ... 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 (The Northern Ireland Peace Agreement, 1998).

Clearly, the Agreement does not provide for a draft text, or even specific details of what the content of a bill of rights should be. It does, however, make clear that equality provisions are essential to such a bill, and that the European Convention does not itself provide adequate rights protections. The latter St. Andrew's Agreement makes similar mention of human rights protections.

### *Recent Developments*

As required by the Agreement, the UK government did create the Northern Ireland Human Rights Commission in March 1999, tasked with a broad mandate to foster human rights protection in Northern Ireland. It began its task of providing advice to the Westminster government on the content of a bill of rights in March 2000, and in total received 650 formal submissions to its public consultation process, as well as publishing three interim reports and 11 discussion pamphlets, performing three opinion surveys, creating nine working groups that included 200 people, met with the Westminster and Dublin governments, and participated in a roundtable process with the Northern Irish political parties (Northern Ireland Human Rights Commission, 2008). After this exhaustive process, the NIHRC ultimately released its final proposal for a bill of rights in

December 2008. It lays out in fine detail its proposals for what should be in a bill of rights along with the supporting arguments for those proposals, as well as its advice on how such rights should be interpreted, enforced, and entrenched.

The UK government, through its Northern Ireland Office led by the Secretary of State for Northern Ireland released its response to the NIHRC draft in the form of a consultation paper, *A Bill of Rights for Northern Ireland: Next Steps*, in November 2009. It contains both a list of specific positions of the UK government on elements of a bill of rights (including highlighting areas of disagreement with the NIHRC), as well as open-ended questions designed to elicit public input during its consultation process, i.e. “Do you believe that the Bill of Rights should include the principle that any electoral system used in Northern Ireland should provide for both main communities to be fairly represented?” (Northern Ireland Office, 2009)

The Northern Ireland Office’s consultation period, during which anyone could respond to these reports, recently ended on March 1, 2010. The next steps will be Westminster’s responsibility; in an election year, with very real possibilities of a minority government (“hung parliament”) or change of governing party in the near future, it is not clear what those steps will be. However, there is clearly strong institutional and political momentum in favour of this bill.

### **Content of the Bill of Rights**

As proposed by the NIHRC, the Bill of Rights for Northern Ireland (BORIN) would be a highly comprehensive and modern rights instrument. It draws on three principle sources: international human rights treaties, the bills of rights of other legal systems around the world (principally common law systems, and particularly those recently drafted), and the specific needs of Northern Ireland as a post-conflict society.

While there is not adequate space in this chapter to describe and assess each individual right in turn, it will suffice to say that the NIHRC proposal contains a virtually exhaustive list of rights. The broad categories included are: rights to life, liberty and security; right to a fair trial and no punishment without law; to marry or civil partnership; to equality and prohibition of discrimination; to democratic rights; to education rights; to freedom of movement; to freedom from violence, exploitation and harassment; the right to identity and culture; language rights; the rights of victims; the right to civil and administrative justice; to health, to an adequate standard of living, to accommodation, to work, to environmental rights, to social security rights, and to children’s rights.

Obviously, the proposed bill would go far beyond the classic civil and political rights entrenched in the American Bill of Rights, and include social, economic and cultural rights as well. It should be noted however, that all the rights are subject to a limitations clause, as with the *Canadian Charter of Rights and Freedoms* and other contemporary bills of rights; indeed, the text mirrors that of the South African constitution’s analogous section. The enforcement provisions also differ between the types of protected, as will be discussed below (“Remedies”).

To briefly assess the contents of the NIHRC proposal, a separation of those rights previously protected in the European Convention and those rights which are new to Northern Irish law is necessary.

#### *Convention Rights*

The European Convention on Human Rights has been in force in Northern Ireland for more than fifty years, first as a matter of international law, and since 1998 as domestic law, when it was implemented in the UK's *Human Rights Act*. The NIHRC (2008) proposes that the BORIN, as a single statute, contain both the rights protected in the Convention ("Convention Rights") as well as the new rights above and beyond those in the Convention ("Supplementary Rights"). This would mean that Convention Rights would be doubly protected, both in the *Human Rights Act* and the new bill. The NIHRC argues that this would allow Convention Rights to be interpreted in light of the BORIN as a unified document and in consideration of the Northern Irish experience.

The Northern Ireland Office report disagrees with this plan, noting "there is a potential risk that having the Convention Rights set out in two separate Acts in the UK could lead to difficulties in interpretation and application of the rights as well as the potential for the development of divergent lines of authority" (Northern Ireland Office, 2009, p. 85), as well as noting that this could lead to Convention Rights meaning different things in different parts of the United Kingdom.

With all due respect to the NIHRC's desire to have a cohesive set of rights to be implemented in Northern Ireland, it is not clear that the benefits of including Convention Rights in the BORIN outweigh the disruption of the existing Convention system. The British legal system has been interpreting the *Human Rights Act* for over a decade as a single, cohesive statute and is accustomed to adjudicating litigation rooted in Convention Rights. The Northern Ireland Office's concern that this could lead to confusion is a legitimate one, given that judicial interpretation of rights frequently involves considering the rights instrument as a whole; if the "whole" list of rights is different in Northern Ireland, Convention Rights will take on a different meaning in different parts of the UK.

More importantly, given that domestic courts are required to follow the jurisprudence of the European Court in interpreting the Convention, it is not clear what would be gained by including Convention Rights in the BORIN. This proposal is either inconsequential, since Convention Rights will be interpreted in the same way in either scenario, or it is consequential, disrupting the UK-wide approach to basic civil and political rights.

Furthermore, given that Convention Rights flow from a regional human rights treaty, the goal of uniform enforcement across different political and legal systems is an important one. Unlike Supplementary Rights, it is not clear that they need to be interpreted in a specifically Northern Irish context; therefore, Northern Ireland should continue to depend on the established British and Europe-wide system for vindicating Convention Rights.

### *Supplementary Rights*

The need for additional rights beyond those protected in the Convention has been acknowledged by the NIHRC, the Northern Ireland Office and by academic commentators, as well as by the text of the Belfast Agreement itself. As described above, the NIHRC takes a very broad view of the supplementary rights that ought to be included, including very general socioeconomic rights (health and education) alongside those with an obvious specific link to Northern Ireland (equality, public identity).

As with Convention Rights, the Northern Ireland Office's concern with the BORIN is its potential to disrupt the "national" rights-protecting framework. It divides

the NIHRC's proposed Supplementary Rights into those which should be included in BORIN, and those which are general enough that they should be left to the Westminster government. Broadly speaking, it considers the following categories of rights to be appropriate for the BORIN: equality, representation and participation in public life; rights relating to identity culture and language; rights relating to sectarianism and segregation; rights relating to victims and the legacy of the conflict; rights relating to criminal justice.

For all other Supplementary Rights, the UK government points to its ongoing development of a national bill of rights (beyond the *Human Rights Act*), and advises Northern Ireland to wait for it to be implemented to ensure a universal framework for such rights as health. Unlike with Convention Rights, though, at present, there is no existing Supplementary Rights system in place in the UK.

Northern Ireland should not be forced to wait for the rest of the UK to implement such legislation, nor should it be subject to the whims of the much larger Great Britain population in determining the content of such a bill. If there is strong public support within Northern Ireland for a comprehensive set of Supplementary Rights, they should be entrenched in the BORIN. The quicker the people of Northern Ireland have access to this instrument, the better.

It should also be noted that even universally important rights such as health and education can be interpreted in a specific Northern Irish context: education, for example, is a minority rights issue around the world, and Northern Ireland lags behind the rest of the UK in health standards (Northern Ireland Office, 2009). More broadly, political tools such as a broad BORIN are badly needed in the context of a Stormont assembly which takes its cabinet from the largest parties, meaning the opposition parties are much less effective than in Westminster.

Finally, the BORIN should contain all these rights because as described below, it should be designed to follow Northern Ireland no matter which sovereign rules it. If Northern Ireland relies on the UK for Supplementary Rights, there is no guarantee these rights would still be protected in a unified Ireland.

### **Enforcement of the Bill of Rights**

In addition to the content of the BORIN itself, the proposed enforcement process for this bill must be evaluated, both in terms of its effectiveness in protecting rights and staying true to the principles of representation and accommodation that have been at the root of Belfast Agreement institutions.

#### *Remedies*

A bill without sufficient remedial instruments would not fulfil the task of protecting human rights in Northern Ireland. While the Commonwealth tradition outside of North America is to implement “weak form” judicial review, where judges can only issue declarations of incompatibility between a statute and the bill of rights as opposed to striking down the conflicting law, the NIHRC proposal goes further.

The NIHRC proposes that the Northern Ireland judiciary be able to declare a Stormont statute (that is, a statute of the Legislative Assembly) invalid when they conflict with the BORIN, but in the case of Westminster statute, only issue declarations

of incompatibility (Northern Ireland Human Rights Commission, 2008, p. 196). This allows for strong-form judicial review within Northern Ireland but weak-form review in the judiciary's impact on the broader UK legal system. This is a compromise between the Northern Ireland desire to have strong rights protection, and the goal within devolution of not privileging devolved Northern Irish institutions over central Westminster ones.

The Northern Ireland Office simply states that the BORIN ought to “contain the same remedies as the HRA” (Northern Ireland Office, 2009, p. 94). Presumably, this means only declarations of incompatibility as opposed to holding statutes invalid. While this is a result of the historical British faith in Parliament's ability to protect rights, this faith is not shared in a divided society like Northern Ireland. The BORIN establishes key protections for ensuring Northern Ireland does not return to being a society where rival groups use state institutions to persecute each other; these protections should not be dependent upon legislative action.

It should be noted that there is not a strong tradition of resolving politicized rights disputes through litigation in Northern Ireland. Morison and Lynch (2007) identify four reasons there has been so little litigation of the Belfast Agreement itself: broad satisfaction with the Agreement, powerful individuals preferring negotiation to litigation, scarce financial resources, and the desire of the courts to avoid interference. The BORIN should change this practice in numerous ways: the courts have a clear legislative mandate to intervene; the courts are open to all people, not just the political elite; it is not likely there will be universal agreement on the interpretation of protected rights. The desire for negotiation, though, is a very useful one, and it is important to remember that the legislature, in Stormont or London, is still the main source of policy; if rights can be protected in the political realm all the better.

