

# *Fordham International Law Journal*

---

*Volume 22, Issue 4*

1998

*Article 2*

---

## The Belfast Agreement

David Trimble\*

\*

Copyright ©1998 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

# The Belfast Agreement

David Trimble

## **Abstract**

Jim Molyneux and Ian Paisley, the then unionist leadership, began this process in 1987 when they gave alternative proposals to Tom King, the then Secretary of State for Northern Ireland. The Brooke talks ended in apparent failure in November 1992, but from a unionist perspective, in fact made significant progress. There was a period in 1993 when it appeared that the British government was receptive to unionist urging to implement the "strand one committee report." Despite these doubts, we in the Ulster Unionist Party remained in the talks when Sinn Fein, the political wing of the IRA, was admitted in September 1997. The last decade had also brought a change in unionist attitudes. In the 1930s, there was a serious "back to Westminster" movement within the Ulster Unionist Party. They were content at that, even if they could only participate vicariously in British politics. This reflects the unionist view that the relevant context is the British Isles as a whole, which was an integrated political entity until partition in 1921. Although other parties had played a part in the discussions, at the end it came down to the SDLP and the Ulster Unionist Party. Moreover, we were well aware that any safeguards would be equally applicable to defend unionist interests. Since then one Ulster Unionist Assembly member has defected to the anti-Agreement unionists.

# THE BELFAST AGREEMENT

*David Trimble\**

## I. HISTORY OF THE BELFAST AGREEMENT

### A. Beginnings

The Belfast Agreement<sup>1</sup> (or "Agreement") was made at Stormont on the afternoon of April 10, 1998. For Ulster Unionists it was the culmination of an endeavor that stretched back over a decade. Nearly fifteen years earlier on November 15, 1985, the British and Irish governments had entered into another agreement.<sup>2</sup> One of its principal architects, Geoffrey Howe, the then British Foreign Secretary, fondly believed that he had solved "the Irish problem." His Prime Minister, Margaret Thatcher, appeared to have the more modest aim of trying to gain greater co-operation, primarily on security matters, from the Irish government and northern nationalists, by making significant concessions to nationalism in the governance of Northern Ireland.

The Anglo-Irish Agreement, however, was a failure even in its more modest aims. It did not result in any reduction in the level of terrorist violence. Indeed, it was counterproductive. The Agreement was made without any consultation with unionists and was imposed on them, even though it was clear that it was opposed by them and, indeed, opposed by a majority of the people of Northern Ireland. Because it changed the way that Northern Ireland was governed and did so in a way immune from Parliamentary scrutiny, it seemed to many to be merely a precursor of more fundamental constitutional changes. Consequently, it radicalized many in the Protestant working classes, resulting in increased loyalist paramilitary violence.

---

\* First Minister [Designate] of the Northern Ireland Assembly; Leader of the Ulster Unionist Party ("UUP"); Nobel Laureate for Peace, 1998.

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

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

### B. *Brooke/Mayhew Talks*

Mainstream unionism continued, as throughout the troubles, to oppose the use of violence. Instead, it committed itself to seek, by negotiation, an alternative to, and a replacement for, the Anglo-Irish Agreement. Jim Molyneaux and Ian Paisley, the then unionist leadership, began this process in 1987 when they gave alternative proposals to Tom King, the then Secretary of State for Northern Ireland. Negotiations did not, however, begin until 1991 (sometimes known as the Brooke talks after Peter Brooke, the then Secretary of State). These talks appeared to end after a few months, but were resumed after the 1992 general election, under the chairmanship of Patrick Mayhew, the new Secretary of State. These talks were attended by the larger parties committed to non-violence—often referred to as the constitutional parties.

The Brooke talks ended in apparent failure in November 1992, but from a unionist perspective, in fact made significant progress. A subcommittee in the talks had produced a report on strand one matters (future administrative structures within Northern Ireland) on which there was near agreement between unionists and nationalists. It appeared to us that the major obstacles were the failure of the two governments to resolve constitutional differences and what appeared to unionists as the ambition of the Irish government, under the guise of cross-border cooperation, to take over a substantial part of the internal government of Northern Ireland.

### C. *The Territorial Claim*

The constitutional differences stemmed from the territorial claim in the Irish constitution, which claimed that Northern Ireland was, irrespective of the views of its inhabitants, part of the national territory of the Republic of Ireland, or Eire, as the state is formally titled in its constitution. At the time of the Anglo-Irish Agreement, the British government had been persuaded that this was merely an aspiration, which would be superseded by a declaration in the agreement. The Irish Supreme Court, however, held that, notwithstanding the Anglo-Irish Agreement, the relevant part of the Irish constitution, Articles 2 and 3, constituted a “claim of legal right” and that Ministers in the Irish Government were under a “constitutional imperative” to give effect

to this claim. This decision curiously paralleled events in 1973-1974 when a similarly flawed attempt at a solution (the Sunningdale Agreement) was torpedoed by an Irish court ruling on the constitutional claim.

#### D. *The Downing Street Declaration*

At the end of the Mayhew talks, the unionist leadership invited the governments to resolve the constitutional differences themselves and in the meantime urged the British government to proceed to implement the "strand one committee report." In the end, both aspects of this approach worked out otherwise than intended.

There was a period in 1993 when it appeared that the British government was receptive to unionist urging to implement the "strand one committee report." But in the autumn matters changed. Then the prospect was held out, by the Hume/Adams initiative, of an end to paramilitary violence if the paramilitary-related political parties were given the opportunity of participating in the process. Consequently, the government appeared to shift its priorities and the result was the Downing Street Declaration of December 15, 1993.

The invitation to the governments to settle constitutional differences eventually resulted in the so-called Frameworks document of 1995. It was produced in quite different circumstances than those at the time when unionists had invited the government to produce proposals on constitutional matters. It did not resolve properly the Irish territorial claim and contained proposals for extensive cross-border structures, which unionists saw as undermining the Union. The Frameworks paper was obviously unacceptable; worse, its existence poisoned relations between unionists and the Major Government.

#### E. *The Beginning of the Mitchell Talks*

Unionists regarded this change in priorities with considerable skepticism, for they doubted whether the paramilitaries genuinely wanted to abandon terrorism. The IRA cease-fire in August 1994 added to these doubts as republicans pointedly refused to declare it permanent. Doubts as to the commitment of paramilitaries to the principles of peace and democracy have not yet been resolved, and the failure of the paramilitaries to build

confidence in their intentions has been the major stumbling block in the entire process since then.

Despite these doubts, we in the Ulster Unionist Party remained in the talks when Sinn Féin, the political wing of the IRA, was admitted in September 1997. Our reasons were first, to ensure that unionism was not marginalized, and second, to try to obtain an agreement with the Irish government and non-violent northern nationalism, i.e., the SDLP, and, in the process, put Irish Republicanism to the test. In all of these aims, I believe, we succeeded. And in so doing we completed the 1991-1992 talks process.

## II. *WHY SUCCESS NOW?*

Why did we succeed in 1998 when previous attempts had failed? There will no doubt be scope for many a doctoral thesis on this point, and I do not intend to try to identify all the reasons, but there are some factors that can be identified.

This time there were different governments in power in both the United Kingdom and the Republic of Ireland. In the case of the former, a government with a substantial overall majority replaced one that suffered from a gradually disappearing wafer-thin majority. This did not have the significance that was often assumed, for on Northern Ireland the Major Government always had the support of Labour. But there was indubitably a benefit in having a government at the beginning of its term with a decisive leader rather than an indecisive administration at the debilitated end of an eighteen year spell in office.

### A. *Blair*

The difference made by a new British Government presented itself to us primarily in terms of Tony Blair's policies. Like other Northern Ireland parties, we believed that the legal protection of human rights was an indispensable part of any agreement. This would have to take at least the form of the incorporation into domestic law of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>3</sup> ("Convention" or "European Convention"). For various reasons,

---

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

mainly because of their conception of English law, the Conservative Party was opposed to this. Labour was not. The change of government removed this obstacle.