### *Appeals*

While an appeal structure will not be part of the text of the BORIN statute, it is another legal issue that will be of great importance in implementing the BORIN. In one sense, the enforcement of Supplementary Rights needs to be “consociationalized”; if the BORIN is entirely dependent upon the will of the British judiciary, which is an institution of the British state, then it is not likely to be an effective tool, either as it is perceived (nationalists would view it as just another way they are forced to submit to the UK) or in practice (British judges may be more sympathetic to unionist causes).

More importantly, if Convention Rights and Supplementary Rights are evaluated separately, as described in the previous section, there is an opportunity for separate appeal routes. In the case of Convention Rights, the ultimate arbiter will always be the European Court, so modifying the appeals process between Belfast and Strasbourg will be of little effect for those cases where appeals are exhausted. Although the long backlog at Strasbourg means the domestic structure does matter to some degree, this is not enough to warrant a change in the Convention Rights system.

While one survey of the UK House of Lords' jurisprudence on Convention Rights claims in the early 1990s found that it had a mixed record of protecting rights, and largely deferred to the British government's security needs (Livingstone, 1994), a follow-up survey in the post-Belfast Agreement and post-*Human Rights Act* era, found that the attitude of the British judiciary had dramatically shifted (Dickson, 2006). It can no longer be said that the House of Lords (or now, the UK Supreme Court) does not take

Convention Rights seriously.

In the case of Supplementary Rights, which are rooted in the Northern Irish experience, allowing the UK Supreme Court to be the ultimate interpreter of their meaning is not satisfactory. Dickinson (2004) canvasses two options for injecting Northern Irish representation into the appeals process for rights issues: a specialist constitutional court, in the model of continental legal systems, which would be responsible for all Bill of Rights challenges (but not for normal legal appeals, which would follow the traditional British ending at the UK Supreme Court) or allowing special ad hoc Northern Irish judges to sit on the Judicial Committee of the Privy Council (JCPC), a separate institution (although mostly made up Supreme Court justices) which is already tasked with hearing appeals of devolution disputes relating to Scotland and Northern Ireland. As Dickinson acknowledges, there seems little appetite for a constitutional court, either due to its strong deviation from the traditional common law approach, or a lack of faith in the limited institutional capacity of Northern Ireland.

The JCPC approach seems most appealing since it is already in practice for devolution issues. The judicial appointments process described below could be used to ensure that the Northern Ireland judges on JCPC panels are in fact representing both political communities; or, as Dickinson suggests, judges from the Republic or even North America could sit on these cases. While McGarry suggests that leaving appeals decisions in the hands of British courts would still leave the institution as a unionist one, whereas devolving appeals to Northern Ireland would be a “compromise”, the goal should be to turn the JCPC into a multi-national institution via representation from outside Britain; in that sense it would still be a representational compromise, but one that acknowledges that Northern Ireland does not currently have the judicial capacity to resolve these disputes internally.

A less radical proposal would also be to make the Northern Ireland Court of Appeal the court of last resort for Supplementary Rights. While this proposal shares the same concerns about institutional capacity as a constitutional court, it would avoid the friction of creating a completely new institution. In either case, Supplementary Rights cannot be left to the UK Supreme Court; if the enforcement of the BORIN is a British matter, then rights protection will not be truly realized in Northern Ireland.

### *Judiciary*

Even with an ideal appeals structure, in a divided society such as Northern Ireland, a judiciary which is responsible for enforcing a bill of rights must be one that reflects the Northern Irish community. If the two national groups are not satisfied that people who share their identity are present and active in the judiciary, they are unlikely to show much faith in the BORIN system. As with the legislature, the judiciary should be consociationalized; not in the sense of requiring both a unionist judge and a nationalist judge to sign off on the same decisions, but in the sense of ensuring that the judiciary is demographically proportional to the population.

Currently, the Northern Ireland Judicial Appointments Commission (JAC) has the task of ensuring a diverse judiciary. It is made up of sitting judges, practicing lawyers, and lay people, from both unionist and loyalist communities. Its annual report documents its efforts to recruit lower-court judges and administrative tribunal members, and gives highly specific data on the proportionality of the judiciary, in terms of religion,

geographic origin, class and other factors (Northern Ireland Judicial Appointments Commission, 2009). The JAC appears to be an effective consociational and democratic institution.

The *Justice (Northern Ireland) Act, 2002*, is the Westminster statute that currently determines judicial appointments in Northern Ireland. It has in many ways devolved the appointments process; lower court judges are appointed by the Office of the First Minister and the Deputy First Minister (OFMDFM) instead of the Prime Minister, and the OFMDFM can only appoint those who have been first selected by the JAC. This is in line with the goals of both devolution and consociation.

In the case of higher court judges, though, the *Justice (NI) Act* is much weaker. It is the Prime Minister who appoints the Lord Chief Justice and other appellate judges. He is statutorily required to consult with the OFMDFM, which is in turn required to consult with the JAC, but none of this consultation is binding. While there is no reason to believe the Prime Minister will not follow this advice, the goal of processes such as the BORIN is to legally enshrine rights protection, instead of making it dependent on the good will of politicians.

The BORIN will mean that the Northern Ireland judiciary will play an important and increased role in politically sensitive legal issues. As a result, it is more important than ever. The selection of appellate judges should be devolved to the OFMDFM, and it should be required to select among those appointments suggested by the JAC. This would fulfil the goals of devolution (by allowing Northern Ireland selection of its own judges), consociation (by ensuring both unionist and nationalist agreement on judicial appointments) and the diffusion of power away from the OFMDFM towards other institutions (since it cannot circumvent the JAC).

### **Permanence for the Bill of Rights**

This Bill of Rights, like the UK's *Human Rights Act*, will not be constitutionally entrenched in the same strict sense as the Canadian *Charter* or the American Bill of Rights. However, that does not mean it will be the same as any statute, and nor should it be, given how it empowers judges to strike down other statutes that conflict with it. Therefore, some kind of entrenchment is needed to ensure that the BORIN provides last protection, and survives short-term political battles.

#### *Amendment Process*

Many countries' constitutions require a super-majority for amending constitutionally entrenched bills of rights; in the case of Northern Ireland, the consociational elements of the Legislative Assembly mean that super-majorities are required for everyday business, in the sense that no one party can implement them. Both the NIHRC and the Northern Ireland Office reports agree that the UK government should commit to not amend the Bill of Rights without "cross-community support" from Northern Ireland (Northern Ireland Office, 2009). While parliamentary sovereignty means that the Westminster Parliament must always be free to modify the statutes of previous Parliaments, the NIHRC suggests that a constitutional convention develop around the principle of Northern Irish support.

While this is an important minimum threshold for amendment, it should be noted

that this could be achieved by a simple majority among the two political constituencies, or depending upon future electoral results, even with the support of one unionist and one nationalist party. Given the concerns relating to the concentration of power in coalition cabinets, this is not an adequate protection against the weakening of the BORIN via amendment.

The UK should use a higher-threshold definition of “cross-community support” in developing this convention. One method might be requiring multi-partisan support within the two political communities, requiring support from the two largest unionist and nationalist parties alike. Another, less immediate method could be to require two successive Legislative Assemblies to support the amendments, ensuring that the changes are known to the public during an election. The simplest requirement, and the one that least entrenches party power, would be to require a super-majority (be it a 60% threshold, or two-thirds) within the unionist section of the legislature, the nationalist one, and the entire legislature.

### *Responsibilities of the Republic of Ireland*

Although raising the prospect of Northern Ireland becoming united with the Republic always risks triggering a political backlash, given that the Belfast Agreement does allow for the possibility, the rights protections that the Bill would put in place should be designed to survive a transfer of sovereignty from the UK to Ireland.

The Belfast Agreement commits the Irish government to “take steps to further strengthen the protection of human rights in its jurisdiction” (1998, p. 19), to ratify the Framework Convention on National Minorities, and envisages a joint committee of representatives of the Human Rights Commissions of Northern Ireland and the Republic. In discussing these obligations, the Agreement makes no reference to a connection between these rights protections and a future unification of Ireland.

O’Leary (2004), on the other hand suggests that much stronger steps are needed to ensure that the Bill of Rights be not only a British statute, but entrenched in a bilateral treaty between the UK and the Republic, as well as in domestic Irish law. This would allow the Northern Irish people to be confident that the rights protections in the BORIN would continue regardless of which sovereign governs its territory. The amendment provisions described above for the BORIN could also be built into the text of such a treaty.

There is certainly a strong political risk that raising this issue during the drafting process of the bill will lead to unionist anger at a public acknowledgement of unification. This explains why neither NIHRC nor the Northern Ireland Office reports mention any involvement of the Irish government having a role in Northern Ireland proper. However, there is a tactical benefit to discussing a bill of rights at this juncture, because both the unionist and nationalist factions have the potential to experience being minorities and therefore have a strong incentive to entrench strong minority protections.

Under the status quo, the nationalists in Northern Ireland are part of a political and religious minority as part of the broader UK; in a unified Ireland, the unionists would be the same position (note that both of these minority statuses would continue regardless of the majority/minority balance in Northern Ireland itself). This puts the two sides into a unique game theory scenario, unlike in most constitutional negotiations, where the minority has a strong incentive to entrench minority rights, whereas the majority has

little incentive to do so beyond its interest in co-operation; in some ways, it is the ideal scenario for negotiating what rights should be immune from legislative interference.

The question of Irish unification is a long-term one, and this report attempts to be concerned with the short- and medium-term. Therefore, it will simply be noted that forcing the Northern Irish people to consider the uncertain future that faces them, and the important role of a Bill of Rights in protecting against the tyranny of any majority, could improve the process. Similarly, if a UK-Ireland treaty on this matter is desirable, it need not be done immediately. The Stormont and Westminster governments could keep this as an issue of concern in their ongoing relations with the Republic.

### **Conclusion**

The good news about the Bill of Rights is that most of the work towards implementing it has already been done. This chapter has taken the view that the proposals of the NIHRC are, for the most part, intelligent and practical ideas for a bill of rights. Where the views of the NIHRC and the UK government have conflicted, it has attempted to elaborate on which option would meet the twin goals of providing human rights protection to the people of Northern Ireland and enhancing, not disrupting, the ongoing political development of the region. On some issues, this chapter has provided opinions that are different from both the NIHRC and the Northern Ireland Office; but given the large agreement that a Bill of Rights is needed, this amounts to fine-tuning instead of radical disagreement.

In summary, these are this chapter's recommendations for the BORIN process:

- Do not include Convention Rights in the BORIN.
- Include whatever Supplementary Rights there is public support for in Northern Ireland, and do not wait for the UK to implement its own legislation in non-Convention areas.
- Judges should be allowed to hold invalid those Northern Ireland statutes which conflict with the Bill of Rights; in the case of Westminster statutes, the remedy should be a declaration of incompatibility.
- The UK Supreme Court should continue to be the domestic court of last resort for Convention Rights.
- The Judicial Committee of the Privy Council should be the court of last resort for Supplementary Rights, with the requirement that ad hoc Irish, Northern Irish or international judges should sit on such claims. The Judicial Appointments Commission should continue its work in appointing judges that reflect the diverse Northern Irish community.
- The JAC's mandate should be expanded to include all judges in Northern Ireland, including the Court of Appeal. No judicial appointment should be the sole prerogative of the OFMDFM, nor the British Prime Minister.
- The UK government should commit to not amending the BORIN without supermajority support from the Legislative Assembly, including among the two political groups individually.
- The Republic of Ireland should commit to upholding the BORIN in any jurisdiction it has over Northern Ireland, ideally in a bilateral treaty with the UK.

It should also sign and ratify the international conventions underlying the BORIN.

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#### 4. POLICING AND THE ADMINISTRATION OF JUSTICE – SCOTT SAMS

The creation of stable and legitimate institutions in Northern Ireland has proven a formidable task. During decades of political violence, no state institutions emerged that could command or sustain popular support amongst both the unionist and nationalist communities (O'Leary & McGarry, 1993). The lack of consensus over constitutional arrangements assured that opposition and resistance confronted the state.

Policing and justice lie at the locus of the conflict. These institutions embody state authority and are fundamental to its maintenance. In divided societies where authority is disputed, their role in security and public order are often directed at those who do not recognize the state's legitimacy. They can therefore exacerbate conflict and further alienate segments of the population. Comprised overwhelmingly of mainly unionist Protestants, these institutions typified a crisis of legitimacy.

The Good Friday Agreement ignited processes that resulted in a multitude of reforms to policing and the administration of justice. Separate reviews of each produced a total of 469 recommendations. A decade has passed since the reports were published, and it is now time to take stock of progress toward the creation of impartial, multiethnic institutions.

Given the multitude and complexity of the changes that have occurred, this chapter focuses on evaluating developments in three areas of reform: (1) the political arrangements for governing devolved policing and justice, (2) workforce composition and efforts aimed at achieving representative police and civil services and, (3) accountability and oversight mechanisms. I consider whether to maintain, replace or supplement the core features of each area over the next decade. My recommendations in each case are based on an assessment of the status quo and an evaluation of its principal alternatives, with an emphasis on normalizing public activity. They also reflect suggestions and critiques raised at the symposium.

##### **Devolution and the Executive**

###### *Context*

The old Stormont parliament had responsibility for policing and justice in Northern Ireland prior to the introduction of direct rule from Westminster in 1972. These responsibilities were not transferred subsequent to the formation of the Northern Ireland Assembly, although the Good Friday Agreement expressed the British Government's willingness to devolve them under certain conditions. In the interim, the independent reviews of policing and justice were constituted to advance the reform agenda. Certain recommendations from both of the reviews are contingent upon devolution.

Devolution could occur only when the Assembly asked for the powers, and when the parliament at Westminster was satisfied that the proposed arrangements were "robust, workable and broadly supported by the parties" (NIO, 2006b). One of the most significant criteria requisite in satisfying those conditions was the political arrangement to govern the devolved functions. These had to "contain adequate safeguards to protect the rights and interests of all sides of the community while ensuring that there is effective decision-taking capability" (NIO, 2006b, p. 5).

A Department of Justice Bill passed the assembly in December 2009 and provided for the appointment of a single minister through a vote in the assembly. The Hillsborough Castle Agreement reached between Democratic Unionist Party (DUP) and Sinn Féin in

February 2010 allows for the first and deputy first ministers to identify a candidate for minister who would command cross-community support in the assembly. The assembly subsequently voted in favour of devolution and the move achieved the necessary cross-community consent to be passed. Devolution of policing and justice occurred on April 12, 2010.

### *Assessment of the Status Quo*

*A single department and minister with appointment by assembly vote.* Evaluating the current arrangement is complicated by the fact that devolution has just occurred. However, it is possible to ascertain its potential efficacy in achieving the dual goals of ensuring effective decision making capability and protecting the rights and interests of all sides of the community on the basis of the model. It is also desirable to assess the appointment process.

The single minister has the same status in the executive and responsibility for operational matters as other ministers. The parties to the Hillsborough Castle Agreement establish therein that the minister makes all quasi-judicial decisions without recourse to the executive. Executive consideration is absolutely necessary with regard to legislative proposals and financial allocations that will affect the department, and for issues that concern the responsibilities of two or more ministers (NIO, 2010, pp. 8-9).

The Criminal Justice Review considered the organization of the devolved functions. An evaluation of models from five jurisdictions contributed to a recommendation in favour of a single department of justice. It was concluded that, “the difficulties of ensuring co-operation and effective coordination... are likely to become more acute as the number of departments increases” (CJRG, 2000, p. 367). However, concern was raised that a junior minister might be required given the omnibus department’s size and spread of responsibilities. This suggests that the principal impediment to effective decision making in this model may be the minister’s potential to become overwhelmed by the scope of the responsibilities.

Apprehension over vesting the responsibility for security functions in a single minister is natural given the role they played in Northern Ireland’s troubled history. Unionists at Stormont abused their legislative control over policing to “disastrous partisan effect” that partly accounted for the abolition of the regime (McGarry & O’Leary, 1999, p. 110). Protecting the rights and interests of all sides of the community must therefore be an imperative of any model. The Hillsborough Castle Agreement stipulates that the judicial function remains independent of government, and that the chief constable has operational responsibility for directing and controlling the police (NIO, 2010, p. 5). Further to the recommendations of the Criminal Justice Review, a non-political attorney general will be responsible for public prosecutions (CJRG, p. 366). These, combined with existing consensus decision-making rules in the assembly, constitute considerable checks on the minister’s influence.

The goal of protecting rights and interests has given rise to a unique appointment process. While the single minister model is characteristic of the other portfolios of government, with the exception of the diarchy comprised of the first and deputy first ministers, appointments are in all other cases made on the basis of the d’Hondt system. It employs a divisor of one plus the number of posts already allocated to ensure that each party receives a number of positions that reflects their vote. In practice, this usually

results in the first and second choice being allocated to the parties with the highest and second highest number of votes, respectively. The system slightly advantages large parties over small ones.

The legislation that established a separate appointment process for the justice minister requires that the he or she be appointed by nomination made by a member of the assembly and passed with the support of a majority of its members, including a majority of unionists and nationalists ("Department of Justice (Northern Ireland) Act," 2010). This effectively prevents the largest party in the assembly (presently the DUP) from claiming the justice post as a first-round pick under the d'Hondt system and requires candidates for the post to achieve cross-community support. It is an ironic feature of the consociational executive that responsibility for ministries is not shared.

However the consensus candidate may further skew proportionality in the allocation of ministerial posts. The incumbent justice minister is a member of the anti-sectarian Alliance Party that, despite holding 7 of 108 seats in the assembly, has not been entitled to a seat on the executive. As a result of the appointment, the Alliance holds an equal amount of ministerial posts as the Social Democratic and Labour Party (SDLP), which has 16 seats in the assembly and nearly three times the vote. The SDLP would be entitled to a second post with the addition of the justice minister were they reapportioned under the d'Hondt system (see Table 1).

Table 1: Allocation of Executive Portfolios

Party	Votes	Portfolios	Portfolios under d'Hondt
DUP	207,721	4	4
Sinn Féin	180,573	3	3
SDLP	105,164	1	2
Ulster Unionist	103,145	1	2
Alliance	36,139	1	0

Reapportionment under d'Hondt would result in a one-seat gain for nationalists on the executive, but they would still hold two fewer posts than unionists. The SDLP has branded the process a "corruption of democracy" (UTV News, 2010) and the Ulster Unionist Party has expressed its preference for the retention of the d'Hondt system (2009). Concern has been expressed that the Alliance might be beholden to the two largest parties. The appointment process has emerged as the most controversial element of the current model.

#### *Evaluation of Principal Alternatives*

*Current model with appointment under the d'Hondt system.* The current model ensures effective decision-taking capability so long as the minister is adequately supported. It also includes checks that limit the minister's influence over public prosecutions, police operations and the judiciary. While the separate appointment process is intended to protect the rights and interests of all sides of the community, it has instead become a point of division. Taken together, this suggests that the separate appointment process is unjustified.

The process has advantaged the Alliance at the expense of the SDLP and resulted

in a less proportional executive. It has not been demonstrated that appointment under the d'Hondt system will produce such an undesirable result. The major parties could come to an agreement with respect to the allocation of the post prior to the reapportionment of the executive. That an executive comprised primarily of single minister departments allocated under the system has been relatively stable since 2007 suggests that it is functional.

The predominant risk inherent in the d'Hondt system is if negotiation fails or does not occur but the DUP claims the justice post against the wishes of the nationalists. McGarry (2010) suggests that:

The advantage of having a cross-community vote is that you're going to end up with a moderate policing and justice minister. The danger of going with the d'Hondt process is that you end up with a unionist as policing minister all the time. This is precisely what gave rise to the current conflict.

The optics of this result would be particularly undesirable given the history of the unionist-controlled security sector. However, mutual interest in the government's stability and the ability of the DUP and Sinn Féin to agree to support devolution suggests that compromises will occur even under d'Hondt.

*A single department headed by two ministers.* The precedent for this model is found in the provision for the election of a first and deputy first minister in the Northern Ireland Act. The candidates for justice minister would run on a joint ticket comprised of one designated nationalist member and one designated unionist member. The ticket would have to achieve an overall majority in the assembly as well as a majority of both designated unionists and nationalists.

Like the current model, the two-headed alternative would strengthen cross-community accountability. However, because the agreement of both ministers would be required in order to take decisions it could weaken the capacity for decision making. It has been suggested that this model might therefore prove unworkable (NIO, 2006b, p. 5).

This alternative institutionalizes the divide between unionists and nationalists. Indeed, so do many of the consociational elements of Northern Ireland's assembly. However, designated others in the assembly could at present hold any executive post with the exception of first and deputy first minister. Adoption of this alternative would preclude a party such as the Alliance, for example, from the position as is possible under either of the prior appointment methods. It could prove problematic if non-sectarian were to grow in popularity.