The previous Conservative Government was, in principle, opposed to devolution to the constituent parts of the United Kingdom. They were prepared to make an exception for Northern Ireland, but were hampered by their inability to give a principled explanation for the inconsistency of their policies. They were consequently opposed to the concept of a Council of the British Isles, a key issue for unionists. As one Conservative Cabinet Minister said to me, this idea raised questions for the Conservatives, with regard to Scotland and Wales, that they were unable to answer. Again, the election of a Labour Government with a commitment to devolution to Scotland and Wales solved this problem and, indeed, made the subsequent Belfast Agreement fit into a pattern of constitutional development throughout the United Kingdom as a whole.

#### B. *Ahern*

While the new government in the Republic of Ireland was, like its predecessor, a coalition, the dynamics within the coalition were quite different. The personal authority of the Taoiseach, Bertie Ahern, was considerably greater, and it was always going to be easier for de Valera's constitution to be changed by a Fianna Fail Government than against the opposition of that party.

#### C. *Personal Factors*

Of course, one cannot omit the purely personal factors. The personal commitment to the talks of both Tony Blair and Bertie Ahern was vital. Nowhere was this more clearly shown than in the final week of the talks when the British Prime Minister relocated himself in Belfast and personally conducted the final negotiating sessions, and when, that Wednesday, the Irish Taoiseach came straight to Belfast from the funeral of his mother. Also vital for the success of the talks was the chairmanship of Sen. George Mitchell; his scrupulous fairness and infinite patience won the confidence of all.

*D. Changes in Europe*

There were also some long-term factors at work. Attitudes in Western Europe to nationality have changed in the course of the last fifty years. The defeat of Nazism, the reconstruction of West Germany within NATO as a modern liberal society, the greater ease and availability of travel both for business and leisure, and the development of the European Community all produced a sense of integration and a more relaxed attitude to national differences. In the past, nationalists generally put an emphasis on a national territory and on cultural homogeneity within that territory. These values now came to appear old-fashioned. The impact of this change was particularly marked on the Irish Republic, which, until its accession to the European Community in 1973, had been outside the mainstream of European experience this century.

At the same time the concept of self-determination was becoming less territorial and was moving to a focus on individual and group rights. This can be seen in the stress on human rights in the Helsinki Accords (1975), which developed from the individual to the communal through the "human dimension" of subsequent accords, culminating in the Charter of Paris (1992). Through the Organisation for Security and Co-operation in Europe there has been an attempt to apply these principles to a number of national and ethnic conflicts in the last decade.

*E. John Hume*

These changes in thought were reflected in the work of John Hume, who for many years has worked to redefine Irish nationalism. He has tried to move Irish nationalism away from the simplistic territorial certainties enshrined in de Valera's constitution and instead attempted to concentrate it on people rather than land and on seeking agreement between the people who actually inhabit the land in question. By implication, this approach involves the concept of consent, which unionists have regarded as the core of their position and which was to underpin the Belfast Agreement. By this redefinition of nationalism, a common ground, where dialogue might take place, became possible.



### F. *Collapse of Communism*

The end of the cold war and of the division of Europe further reinforced the feeling of many in Northern Ireland that this dispute was simply out of place in modern Europe. The fall of Communism was also significant as Eastern Europe was, indirectly, a major source of munitions for the Republican movement, and both they and some loyalists styled themselves as "socialist" and drew inspiration from revolutionary mythology and Leninist methodology.

### G. *Unionist Changes*

The last decade had also brought a change in unionist attitudes. Unionism had acquiesced in the abolition of the devolved Parliament at Stormont in 1972. For most unionists, Stormont had not been of great value in itself. Historically, unionists preferred the situation before the creation of a devolved Parliament for Northern Ireland when they were fully integrated into the United Kingdom. The acceptance of Stormont in 1920 as a "historic compromise," to quote Sir James Craig, was no mere form of words. In the 1930s, there was a serious "back to Westminster" movement within the Ulster Unionist Party. Consequently, when in the mid-1970s, it became clear that the abolition of Stormont was not going to be followed by moves towards a united Ireland, most unionists regarded direct rule as tolerable. Direct rule did, however, have disadvantages, the chief one being what we called the democratic deficit. This arose because local services were being centralized at the regional level just as Stormont was abolished. As a result, there existed in Northern Ireland only district councils with very limited functions, and what in any normal society would be regarded as matters for a local administration were handled by London-based Ministers who were not accountable to the local electorate.

Unionists, in fact, were more concerned with preventing nationalists exercising power over them than they were with exercising power themselves. They were content at that, even if they could only participate vicariously in British politics. While a return to Stormont was desirable in theory, it was not then considered worth the compromise entailed in an accommodation with nationalists.

This changed after 1985. The imposition of the Anglo-Irish Agreement, involving what unionists regarded as a form of Dublin rule, led many unionists to reassess direct rule. It no longer seemed so benign or tolerable, and the desire to restore a measure of local control over local decisions became stronger, even if acquiring such control could only be achieved at the price of a compromise with northern nationalism. It was this desire that brought unionists to make overtures about talks to the government in 1987, which in unionist eyes was the beginning of the road that led to the Agreement made at Stormont on April 10, 1998.

The talks in 1991 and 1992 left a number of unionists with the conviction that an agreement with constitutional nationalism was possible. Those talks had also defined the issues on the three main constitutional and institutional areas, namely the constitutional status of Northern Ireland, internal structures of government in Northern Ireland, and relationships with the Republic of Ireland.

### III. *THE BELFAST AGREEMENT*

#### A. *Constitutional Issues*

The Belfast Agreement dealt with constitutional issues unambiguously, thus avoiding a repetition of the mistake made in the Sunningdale Agreement in 1973 and the Anglo-Irish Agreement in 1985. Those agreements made the mistake of thinking that a declaration of the consent principle in a treaty would be sufficient. But, of course, such a declaration was not enough to override the clear statement in Article 2 of the 1937 Irish Constitution that "the national territory was the whole island of Ireland . . . ." This time the Belfast Agreement provides for the repeal in their entirety of Articles 2 and 3. In their place is a new Article 2, which recognizes the right of persons on the island of Ireland to be part of the Irish nation if they so wish.

A new Article 3 sets out the aspiration of a united Ireland. It recognizes, however, that this could be "brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions . . . ." The latter phrases interestingly contain a double referendum, i.e., that even if the people of Northern Ireland voted for a united Ire-

land, there would also have to be a referendum in the Republic of Ireland.

The first paragraph of the Agreement clearly recognizes that it is for the people of Northern Ireland alone, without any outside interference, to determine the destiny of Northern Ireland.<sup>4</sup> This conclusion is firmly stated in subparagraph (ii) with its reference to the exercise of consent being "without external impediment."<sup>5</sup> Subparagraph (i) contains a recognition of the "legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland."<sup>6</sup> This subparagraph is reinforced by the explicit acknowledgement in subparagraph (iii) that the present wish of the people of Northern Ireland for the maintenance of the United Kingdom is "freely exercised and *legitimate* . . . ."<sup>7</sup>

During the negotiations, the Irish government regularly referred to the need for a balanced constitutional settlement. As a result, the Agreement provides for clauses, which were incorporated into the Northern Ireland Act 1998, incorporating the consent principle and undertaking to support the wishes of the people of Northern Ireland if they wished to become part of a united Ireland. This provision, however, is merely a restatement of existing British legal provisions stemming back to the Irish Free State (Agreement) Act 1921.

The Agreement also addresses the need for protection of human rights and equality in civil, political, social, and cultural rights. This will be secured primarily by the incorporation of the European Convention into U.K. law. With regard to the regional administration in Northern Ireland, it will not be able to legislate or act contrary to the Convention. Under this convention, any aggrieved citizen will have a remedy in the courts. In addition, there will be a Human Rights Commission and an Equality Commission to keep those matters under review. The Republic of Ireland undertook to establish a Human Rights Commission, to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the United Kingdom), and to consider the incorporation of the European

---

4. Belfast Agreement, *supra* note 1, Constitutional Issues ¶ 1.

5. *Id.* ¶ 1(ii).

6. *Id.* ¶ 1(i).

7. *Id.* ¶ 1(iii) (emphasis added).

Convention into its law. All these matters were not controversial in the talks themselves, Unionists having been committed to the concept of a judicially enforceable Bill of Rights since the early 1970s.

The draft report presented by Senator Mitchell's team in the final week of the negotiations contained the above constitutional provisions. While it was acceptable to us on those points, the constitutional implications of its proposals on north/south matters were so far-reaching that we had no alternative but to reject the draft in its entirety.