*Two departments with two ministers, each from a different tradition.* The Criminal Justice Review studied cases where justice functions were split into two departments (CJRG, pp. 362-364). In this case, power sharing could be achieved by requiring that the ministers responsible for the departments come from a different tradition. Dividing the portfolio might reduce the "risks of deadlock" (NIO, 2006b, p. 6) and mitigate any risks associated with a single designated group controlling most security functions.

As in the prior alternative, the two department model further institutionalizes the division between unionists and nationalists and precludes a designated other from taking office. Moreover, evidence has shown that increasing the number of departments can exacerbate problems of coordination and inhibit the integration of the system. Further

complexity arises in determining which half of the portfolio should be assigned to unionists or nationalists.

### *Recommendations*

*Retain current model with eventual return to the d'Hondt system.* The parties generally support the single minister and department model. It strikes a balance that promotes effective decision making while protecting community rights and interests.

However, ministerial appointment by assembly vote emerged as a point of controversy and it has not been demonstrated that it is necessary to maintain the stability of government.

However, Northern Ireland's troubled history with unionist-dominated policing suggests that a gradual approach is adopted. In order to avoid conflict with the SDLP it is recommended that the other parties negotiate a concession to compensate the party for not receiving an additional ministerial post under d'Hondt. When trust improves sufficiently and it is demonstrated that further abuse of the position cannot take place, the current appointment process should be modified to conform to the d'Hondt system.

## **Workforce Composition**

### *Context*

As the primary agent of state control, the police "embodied the fears and aspirations of Protestants, as well as confirming the worst suspicions of Catholics" (Ellison & Smyth, 2000, p. ix). While unionists regarded the state as a legitimate political entity reflective of the majority outlook, nationalists claim it is an artefact of imperial retreat that depends on unionist dominance for its survival (Mulcahy, 2006, p. 5). This crisis of legitimacy resulted in the police and public sector becoming dominated by unionists.

The legitimation of the security sector and political stability is incumbent on creating institutions that command the support of and incorporate all citizens, including unionists and nationalists alike. To this end, they should be nationally representative of all segments of the population (McGarry & O'Leary, 1999, p. 45). This includes the range of religious believers and non-believers, unionists, nationalists and others, as well as women and men. Most pressing in promoting peace, however, is to increase the proportion of Catholic and nationalists working for the state.

To that end, the policing and criminal justice reviews each made recommendations aimed at achieving a representative workforce. The Patten Commission on policing regarded the imbalance between Catholics/nationalists and Protestants/unionists as the most striking problem in its composition. It recommended a police recruitment profile of 50% Protestant, 50% Catholic (ICPNI, 1999, pp. 82-83). This recommendation was subsequently enshrined in legislation ("Police (Northern Ireland) Act," 2000). Under the terms of the St Andrew's Agreement the policy will lapse when Catholics reach 30% of the workforce (NIO, 2006a, p. 13). The Criminal Justice Review concluded that appointments should be as reflective of Northern Ireland society as can be achieved, consistent with the overriding requirement of merit (CJRG,

p. 409).

### *Assessment of the Status Quo*

*A mix of discriminatory and merit-based employment practices.* The recommendations have contributed to divergent practices and outcomes. Considerable progress has been made towards achieving representativeness among police officers as a result of discrimination in appointments. However, the composition of civilian police and justice staff has remained highly skewed.

The Patten Commission anticipated that its recommendations would quadruple the proportion of Catholic police officers from 8% to the range of 29-33% over a ten year period (ICPNI, pp. 82-83). The recruitment profile achieved its intended outcome and by 2008, nearly 28% of officers were Catholic. This reflected the “critical mass” estimates that experts advised would be necessary to ensure that the Catholic minority would not be subsumed within the majority organizational culture (ICPNI, p. 83). Despite this progress, there remains a significant under-representation of Catholics among officers. Catholics comprise 43.8% of the population as of the 2001 census.

Imbalances among officers exist both on aggregate and within the organization’s hierarchy. McGarry and O’Leary observed that while in 1998 Catholics were slightly better represented in the senior ranks than at the rank of constable, they were still markedly under-represented when compared to their share of the population (1999, p. 59). The legislative provisions mandating discrimination in appointments apply only with respect to police trainees, although appointments to other ranks are encouraged to have regard for the goal of representativeness. As a result, today’s constables are more representative of the population than the police leadership.

Under-representation extends to the civilian police staff. McGarry & O’Leary noted that 85% of workers were Protestant in 1998 (1999, p. 46). The Patten Commission acknowledged that it would be “illogical to argue for diversity in the officer ranks while leaving the civilian staff unchanged,” and recommended that the civil service facilitate transfers to other departments to achieve a balanced and representative civilian workforce (ICPNI, pp. 84-85). However, only modest gains have been made in the absence of legislation to that effect. As of 2008, 17.5% of civilian staff was Catholic (PSNI, 2008).

The situation is similar throughout other justice organizations. The Equality Commission produces an annual workforce monitoring report that details the community background of employees in many public sector organizations. Its most recent report found that Catholics represent 18.3% of security-related employment, an increase of 3% year-over-year caused mostly by the elimination of jobs held by Protestants (ECNI, 2009, pp. 1, 120).

Despite workplace inequality, both unionists and nationalists express general support for the merit principle (McGarry & O’Leary, 1999, p. 57). Positive discrimination might stigmatize Catholics or nationalists and aggrieve unionists. Discrimination based on religion is prohibited under long-standing fair employment legislation, although more recent orders allow for affirmative action that encourages the participation of under-represented communities.

*Over-policing to consolidate the peace.* Northern Ireland has long been over-policed. McGarry & O’Leary maintain that “[l]ightly policed peoples... are less likely to

resist the authorities and are more likely to support their necessary activities” (1999, p. 45). They insist that smaller police services must rely more on interpersonal skills than brute force and face stronger incentives to comply with the law. With a 2008 complement of 7,346 full time officers (PSNI, 2008), Northern Ireland’s police service remains the largest per capita in the United Kingdom by a factor of two. It has been downsized by approximately one third since 1998.

There is relative consensus about the proper size of the police. Northern Ireland remains disproportionate in the type and scale of organized crime that it experiences (Moran, 2008, p. 193). The Royal Ulster Constabulary argued that the service needed to retain between 6,000 and 8,000 officers based on the suppositions that Northern Ireland would continue to have problems and that it is harder to get emergency assistance from other police services (McGarry & O’Leary, 1999, p. 49). The Patten Commission concluded that Northern Ireland’s policing requirements justify a service of 7,500 officers (ICPNI, p. 83).

While reducing the number of officers might increase the quality of policing, a larger service makes it easier to accommodate more Catholic and nationalist officers without disadvantaging serving Protestants. McGarry & O’Leary accepted the argument that up to 8,000 officers are needed to consolidate the peace over the two decades after the Belfast Agreement, in return for meaningful changes in the composition of the police (1999, p. 49). It is in this context that the growth in Catholic representation occurred.

#### *Evaluation of Principal Alternatives*

The projections made by the Patten Commission were based on a ten-year period that is set to expire. It was anticipated that the size of the police service would be revisited, and a judgement rendered about whether a representative workforce could now be expected to develop naturally in the absence of special measures (ICPNI, p. 83). In light of the substantial increase in Catholic police officers and the achievement of a threshold where they are not at risk of being subsumed by a Protestant organizational culture, it is worth evaluating whether the current approach should be retained, replaced, or supplemented.

*Entirely merit-based employment practices.* It has been argued that impartiality is more important than representativeness, and that the focus on the latter is misguided, if not harmful, because it emphasizes group differences (McGarry & O’Leary, 1999, p. 50). However, perceptions of the police service hinge on its composition as much as the behaviour of its officers, no matter how impartial they may be. The quota of 30% Catholic representation in the police in order for the discriminatory hiring provisions to lapse has nearly been reached. However, it should be confirmed that Catholic representation is self-sustainable if entirely merit-based practices are to be adopted.

Despite the progress made to date, Catholics remain significantly under-represented among officers. By virtue of comparison with employment in the broader security sector, it is doubtful that their gains would have occurred if not for the legislative requirement to recruit equally from among the groups. The “nature of the police as a continuing Northern Irish force rather than an all-Ireland one meant that police reform would not achieve legitimacy” among all nationalists (Moran, p. 197). The continued growth in their participation should therefore not be taken for granted.

*Continued and expanded discrimination based on religion.* This alternative

envisions maintaining existing discriminatory hiring practices and extending them to promotions and to the broader justice sector. It is supported by the success discrimination has had in quickly achieving a more representative police, and the comparative lack of success among civilian staff and organizations. It promotes a short-term de-emphasis of the merit principle in favour of achieving representativeness.

Maintaining current momentum will require the police service to incentivize the retirement of long-serving, disproportionately Protestant officers. If Catholics continue to join the organization at rates matching the last decade, they will comprise 43% of the organization by 2020. This reflects the percentage of Catholics in the general population. Although opportunities for the new cohort of constables to rise through the ranks will emerge as long-serving officers retire, police leadership will remain Protestant during the next decade. A solution is to introduce positive discrimination so that qualified Catholics have an advantage over qualified Protestants in promotions.

Continuing and expanding the legislative provisions among the police would be easier to achieve than expanding them to the justice sector as a whole. Many justice employees are civil servants subject to employment policies that implicate the whole of government. Special legislation or amendments to the Fair Employment Act and related orders would have to be passed. The political challenge of securing a change in long-standing equality policies cannot be over-stated. Neither can the implications such a change would have on tensions among communities and perceptions of legitimacy in employment.

The positive discrimination measures introduced for the police were a temporary measure negotiated between unionists and nationalists. As they are about to expire, unionists will be reluctant to support additional measures that disadvantage Protestants. McGarry (2010) observes that: “if you extend it but you don’t give [the unionists] something in return there’s zero chance of them accepting it. So you have to think in terms of tradeoffs, or what you can give them to make it acceptable.” Extending and expanding positive discrimination would require negotiations between the parties to achieve agreement with respect to the tradeoffs that could be made.

If the scheme were to succeed, it would have to be regarded as a temporary measure. When equality is achieved, the discrimination criteria would have to be relaxed or eliminated so that employment remains proportional. Although fraught with challenges and the potential for conflict, this alternative is more likely to produce representative institutions in the near to medium term than current practice.

*A reduction in the size of the police service.* As Northern Ireland is over-policed on a per capita basis when compared with other jurisdictions in the United Kingdom, this option would provide for a reduction in their numbers to what is required operationally by the security situation. As the peace consolidates, it implies a need for fewer officers. Any decrease could be handled through attrition and the provision of early retirements.

However, if representativeness is to be achieved in the next decade, the complement of approximately 7,500 officers must remain static or increase. Reducing its size before then would provide few opportunities for new Catholic recruits and would have to disproportionately affect Protestants. Achieving representativeness in the police can be considered an integral part of consolidating the peace. When that occurs, it may then be more appropriate to re-examine the issue of over-policing in the context of operational requirements.

### *Recommendations*

*Expand and maintain discrimination based on religion.* Religion-based discrimination in hiring has been effective in promoting more equal representation of Catholics and Protestants in the police over the last decade. However its success was aided by a workforce reduction that predominantly affected Protestants. If society is to be reflected in the police, these initiatives will have to continue or the ratio of new hires will have to be skewed in favour of Catholics. Based on cross-community support for the merit principle, the former option is likely more palatable. Positive discrimination should be applied to promotions as well, as to effect change in the senior ranks.

It is recommended that discriminatory employment practices be extended to the remainder of the civilian positions within the justice portfolio where growth in the proportion of Catholics has been much slower. This would necessitate a political debate and a shift in the orientation of existing equality policy and community values. It would require political negotiation and compromise so that the unionists get something in return for supporting the measure. It would also have implications for the entire civil service. A new balance between merit and representativeness would have to be struck, and the community would have to reach a consensus over the extent of the positive discrimination. It could be implemented as a temporary measure. In the absence of such a difficult initiative, however, Protestants will remain over-represented in policing and justice for the foreseeable future.

*Maintain the size of the police service.* The current complement of police can be justified on the grounds of consolidating the peace. It is desirable so long as real progress is being made towards achieving representativeness within the organization, and as long as a heightened security risk is present. Policing numbers should be re-evaluated when the two communities are adequately represented, and as the risk diminishes.

## **Oversight and Accountability**

### *Context*

Oversight and accountability are important features of a democratic society. They are “essential to ensure the legitimacy of rule and to promote the concept of the public administrator as the servant of the people” (den Boer & Fernhout, 2008, p. 3). The Royal Ulster Constabulary’s accountability mechanisms were “dismissed as flawed and worthless” (Wright & Bryett, 2000, p. 115). Any oversight body charged with holding policing and justice to account must be representative of the national political communities. As a result of the reforms in policing and justice and the broader public sector, there exists today a multiplicity of scrutiny bodies. Indeed, sixteen separate bodies scrutinize the prison service alone (Maguire, 2009, p. 8).

*Devolution and political accountability.* Transferring legislative and executive control for policing and justice to Northern Ireland’s politicians is the only way to achieve proper democratic accountability (McGarry & O’Leary, 1999, p. 110). Accountability may be easier under Westminster control because there are “more compelling attractions to engage the interest of politicians down there” (Maguire, p. 2). Under devolution, policing and justice organizations will come under increased scrutiny.

Northern Ireland's politicians will not necessarily be attached to the policies and procedures of direct rule, which will result in a reconsideration of past practices.

### *Assessment of the Status Quo*

The policing review made recommendations with respect to establishing democratic, legal, financial, and internal accountability and transparency (ICPNI, pp. 28-39). It prompted the creation of a new policing board to publicly hold the chief constable and the service to account. The board is comprised in part of assembly politicians. The review recommended a fully independent police ombudsman to handle public complaints against the police and hold them accountable to the law. Since the establishment of the latter, complaints are trending downward and confidence that the office is impartial is high both among the public and police officers who have been subject to investigation (den Boer & Fernhout, p. 16). An oversight commissioner was created to oversee the implementation of the review's recommendations.

The Criminal Justice Review recommended the creation of a single, independent inspectorate to carry out periodic, cyclical and surprise evaluations of all aspects of the criminal justice system apart from the courts (CJRG, p. 370). It led to the creation of Criminal Justice Inspection Northern Ireland, which widely publishes its inspection reports. While the Review acknowledged that complaint handling is an effective part of effective accountability mechanisms (CJRG, p. 403), it did not recommend a system of independent, unified oversight over complaints. As a result, it remains difficult to ascertain the system-wide efficacy of complaints handling.

The relative lack of democratic oversight by politicians has made it difficult to achieve a whole-of-government perspective when considering policing and justice matters. Although the policing board is comprised in part by 10 politicians from the assembly, it is only mandated to hold the service to account for performance and expenditure against the policing plan (Maguire, p. 4). This narrow frame of reference precludes the board from considering whether the expenditures are appropriate when compared with government spending in other areas.

None of the committees at Westminster have a regular mandate to consider policing and justice issues in Northern Ireland. There, reports of scrutiny bodies are not debated in any forum. They rely on the media to disseminate results to the public (Maguire, p. 5). In short, there remains a considerable democratic deficit with respect to the oversight of policing and justice.

### *Evaluation of Principal Alternatives*

*A unified complaints ombudsperson for justice.* The police ombudsman has demonstrated that complaints can be handled in an impartial manner that broadly maintains the confidence of the general public and those who are investigated. Among justice agencies there remains a patchwork of bespoke complaints procedures and appeals processes. These are difficult for the public to understand and have confidence in. Moreover, it is hard to gauge the overall effectiveness of these processes. In order to enhance accountability, this recommendation would create a unified public complaints procedure for all bodies that comprise the justice portfolio (apart from the courts). The primary challenge would be providing effective investigation and resolution in the

context of a variety of organizations of different mandates and operating procedures.

*Increased democratic oversight.* Democratic oversight is the primary shortcoming of the status quo. The assembly and the justice committee will provide a forum for holding the department to account. It will be able to use and debate the reports of the scrutiny bodies. It will also be able to adopt a holistic approach to social policy that should promote coherence with already devolved functions. However, there is no guarantee that devolution and increased political oversight will produce a productive effective consideration of policing and justice issues rather than grand standing and media-fuelled reactivity.

### *Recommendations*

*Increased democratic oversight and a justice ombudsman.* Devolution will finally provide the democratic oversight that has been missing to date from the policing and justice portfolio. However, minor organizational reform among scrutiny bodies should provide for a consolidated and simplified complaints procedure for the portfolio. Taken together, these initiatives will build upon the progress made to date in achieving the trust of the nationalist and unionist communities.

## **Conclusions**

Both unionists and nationalists must identify with the new institutions if renewed conflict is to be avoided and resolved (McGarry & O'Leary, 1995, p. 392). Policing and justice arrangements must reflect each community. The policy of accommodating differences has gone some way toward enabling “both communities to enjoy the benefits of equality without forced assimilation” (O'Leary, Lyne, Marshall, & Rowthorn, 1993, p. 125). Yet there remains much more to be done.

Policing and justice are contentious issues that strike at the heart of the conflict. Given the history of violence, it is unsurprising that the major parties would put the devolved department's leadership to a cross-community vote in the assembly. However, the benefits of abandoning the d'Hondt system for this post are unsubstantiated, and it comes at the cost of a less proportional executive. In the short term, compromises should be made so that no party is left empty-handed by the abandonment of the d'Hondt system. As trust between the parties improves and the efficacy of existing checks on power is demonstrated, the d'Hondt system should be reinstated.

The equality found at the political level remains elusive within the police and the civil service. The development of non-sectarian, neutral state organizations requires pluralism and a commitment to proportionality. Given the slow pace of change, positive discrimination may be the only way to achieve it in the foreseeable future. However negotiations between unionists and nationalists will be necessary in order to produce a trade-off that benefits both communities.

Oversight and accountability measures have made significant inroads in achieving public trust. However, the relative lack of democratic oversight and the confusion caused by the existing multiplicity of criminal justice complaints processes need to be addressed. Devolution will address the democratic deficit, but a complaints ombudsperson for criminal justice should be created.

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## 5. THE GOOD FRIDAY AGREEMENT AND TRANSITIONAL JUSTICE – ANDREW AHERN

The purpose of this chapter is twofold. First, given that we are just over a decade on from the signing of the Good Friday Agreement (GFA, 1998) and that the power-sharing arrangement seems to be more or less stable following the St. Andrew's Agreement (Northern Ireland Office, 2006), one aim of this chapter is to critically assess what has been accomplished from the perspective of transitional justice. The second feature is then to present a policy proposal for moving forward in the near term. A crucial feature of this process is to examine the ways in which the nature and structure of the GFA has shaped the way in which transitional processes have been pursued. This connection is important, as one of the criticisms of the Agreement has been that it generally avoided dealing with both victims and the past more broadly (Hamilton, Thomson, & Smyth, 2002). While this may have been a necessary step towards reaching an acceptable political compromise, greater attention to the role of transitional and restorative justice mechanisms must be considered in the next phase of the process.

In order for the peace process to become consolidated, efforts at social transformation and an increased legitimization of state institutions must be pursued. Given the central position that official truth and reconciliation commissions occupy in the transitional justice literature, attention must be given to the reasons why such a mechanism is absent in the Northern Irish context. I argue that such a process does not fit within the broader pattern of the post-conflict settlement and that given the various reports and inquiries pursued since the GFA, may in fact serve to undermine the benefit of adopting a flexible, 'piecemeal' approach. Instead of pursuing a singular process, more attention should be directed towards supporting and institutionalizing 'bottom-up' efforts at community-centred justice. These processes may represent a real potential to increase the legitimacy of the state, police and justice system as well as a broader respect for the rule of law in a way that supplements the consociational, political arrangement.

### **Problematizing Transitional Justice and Consociationalism**

One of the paradoxes to emerge out of the post-conflict environment in Northern Ireland has been the seeming challenge of reconciling on the one hand, a desire to put aside violence and move towards a stable, democratic peace, and on the other, the substantive need to deal with the legacy of nearly 40 years of ethno-national violence. Following the Good Friday Agreement in 1998 an additional tension has emerged in relation to this dynamic. While the Agreement, and the political institutions which it created, are broadly accommodationist in their consociational structure, issues of transitional justice and 'dealing with the past' were conspicuously absent. This raises a dilemma in that the majority of mechanisms and practices associated with consociationalism are not generally geared towards processes of mutual reconciliation such as a broad-based truth commission. Additionally problematic is that much of the transitional justice literature and experiences have been generated in response to post-authoritarian regimes (Ní Aoláin & Campbell, 2005; Teitel, 2000). This creates complications around the way in which transitional processes are imagined and leads not only to implementation problems, but also more substantively to conflicts over the very terms of what a transitional process should entail.