### B. *North/south Matters*

Following our rejection of the Mitchell draft, Prime Minister Blair and Taoiseach Ahern decided to come to Belfast. With them we decided to concentrate on north/south matters. Our concern was to ensure that the proposed North/South Ministerial Council would, unlike the 1973 proposed Council of Ireland, have no supra-national characteristics. Instead, for us, it was essential that it should clearly draw its authority from the Northern Ireland Assembly and the Irish Dáil and be accountable to these democratic institutions.

Our impression was that this was not, in principle, unacceptable to the Irish Government. But their concern was that if they conceded a veto for the Northern Ireland Assembly, which would, because of the requirement for unanimous decisions, be in practice a unionist veto, then the North/South Ministerial Council might be completely stultified. They wanted to be sure that there would in fact be more than lip-service to north-south co-operation. This came down to a matter of trust. The Irish delegation wanted the Agreement to contain a number of pre-cooked co-operation schemes. The draft contained a list of such schemes, but its length was such that Senator Mitchell in his memoirs on the talks said that he immediately concluded that it would be impossible for us to accept the proposals. We considered that we could not commit the Assembly, even before it was elected. Moreover, having being excluded from participation in the administration of Northern Ireland for twenty-six years, we were not in a position to judge the merits of any of the proposed schemes. Above all, putting pre-cooked schemes in the agree-

ment smacked of imposition, and after the 1985 Agreement the notion of any imposition was anathema to unionists.

The solution emerged late on the Wednesday and was based on our suggestion for an imaginative use of the transitional period. I was aware from discussions with the Northern Ireland Office that while the intention was to proceed as quickly as possible to Assembly elections—they were held on June 25, 1998—it would not be possible to transfer power until February 1999 at the earliest. Consequently, we suggested that the Assembly use this transitional period to consider and agree upon a number of cross-border co-operation schemes. This met our concerns and at the same time gave the Irish the assurance that there would be some cross-border co-operation. It also tied in with the concept that all the institutions of the Agreement should come into operation at the same time. As Paddy Teahon, the Irish Cabinet Secretary, said, the transitional period could be likened to someone threading pearls onto a string. The individual pearls would be the various individual aspects of the Agreement, to which each north/south co-operation scheme could be added, one by one, as agreed during the transitional period, so that at the end of the transition all the institutional aspects of the Agreement would come up together.

As additional assurance, the Agreement set a target date of October 31 for agreement on these schemes. Ultimately, the target was not achieved. This was due to a range of factors, as can be seen from the fact that the Irish Government did not submit its suggestions in writing to the parties in the Northern Ireland Assembly until October 30. Agreement appeared to be reached at the beginning of December, but for various reasons it then unraveled. It was not until December 18, 1998 that agreement was reached on six co-operation schemes that would involve the creation of new cross-border machinery. That agreement was translated into legal effect by March 10, 1999, when four new British-Irish treaties were made and legislation to give the appropriate capacity to that new machinery was enacted.

Our concerns about the status and accountability of the North/South Ministerial Council are met in the Agreement. The North/South Ministerial Council is not a supra-national body. The Ministers from Dublin and Belfast who meet in it must act "in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly

and the Oireachtas respectively.”<sup>8</sup> This is reinforced by paragraph 6, which reads,

Each side to be in a position to take decisions . . . within the defined authority of those attending, through the arrangements in place for co-ordination of executive functioned with each jurisdiction. Each side to remain accountable to the Assembly and Oireachtas respectively, whose approval . . . would be required for decisions beyond the defined authority of those attending.<sup>9</sup>

It should be noted that “defined authority” in this paragraph means the authority given by the Executive or Assembly with regard to a particular meeting of the North/South Ministerial Council. Also, in the North/South Ministerial Council the Northern Ireland delegation must be balanced as between unionist and nationalist,<sup>10</sup> and that delegation acts as a unit. This gives unionists the assurance that nothing will happen in this North/South Ministerial Council without their consent.

### *C. British-Irish Council*

The North/South Ministerial Council is balanced by the creation of a British-Irish Council. This reflects the unionist view that the relevant context is the British Isles as a whole, which was an integrated political entity until partition in 1921. That integration has never entirely disappeared. The United Kingdom and the Republic of Ireland form a common travel area. Citizens of either state acquire most of the rights of citizenship in the other on residence, without having to become naturalized, and, most importantly, there continues to be a high degree of economic, social, and cultural interaction. In terms of both travel and trade, the east/west axis is more important than the north/south one.