One central issue in Northern Ireland in this regard is that the British state, while perhaps not being seen as a legitimate government in parts of the six counties,

nonetheless remained an internationally recognized democratic regime over the course. In terms of post-conflict transitions this presents a differing set of incentives and constraints within which actors can operate and in combination with the multiple political narratives, helps explain why no large-scale transitional justice initiative was constructed along the lines of the South African Truth and Reconciliation Commission (TRC) (Hamber, *Rights and Reasons*, 2002-2003, p. 1093; Bell, Campbell, & Ní Aoláin, *Justice Discourses in Transition*, 2004, p. 311).

The distinctively problematic features of the situation are captured by Ní Aoláin and Campbell who differentiate Northern Ireland as a “conflicted democracy,” as opposed to the more foundational social and political change which occurs in cases of “paradigmatic transition”.<sup>6</sup> (Ní Aoláin and Campbell 2005, pp. 174-5) They propose that there are significant qualitative differences between these two models of transition which lead to the pursuit of differing institutional responses. Most pointedly, the emphasis on institutional reform through power-sharing and the inclusion of formerly excluded political actors in a common political space limits the degree to which either a truth Commission or criminal processes may be widely employed to deal with the past (Ní Aoláin & Campbell, 2005, p. 194).<sup>7</sup> Indeed, the debate surrounding the role of the British state in either direct violence or collusion with loyalist paramilitary groups highlights the difficulty in defining which institutions can be seen as neutral and which ones are partisan<sup>8</sup> particularly in “conflicted democracies” where a degree of institutional continuity is present. While there are aspects of state action which may rightly be seen as illegitimate, they are insufficient in the “conflicted democracy” context to initiate more cathartic and sweeping transformations.

While the purpose and effectiveness of truth commissions and the associated top-down transitional justice mechanisms can be defined in terms of an attention to justice and long-term institutional and social impacts (Merwe, 2009), the conflict over the past made truth processes at the time of the peace negotiations potentially too volatile (Hamber, *Rights and Reasons*, 2002-2003, pp. 1087-8). In the end there was “a political premium...placed on the avoidance of anything as potentially problematic as a mechanism for dealing with the past” (Lundy & McGovern, *Truth, Justice and the Past*, 2008, p. 180).

While one can certainly recognize that the secession of violence was indeed a necessary first step towards a broader peace, this does not preclude additional processes of transitional justice, nor does it assure that issues and tensions connected to past violence are addressed. Thus in defending the GFA, McGarry and O’Leary assert that it is a necessarily consociational agreement and that “plurinational places like Northern Ireland require consociational arrangements, including power sharing and territorial

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<sup>6</sup> This latter category is seen to encompass the transition from military, authoritarian (including apartheid) or communist rule to civilian democracy in Latin America, South Africa and Eastern and Central Europe (Ní Aoláin and Campbell, 2005, p. 173).

<sup>7</sup> While Ní Aoláin and Campbell see the Northern Irish process as differing from those in places such as South Africa, Chile, Argentina or the Balkans where truth commissions were held (p.180), there is a question as to the extent to which the South African case is anomalous in that it combined a TRC with a form of power-sharing over the transitional period (Hamber 2002-2003).

<sup>8</sup> This concern is particularly relevant to the claims of nationalists and features in the debates surrounding some of the most prominent acts of political violence such as Bloody Sunday Investigation and the investigations into the murders of solicitors Patrick Finucane. More broadly this issue has come up within the context of the European Court of Human Rights (ECHR) which found evidence that the state failed to carry out an investigation in a timely manner under the Article 2 provisions and the ‘right to life’ *Finucane v. United Kingdom*, VIII (European Court of Human Rights 2003).

autonomy, but that these are not enough” (2009, p. 36). This view is coupled with a broadly liberal commitment to the rights of individuals and to the salience of “other public identities” (2009, p. 37). While they are hopeful in their assessment that this institutional arrangement will perpetuate a “common Northern Irish identity (2009, p. 83) there is a concern with regards to the ways in which consociational political structures shape other transitional and restorative mechanisms, particularly surrounding peace, justice and social transformation (McGrattan, 2009, p. 168).

In critiquing the structure of consociational politics John Cash questions the extent to which elite discourses can displace the social construction of “friend-enemy” (2009, p. 242) and argues that the consociational arrangement, although a part of enabling change, also “tends to perpetuate the pre-eminence of the traditional political identities” although he is somewhat positive about the degree to which these are more inclusivist now (2009, p. 248). The dilemma of the consociational agreement in this analysis is that it relies on elite bargaining to moderate political discourse and provide for a workable public sphere. Given that both nationalists and loyalists have elected more partisan parties as opposed to moderates – the DUP and Sinn Féin respectively (Northern Ireland Elections, 2010) - there is reason to be cautious in placing too much emphasis on top-level bargaining as a way to reconcile social divisions. Rupert Taylor makes a more glib assessment as he stresses the degree to which a focus on ethnic-national group identity masks extant issues of social justice and systemic discrimination (2009, p. 310). While these concerns are certainly substantive they must also be seen within the context of security and peace initiatives.

Following this logic, McGarry and O’Leary argue that, the institutional security of broadly consociational processes are a necessary first step towards a wider socially reformative process, however in light of the experience of the first decade under the GFA this seems to be an insufficient incentive. John Morison makes the argument that the GFA should not be seen as a particular “solution” to the conflict but rather as a point in a continuum of transitional processes which allows for social and ideational transformation (2009, pp. 284-5). This admittance of a more dynamic component of the post-conflict process leads into a more general consideration of transitional justice as part of the wider settlement including restorative justice initiatives.

### **Elites, Stages and Moving On**

As we have seen, the political dimension of the Agreement was largely the result of an elite process (Edwards, 2008, p. 211) and was constructed along deliberately consociational lines (McGarry & O’Leary, 2009, p. 23). While Edwards attributes the significant reduction in violence to the ability of elites to bargain and broker peace terms he is also cognizant of the potential for this to overshadow the lower-level process of accommodation and reconciliation. He argues that it may be that transitions are best thought of as a two stage process first involving elites and then building community responses once a settlement has become entrenched (2008, pp. 211-2). This perspective is shared by those in the consociational camp who acknowledge that “Northern Ireland’s experience confirms the values of reciprocal confidence building” although they are quick to point to the lack of a clearly mandated timetable for mutual concessions as a potential fault (McGarry & O’Leary, *Argument*, 2009, p. 47).

What is less clear from this perspective is the extent to which consociational

arrangements incentivize secondary transformation. While McGarry and O’Leary are quick to disagree with the contention that consociationalism necessarily ‘freezes’ political identities at a particular time through electoral incentives (2009, p. 83), they nevertheless under-specify the ways in which this political system can initiate broader, social transformational processes. In this light O’Flynn seems correct in his assertion that progressive integration is required *alongside* accommodation in particular as consociational power-sharing may be seen to be considered legitimate having been reinstated and supported by all parties. (2009, p. 264)

In a social, as opposed to purely political context this need for integrationist structures can be seen to be a key feature of cross-community reconciliation. To the extent that any such process is designed in a broad way, the outcome needs to be more than simply the intersection of two opposing camps. While this is not to say that there needs to be an explicit drive towards producing an “official” truth narrative or a singular public culture, it does suggest that there be a component of mutual integration between members of the two communities beyond their status as either nationalists or unionists. This imperative seems to be necessary at a social level for the very reason that one continually problematic and potentially destabilizing social feature is the extent to which the physical, and thus social space within Northern Ireland, and particularly in Belfast, is divided along ethno-national lines (Shirlow, 2008). This feature produces two potential issues. First, there is the extent to which exclusionary notions and negative constructions of the ‘other’ are reinforced through a lack of substantive interaction (Shirlow, 2008, p. 75) and secondly, that in the absence of cross-community interaction the actual sites of community contact become much more pressure laden and conflict prone (Shirlow, 2008, p. 76). This is borne out empirically as Shirlow and Murtath calculate that nearly 70% of conflict deaths occurred with 500m of so-called ‘interfaces’ between communities (2006, p. 73). Another pointed and clearly divisive manifestation of this can be seen surrounding the so-called ‘marching season’ and the periodic violence that marks the various sectarian parades (BBC, 2009).

### **Timing**

In asserting that the peace process necessitates a next phase, a crucial question that arises is one of timing. Accepting the continuation of the consociational power-sharing arrangement as a first move towards peace, there is the implication that there will be a transition from one set of processes to another or at least an additive process of institutional reinforcement as social processes and transitional practices emerge. Indeed this seems to be a widely shared view in the literature on the Northern Irish transition however there is much disagreement as to what or when greater attention to transitional justice or ‘truth’ processes should begin or how this should be constructed (Smyth, 2007, pp. 147-68). Most pointedly the Northern Ireland Affairs Committee asserted in 2005 that it was ‘virtually impossible’ to begin a truth process based on the absence of substantive agreement between the parties as to the subject and content of such a process (Smyth, 2007, p. 139). This ambiguity about criterion and timing threatens to undermine potentially fruitful advancements as tensions and contradictions may build up in the system the longer underlying concerns go unaddressed. To this end, the consociational framework of the GFA must be re-examined in light of a potential for institutional gridlock or a decline in institutional trust.

### **Taking the Next Step**

In attempting to reconcile the transitional justice approaches with the consociational outcomes of the GFA, this report focuses on three-issue areas which feature prominently in the transitional process.

- Top-level engagement with the past through some form of criminal process or Truth Commission
- Mid-level, institutionally specific inquiries
- Bottom-up community-based restorative justice initiatives

The first avenue of inquiry is perhaps the most difficult and contentious as highlighted above. While there are certainly linkages with more institutional reforms such as the reworking of the Police Service Northern Ireland (PSNI) (Gordon, 2008, p. 154; Patten Commission, 1999), one recurring instrument considered is either a truth commission or some other form of truth-recovery process. While there certainly have been a number of proposals put forth in this regard, and indeed there are numerous NGOs and other transitional justice organizations engaged with this potential process, the lack of broad political support and the central disagreement over the terms of any such official mechanism would seem to preclude it as a viable option in the near term. This resistance to truth recovery comes from both sides of the Agreement whose intransigence is reinforced through the incentives of the consociational agreement.