The British-Irish Council also responds to the development of devolution within the United Kingdom. It will consist of the British and Irish Governments and the regional administrations within the British Isles, namely the Isle of Man and the Channel Isles (both of which are strictly speaking outside the United

8. *Id.*, Strand Two, North/South Ministerial Council ¶ 2.

9. *Id.* ¶ 6.

10. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Relations with other institutions ¶ 30.

Kingdom) and, on their creation, the devolved administrations in Northern Ireland, Scotland, and Wales. At the time of the Agreement, there were no regional administrations within the Republic of Ireland and so the issue did not then arise. Since then a measure of regionalization has been mooted, and the British-Irish Council, when it meets, may have to reconsider the matter.

Like the North/South Ministerial Council, the British-Irish Council will operate by consensus and be a forum where the parties can discuss, consult, and agree on co-operation on matters of mutual interest. Such co-operation may result in common policies or common action. Such co-operation could be on a bilateral or multilateral basis and could involve mechanisms to enable consultation, co-operation, and joint decision-making and mechanisms to implement any joint decisions made. Consequently, the British-Irish Council could develop the same type of implementation body already being created within the north/south context. While it has not yet attracted a high level of public visibility, it could be that this will, in the long-term, be the most important for the future. Certainly, it must be significant that for the first time since 1921, the Republic of Ireland has come into an institutional relationship with all other parts of the British Isles.

#### D. *The Northern Ireland Assembly*

Having settled the arrangements for north/south co-operation, the question of the administration of Northern Ireland was left for Thursday evening, which had been planned as the last night of the negotiations. Although other parties had played a part in the discussions, at the end it came down to the SDLP and the Ulster Unionist Party. For both of us it was familiar ground. The concept of an assembly elected by proportional representation with powers similar to the old Stormont Parliament, but with an initial reservation of police powers was common ground. However, that left to be decided the all-important issue of the way in which those powers would be exercised and the extent of safeguards to avoid abuse of power and to protect minorities, as it was agreed that such safeguards should exist.

The original unionist proposals had been for an administration operating in a way similar to local government, that is, a

system of executive committees, without Ministers, as such. Unionists proposed that such committees be formed on a proportional basis, with the chairmanships distributed proportionally among the parties. This, we argued, would allow all parties to be involved at all levels and in all stages of the process. Proportionality was to be achieved by the application of the d'Hondt formula, as used in the European Parliament. This enabled parties, in turn, to make choices about which position they would hold—the order in which choices would be made to be determined by the size of their representation in the Assembly.<sup>11</sup> The unionist proposals were deliberately designed to be inclusive, and it is worth noting that the basic concept was contained in the paper presented by Ian Paisley and Jim Molyneaux to Secretary of State Tom King in 1987.

During the negotiations, the unionist proposals were subject to criticism, particularly by the SDLP, on the grounds that they would be too unwieldy and inefficient in practice. Consequently, Unionists modified the scheme. They proposed that each committee would have, in addition, a Secretary to carry out committee decisions. However, the SDLP held out for a conventional Executive or cabinet system with Ministers.

In the negotiations, the SDLP also proposed a very elaborate range of checks and balances. We understood the need for safeguards. Indeed, the talks procedures with their requirement for a majority of unionists and a majority of nationalists to endorse any decision set a clear precedent, which, in effect, was followed. Moreover, we were well aware that any safeguards would be equally applicable to defend unionist interests. We were very concerned, however, that the safeguards proposed by the SDLP, in particular an elaborate system of special committee hearings for key proposals and decisions, were so overworked that they would prevent effective government. The SDLP responded to this criticism by suggesting that this safeguard could be overridden, by a cross-community vote. Moreover, they suggested an alternative method for achieving a cross-community vote to that used in the talks. In addition to the majority of unionists and a majority of nationalist as in the talks, it was sug-

---

11. For a further explanation of the d'Hondt system, see Brendan O'Leary, *The Nature of the Agreement*, 22 *FORDHAM INT'L L.J.* 1628, 1663 app.2 (1999).



gested that a sixty percent weighted majority would suffice, provided that it included forty percent of each communal identity.