### **Transitional Democracy: Engaging with the Past**

One substantial issue in moving forward in a more formalized truth-based process is that terms of reference between unionists, nationalists and the British state are problematic and indeed much of the post-Agreement conflict involves a meta-debate concerning the relational aspects of those involved (Bell, Cambell, & Ní Aoláin, *Justice Discourses in Transition*, 2004, p. 316). This is significant given the claims of abuses perpetrated by all sides. In order for a centralized commission to be seen as both legitimate and effective it would require these parties to ‘by-in’ to the process as a substantial amount of cooperation and access to information would be needed to fully deal with the past. In the absence of this legitimating function of official recognition, the risk is that the process would remain stuck in the worn narratives such as the debate over former-paramilitary (particularly IRA) as either ‘soldiers’ (O’Boyle, 2002, p. 31) or ‘terrorists’ (Lundy & McGovern, *Unionism and Trust*, 2008) or how different factions have defined and classified ‘victims’. In this the ‘conflict about the conflict’ enters into conceptions, expectations and prescriptions when it comes to dealing with ‘truth’, which presents a set of unique impediments to the institutionalization of a transitional process.

One substantive point of disagreement between unionists and nationalists turns on how those either killed or affected by factional violence are to be regarded (Lundy & McGovern, *Unionism and Trust*, 2008). Most problematically, this line of thought has engendered some to construct a ‘hierarchy of victims’ which assigns more or less ‘blame’ to individuals relative to their involvement in the conflict (Smyth, 2007, pp. 76-8). This differentiation may help explain why no overarching truth process was initially possible.

While it may be possible in some instances to determine the extent to which a

victim of violence was in fact ‘innocent’ or a ‘true’ victim, the very use of these sorts of terms reveals the extent to which criteria can become politicized (Smyth, 2007). This politicization can be seen not only as an impediment to formal processes for dealing with the past but may also be seen as “reproduc(ing) in the dominant ethno-nationalist explanations that inspired and maintained the Troubles in the first place” (McGrattan, 2009, p. 168). In this line of argument, McGrattan highlights the role that political manipulation can play in reinforcing sectarian views and offers a critique of the transitional justice project in terms of its failure to consider both objective “chronology and alternative sources” in constructing ‘truth’ narratives (2009, p. 167).

While the problems of politicization remain a salient issue within any process of dealing with the past, this difficulty need not pose a structural limitation to moving towards processes which reconcile communities any more so than constructing a singular narrative is problematic (Smyth, 2007, pp. 22-39). As so many of the combatants involved were non-state actors, the social component of their constructed identity cannot be wholly circumscribed as simply a ‘victim’ or a ‘perpetrator’ and as such if we can accept that attempts to differentiate victims of violence in this way can become problematic, then it becomes clear why truth processes at a broad level were not undertaken from the outset.

### Next Steps

#### *Retain: Consociationalism plus*

Some commentators such as Ryan Gwan note that the result of the GFA was an ‘honourable draw’ (2007, p. 342) and that peace was only possible in the absence of substantial engagement with the past. This view seems to accurately describe the Agreement’s outcome, which is notably silent on “retrospective components, focusing instead on prospective provisions” (Duffy, 2010, p. 26). The process, rather than internalizing a debate related to the past, focused on the political as opposed to social aspects of peace (McGarry & O’Leary, 2009, p. 45). The political settlement, although certainly not consolidated immediately has been more recently reinstated via the St. Andrew’s Agreement and a viable power-sharing arrangement seems to be possible.

This suggests that the continuation of a consociational power-sharing arrangement is not only a feature of the peace process going forward, but that it also shapes the political landscape and conditions the way in which other transitional processes may operate. Significantly this means that centralized truth-process or broadly pursued criminal prosecutions are ruled out in the near term. While a truth commission of some sort may be possible in the future, greater political legitimacy and trust is required first. One implication of this position is with the exception of the more targeted inquires discussed below, criminal proceedings may be ruled out and the *de facto* amnesty<sup>9</sup> which is in place may be continued (Duffy, 2010, p. 38).

While we can be critical of the way in which this type of political structure may

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<sup>9</sup> While amnesty is *de facto* it is not *de jure* which leaves some individuals in a legal limbo. Most notably there is the situation of so-called ‘on-the-runs’ (OTRs) who are individuals who have fled Northern Ireland fearing prosecution for a political crime. While there are some proposals such as extending the GFA prisoner release provisions, the issue remains politically charged with little incentive for any major actor to revisit it currently. Significantly a blanket amnesty is ruled out in Harrington’s estimation which leaves the matter largely unresolved Harrington, J. (2009). Peace in Northern Ireland and the Remaining Issues of the ‘On-the-Runs’. *Human Rights Review*, 10, 5-34.

perpetuate sectarian attachments (Taylor, 2009, p. 320), the commitment to it by all parties following the St. Andrew's Agreement should not be underestimated. In the context of the Northern Irish process, this formalization of political engagement sets a stable background condition for future transitional justice mechanisms (McGarry & O'Leary, 2009, pp. 83-4) and must be considered within the context of policy proposals over the near term.

*Replace: A Truth Commission*

One potential, and much debated transitional process involves the creation of a Truth Commission which would systematically look into, not only specific instances of past violence, but would also have a mandate to try to draw together a larger macro-view of the past and the legacy of the conflict. While a number of mechanisms have been suggested, the report of the Consultative Group on the Past represents the most recent and fully articulated proposal. In brief, the main aspect of the Group's proposal was that an independent Legacy Commission should be tasked with investigating the past along four strands:

1. Helping society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict.
2. Reviewing and investigating historical cases.
3. Conducting a process of information recovery.
4. Examining linked or thematic cases emerging from the conflict. (Consultative Group on the Past, 2009, p. 17)

While this seems to approach the issue of the past in a more holistic way than previous efforts,<sup>10</sup> there has been substantive criticism of it which may underscore the relative lack of political support which may be necessary for such an initiative to work. Duffy notes that not only is the scope of the proposed Commission perhaps too broad to be effective (2010, p. 45), but he also laments the lack of attention to the role that inequitable power relations played in the conflict and the lack of prospects for this structural feature (2010, pp. 43-4). Another line of critique comes from Campbell who argues that the heavy reliance on legalistic mechanisms places the burden of evidence collection beyond the capacity of that which most independent commissions would be reasonably expected to pursue (2010, p. 6). The negative implication of this approach in Campbell's estimation is that the process imagined by the CGP problematically combines processes of 'truth' seeking and the potential for future prosecutions within the same body. In collapsing these two processes into one, the potential outcome is that neither may be pursued fully or satisfactorily (Campbell, *Conflicted Democracies*, 2010, pp. 6-7).

In broader political terms the report has generated considerably negative reactions from both major parties in the Northern Irish Assembly, which underscores the extent to which formal structures can become politicized and thus gridlocked. What has resulted is a continuation of the problems of the meta-narrative conflict with nationalists like Gerry Adams critiquing the lack of independence of the proposal (Sinn Féin, 2009) and

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<sup>10</sup> Compare this to the narrower mandates given to the HET (2006), The Patten Report (1999) or The Bloomfield Report (1997).

unionists restating their objections to equivocating conceptions of victimhood, preferring instead to restate their view that there are ‘real’ victims which hold a morally superior position (BBC, 2009).

A further issue with pursuing a largely top-down approach to dealing with the past is that broader public support seems lacking. This is salient in the context of thinking about transitional justice as Lundy and McGovern find that while nearly half (49.6%) of all respondents to the Northern Ireland Life and Times Survey saw a truth commission as either fairly or very important (2007, p. 326), there was an overwhelming distrust of nearly all local institutions and political parties (2007, p. 332). Of the institutions mentioned in the survey only the Northern Irish Assembly was trusted to run a truth commission by more than 10% of respondents (10.8%) (2007, p. 332). Other groups such as Loyalists (0.6%), Republicans (0.6%) and Judges (4.7%) fared worse (2007, p. 333). The only institution to receive a plurality of support was international organizations such as the UN (46.6%) (2007, p. 332). This suggests that if a process like the Legacy Commission was to be pursued, it would run the considerable risk of not only increasing partisanship within the Assembly but could also potentially undermine overall support for the very basis of a consociational bargain. If one of the desired outcomes of the process of consociational politics is that the public can begin to form durable connections with the state, then the seeming lack of broad-based support points to a potential cause for concern.

This lack of public trust in high level political structures should lead us to question the extent to which primarily elite driven solutions are politically viable across the next phase of the peace process. While only measuring trust within the context of a possible truth commission, Lundy and McGovern’s data suggest that more could be done to reinforce basic trust in institutions. Some form of reconciling this division must be undertaken if we are to move beyond the political arrangements and towards a more consolidated peace at a social level.

#### *Supplement: Mid-level enquires*

While the centralized processes imagined by the Commission on the Past’s recommendations might be problematic given a lack of institutional trust and conflicting ‘meta-narratives’, there is considerable evidence that more targeted, mid-range processes can allow for some measure of engaging with the past. Significantly, these can involve not only institutionally specific responses, but may also incorporate civil society activities. While not as overarching and holistic as the proposed Legacy Commission, these efforts nonetheless fit with the overall pattern of the post-conflict settlement and, while perhaps politically contested, offer a way in which specific acts of violence may be addressed. In locating the exploration of the past in narrower terms, this approach grounds the significant questions of actions and culpability in pointed events and may mitigate the potential for the past to become a political or rhetorical contestation.

These processes are the manifestation of Bell’s ‘piecemeal’ (Dealing with the Past, 2002-2003) process and have occurred largely outside of the GFA framework. While there is a desire to address some areas of criminality surrounding past violence or victims’ issues, they may be best pursued through more targeted, institutionally specific mechanisms. To this end three examples are worth highlighting. The Historical Enquires Team (2006) which is charged with re-examining security related deaths over the course

of the Troubles, the “Stevens 3” report (Stevens, 2003) which investigated the role of police collusion in the death of nationalist solicitor Patrick Finucane and the Healing Through Remembering Project (Healing Through Remembering, 2002) which provided a cross-community forum for individual story-telling and remembering, all deal with aspects of the past in specific ways. While each process takes a differing approach and perspective, they each begin to engage with the legacy of violence in substantive and positive ways.