While both ourselves and the SDLP had already offered an element of compromise during the negotiations, if there was going to be an Agreement, there had to be further compromises. It would perhaps have been desirable for us to have pressed the SDLP further, but there was the danger that if we did, we would leave them open to attack by Sinn Féin. The SDLP had to be able to say that they had obtained safeguards that would protect the essential interests of nationalists. This meant that on a range of issues the SDLP would in effect have a veto. In theory, this was undesirable, for it could result in stalemate, but we knew that the realities of society in Northern Ireland meant that no arrangements would work unless built on moderate nationalism and moderate unionism. Several times in the negotiations with the SDLP, I described our two parties as the center of gravity of Northern Ireland. If we were determined to work together, then virtually any system could be made to work, and so it has proved since the Agreement in the relationship between myself and the Deputy First Minister, Seamus Mallon.

We therefore decided to move closer to an executive-based administration and even to adopt the terminology of "Ministers," which we knew to be close to the SDLP's heart, and to adopt the SDLP safeguard scheme as they had amended it. What strongly influenced the latter decision was that the SDLP scheme for safeguards limited cross-community votes to a handful of circumstances, with a trigger mechanism that such a vote would be required for other matters if a "petition of concern" is presented by thirty members of the Assembly.<sup>12</sup> This decision, taken after midnight on Thursday, effectively ended the strand one negotiations when it was reported to the Chairman's office.

---

12. In the Agreement, cross-community votes are only required on the election of the Chair of the Assembly, the First and Deputy First Minister, adoption of Standing Orders and Budget allocations, decisions to invoke the equality procedures, and exclusion or removal from Office. The draftsman of the Northern Ireland Act 1998, however, added significantly to the list, in most cases without consulting the parties. I formed the impression that whenever he or she encountered a difficult drafting decision, resort was had to a cross-community vote or a joint decision for First and Deputy First Minister—the Agreement is also very economical on the latter.

### E. *Other Matters*

There were, in addition to the constitutional and institutional matters mentioned above, a range of other matters that were also crucial to the Agreement. These covered the so-called equality agenda, policing, security, decommissioning, and prisoners.

#### 1. Human Rights

Reference has been made above to the decision to incorporate the European Convention into domestic law. This will produce a legal revolution. In the absence of a formal constitution, U.K. courts and lawyers are not accustomed to working with fundamental laws. In British constitutional law, Parliament can, in theory, enact whatever it wills, and judges cannot strike down statutes or administrative acts based on statutes as unconstitutional. This will now change, if only for the devolved regions. The European Convention is incorporated into U.K. law generally in a very cautious manner. A decision by the courts that a statute contravenes the Convention does not invalidate the statute, but leads to a special Parliamentary procedure by which Parliament, if it wishes, may amend the statute. In the devolved regions, however, the Convention is made fundamental law for the devolved legislature and administration.

Courts, lawyers, legislators, and administrators in Northern Ireland, Scotland, and Wales will, therefore, have to develop a range of new skills and to cope with new legal challenges in a way in which their counterparts in England will not. It will be interesting to see how quickly these skills develop. In the Irish Republic it took about a generation for the fundamental law adopted in the 1937 constitution to develop a substantial body of case law. Also interesting will be the reaction of the Appellate Committee of the House of Lords, as most of its members will continue to be drawn from England.

There is here a precedent that I hope will not be followed. The Government of Ireland Act 1920 contained a few sections that operated as fundamental law for the Northern Ireland Parliament.<sup>13</sup> There was very little litigation based on them. In the

---

13. The failure to use these provisions is quite remarkable as they rendered unconstitutional and invalid statutes and, arguably, administrative actions that were discriminatory in religious terms. In the half century of the Stormont Parliament, there was only one case brought alleging that an Act of Parliament discriminated in religious

late 1940s, however, the Northern Ireland Court of Appeal, basing its decision on a major U.S. Supreme Court decision, tried to create a situation where a wide range of administrative acts would become subject to judicial control. The House of Lords, however, stepped back from this judicial adventurism and construed the 1920 Act so as to return the Courts to the traditional British approach.