Pursuing matters of justice in this way as opposed to through a more centralized body is a better fit within the context of the transitional process in Northern Ireland. As Campbell and Ní Aoláin have argued, historically the peace process has been “less one single uniform transition than the sum of multiple, and partly sequential shifts” (2002-2003, p. 883). The legacy of this approach to a certain extent limits the viability of moving towards a more centralized mechanism. Just as the absence of a high-level truth commission within the GFA prompted lower-level and ad hoc attempts at transitional justice, this trajectory now can be seen to have created a degree of path dependency wherein the political settlement has established the broad context of peace and exists as the primary venue for partisan engagement.

Over the near term, processes such as the above mentioned enquires and reports should be pursued where appropriate. Specifically the roles of the HET and the Police Ombudsman have the potential to provide substantial and meaningful institutional linkages between communities and state as outlined below. Pursuing transitional justice in this manner respects the additive function that incremental processes produce in dealing with the past. The institutional or situational focus has the benefit of not only addressing past actions but may also work to encourage institutional reform as can be seen in the case of the PSNI (Gordon, 2008).

*Supplement: Enhance bottom-up processes*

In the absence of support or agreement on a broad truth process or official commission, a viable next step should be to focus on supporting the ‘bottom-up’ and community focused efforts at restorative justice which have begun, with an aim to expanding their mandate beyond their original community environments. This process can be seen to take two forms and aims at primarily addressing both material and substantive issues within communities and also potentially to bridge across divisions. Within a larger analysis of the Northern Irish peace process, efforts along these lines aim to supplement the consociational political arrangements with greater integrative approaches at a social level as suggested by O’Flynn (2009).

This area of the transitional process in Northern Ireland can be seen to contrast with the largely institutional focus of the truth commission process and instead engages with communities. While perhaps more restorative than necessarily transitional, these processes seek to build on individual experiences and knit together a shared narrative based on the experiences of the most affected communities and citizens.<sup>11</sup> While there are certainly positive and negative implications of this, these processes are worth exploring as they could potentially increase both institutional legitimacy and trust, as

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<sup>11</sup> The most prominent example here is perhaps the Ardoyne Commemoration Project which was a “community-based ‘truth-telling’ project” based on the personal reflections and a contextualized history of one particular Unionist area, heavily affected by violence during the Troubles (Lundy and McGovern, 2006, p. 50-1).

well as respect for the rule of law.

This linkage between trust and legitimacy runs through many of the discussions surrounding local initiatives. In assessing the potential and continuing tensions at a social level within Northern Ireland, the matter of community-based initiatives comes through as one potentially crucial site for transitional mechanisms. These efforts were initially programs to intervene in ‘punishment’ violence but could be potentially more expansive as they evolve and grow. A crucial step in this process is the connections between the state and community organization as they began in the absence of ‘official’ processes.

While that first decade after the GFA has seen some progress in terms of societal reconciliation, a crucial feature in this is the way in which community efforts are seen to interface with official organizations, particularly with the police and justice system.

These linkages can be both potentially beneficial in terms of furthering the positive acceptance of reform efforts and also in terms of mitigating the amount of internal community conflict as a stepping-stone towards greater social interaction and acceptance between the two communities. In this light they present one aspect of a transitional justice regime although there are significant institutional and organizational impediments to their continued success and to a more widespread potential impact.

In addressing local justice issues and the prevention of incidences of ‘punishment’ violence – which in the past has been a form of informal social control handled by various paramilitary organizations - two prominent groups are Community Restorative Justice Ireland (CRJI) in nationalist areas and Northern Ireland Alternatives (Alternatives) in unionist areas (Eriksson, Bottom-Up Justice, 2009, p. 301; Mika, 2008). Both organizations employ ex-prisoners as counsellors and attempt to either intervene in cases where someone has been targeted for a ‘punishment’ or refer complaints of criminality to the police directly (Mika, 2008, pp. 43-6).

In surveying the prospects for community-based initiatives Mika argues that they have the potential to be seen as “authentic, sustainable and durable” (2008, p. 41) in contrast to more wide-ranging and centralized processes. This, he argues moves some of the work from institutional arrangements which may privilege ‘truth’ processes and emphasizes more restorative justice processes. This transition is a crucial distinction in that ‘truth’ remains largely contested in Northern Ireland, while restorative efforts focus more on “...victim service and support, restoration and healing, offender accountability, rehabilitation and re-integration, community safety, crime prevention and generally community responsibility, community development and regeneration and welfare and peace”. (Mika, 2008, p. 43)

While this list of goals may be laudable and there is considerable evidence that these efforts have been relatively successful to this point,<sup>12</sup> there are also reasons to be sceptical about the capacity of existing organizations to accomplish these tasks. One problem relates to institutional capacity and the degree to which community-based organizations may trade off creditability for effectiveness in relying disproportionately on volunteers. At one level the voluntary status of outreach workers may underscore their political impartiality and increase the community acceptance of them but at a

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<sup>12</sup> In discussing the CRJI and Alternatives Mika makes the point that they were able to stop paramilitary punishments in 82% and 71% of their cases respectively Mika, H. (2008). Community-Based Peacebuilding: A Case Study from Northern Ireland. *The Journal of the Institute of Justice and International Studies*, 8, 38-56.. This not only has the direct effect of aiding those particular individuals and their families but also has the broader impact of ‘building community’ through delegitimizing the use of violence (Mika, 2008). This contribution is crucial in a society where the very notion of ‘community’ remains a contested term.

certain point this may produce diminishing returns. The potential issue here is the degree to which trust is built on successful and effective community services (Mika, 2008, p. 44) wherein a reduction in quality would similarly reduce community acceptance.

The second major impediment which community-based processes face is that in the sense that they are successful, they have perhaps reached the bounds of their capacity without becoming further linked with state institutions. In this view, the evolution of community-based justice initiatives and police reform seems to be moving towards a point of convergence. This institutional linking is crucial and care must be taken to ensure that the process is mutually beneficial and does not erode the community basis of trust (Eriksson, *Justice in Transition*, 2009, p. 139). The initial processes in this regard seems to be positive as evidenced by the way that the Northern Ireland Office (NIO) developed and standardized the *Protocol for Community-Based Restorative Justice*<sup>13</sup> as a collaborative process (Eriksson, *Justice in Transition*, 2009, pp. 151-7). As the police reforms internally and the PSNI becomes more integrative and less partisan (Gordon, 2008, pp. 146-7), community trust and support becomes a crucial component of vetting the effectiveness of the initiative (Gordon, 2008, p. 154). For community-based organizations, this connection to state institutions provides a measure of legitimation beyond their initial community of interest. If creating cross-community connections is a goal over the near term, then this could prove to be a crucial step in expanding these organizations' mandates.

In terms of policing, from one perspective the increased recruitment of Catholics to the PSNI can be seen as a positive step towards reducing the apparent bias of state justice, however an equally important and reciprocal process of community acceptance is required if the transition from informal intracommunity policing through paramilitary organizations to official police recognition is to be consolidated. This latter process involves not only a renunciation of paramilitary 'punishments' as a way of settling 'ordinary' crime but also requires that communities accept that the police represent a fully integrated and nonpartisan force. In part this process is beginning to be played out through interconnections between the police and CRJI and Alternatives (Eriksson, *Bottom-Up Justice*, 2009, p. 301). In particular in the first case, the police recognize that this relationship may be the 'gateway' into otherwise closed communities and that they can build a basis of trust on it (Eriksson, *Bottom-Up Justice*, 2009, p. 314).

This view then sees the police as potentially integrationist as opposed to accommodationist in the sense that the goal is that it should not matter to which national group any particular officer belongs when they are responding to a call. What matters is that they treat all citizens equally regardless of their identity. This view seem hardly controversial as it embodies the well-established notion of state administrative neutrality, however in the context of transitioning from otherwise very insular neighbourhoods, it may be more problematic, particularly given the police record in dealing with nationalist areas. It is at this point where the potential linkage between the police and community-based organizations could begin to construct important and necessary connections based on reciprocal trust (Eriksson, *Justice in Transition*, 2009).

## Conclusion

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<sup>13</sup> This protocol seeks to register community groups with the NIO as a way of increasing the interconnections between the state and society and to provide a common template for the community processes going forward (Eriksson, 2009).

Situated within the consociational model of governance that has typified post-conflict Northern Ireland, transitional justice processes remind us that elite level arrangements may be necessary but not sufficient for a stable social order to emerge and become consolidated. While there have been substantial reductions, not only in terms of deaths but also overall political violence (McGarry & O'Leary, 2009, p. 52), this metric alone seems to be rather minimal in terms of a satisfactory transitional process. In reviewing the efforts at both restorative and transitional justice over the course of the first decade of the GFA two dominant narratives emerge. First, the relatively ad hoc or 'piecemeal' approach to transitional practices can be read as not only politically necessary but also as a prominent structural characteristic. Specific and targeted investigations, processes and inquiries typify the response to the past in the Northern Irish context as opposed to more singular 'grand narrative' efforts. While for some this is problematic in the sense that it may fail to provide for a more cathartic 'truth' process, the collective outcome nevertheless seems to provide a way to deal with the contentious issue of the past in a way that is flexible, adaptable and allows for a more additive process. In a situation where basic notions of responsibility, and conceptions of 'victims' and 'perpetrators' are contentious, this approach offers a pragmatic, if incremental vehicle for engaging with transitional justice goals.

The second dominant narrative highlights the role that 'bottom-up' processes may play in such fractious social environments. While these projects encompass both truth-orientated processes as with the Ardoyne Commemoration Project and more restorative justice initiatives, they have generally tended to be intra-community efforts. As such they may be considered loosely accommodationist in that they operate within, as opposed to across communities. While the relative success of initiative such as Alternatives and CRJI is a substantive step forward for peace within affected communities, there are concerns with the structure of these initiatives as the next phase of the peace process rolls out. One important positive outcome of increasing these sorts of processes is the entrenchment of institutional trust and respect for the rule of law within otherwise deeply divided and marginalized communities. Much of this trust building can be attributed to the creditability of the volunteers and the extent to which the organizations themselves are creatures of the communities they serve. On a more critical note, the lack of cross-community interaction raises significant concerns for the future prospects of these agencies to become more transformative. As they become successful within communities it would seem that a logical next step in a greater peace initiative would be to extend beyond the relatively contained community origins. For this to become a reality however there is a need to be attentive to not only resource requirements but also to the need to preserve perceived legitimacy as greater interconnections with the state are pursued.

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