The incorporation of the European Convention is reinforced by a statutory obligation to promote equality of opportunity, a Human Rights Commission, and an Equality Commission. The task of the Human Rights Commission will be to review the adequacy and effectiveness of existing laws and practices and to make recommendations thereon, the latter to advise on, validate, and monitor the operation of the statutory equality obligation. There is an interesting comparison here. The incorporation of the European Convention as fundamental law for the Assembly is, in British terms, a radical step. Establishing a commission of persons with much experience of politics or administration who are each considered to be a "safe pair of hands" to advise government is the traditional British practice. Time will tell which will prove the more effective. I rather suspect that the old-fashioned approach will be eclipsed by the more radical approach.

It should be noted that the Equality Commission is not a new measure. Apart from its work on the statutory equality obligation, it will merely continue the work of the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality, and the Disability Council. Indeed, it appears to have been the policy of the British Government to merge these commissions anyway, and the Agreement and subsequent legislation was utilized as a handy vehicle. Similarly, the reference later in the Agreement to a new regional development strategy and a new economic development strategy are not, in fact, Agreement-inspired proposals, but part of the administration's routine review of its policies.

---

terms. The case, which was brought by a Protestant clergyman arguing that an Act discriminated in favor of Roman Catholics, succeeded!

In addition, however, my academic and political colleague, Edgar Graham, who was murdered by the IRA, argued persuasively that all the educational legislation passed after World War II was unconstitutional as it endowed religion, both Protestant and Catholic.

## 2. Policing and Justice Matters

In dealing with policing and justice matters, it was agreed to institute two major reviews. The first involved the establishment of an independent Commission into policing arrangements with international and expert representation among its membership. The Commission has since been established under the chairmanship of the former governor of Hong Kong and Northern Ireland Office minister during some of the Thatcher years, Chris Patten. The second review involves the criminal justice system other than policing and matters relating to emergency legislation. A Civil Service team with some independent participation, however, is carrying out the latter review. The Agreement sets out the terms of reference of both reviews in full and generally unexceptional terms.

The contents of the reviews when complete will, of course, be extremely important, as policing and related matters can be extremely controversial. It is partly for this reason that the reviews were instituted. Had these matters been left to the talks participants, the likelihood is that political considerations would have dominated the outcome, assuming that is that there would have been an outcome. Many doubted the ability of the talks participants to agree these matters, even if they could agree, as they did, on constitutional matters!

The criminal law review may also give rise to controversy as it might provide a vehicle for what some call "restorative justice." In some contexts this idea may be a quite innocent means of enabling offenders to make some restitution to victims and the community. However, in the actual circumstances that prevail in Northern Ireland today, there is a serious danger that this concept would degenerate into state support for paramilitary beatings. These have increased significantly since the Agreement, as paramilitaries try to keep control over working-class areas and to maintain their rackets. Clearly, it would be unacceptable right across the community for these to continue under the label of "restorative justice." This problem could emerge too in connection with reforms of procedures concerning juveniles.

Two other problems might arise in connection with the review of criminal law. The first relates to whether this matter, together with responsibility for policing and prisons, should be devolved to the Assembly. Under the 1998 Northern Ireland

Act, this matter is initially reserved to the Westminster Parliament, and so the Secretary of State will continue to be responsible for it. There is, however, a broad view in Northern Ireland that the Assembly should, as confidence is built in the new institutions, assume responsibility for criminal law, policing, and prisons. It would be a mark of the growing maturity of the Assembly and of the political parties in it to become the means by which these services become accountable to society in Northern Ireland.

The second presents itself in the question of the decision to prosecute. At the moment serious cases go to one of the principal law officers of the Crown, the Director of Public Prosecutions, and in minor cases the decision to prosecute lies with the police themselves. Recently, in England a Crown Prosecution Service ("CPS") was created to put all these decisions into the hands of professional lawyers, but the CPS has not been a success, partly because of administrative problems, but partly, too, because of the difficulty of attracting lawyers of sufficient caliber.

If, however, this matter is handled, as I would suggest, then it could go a long way to deal with the difficult matter of confidence in policing generally. Hitherto the question of confidence in the police has been tackled by establishing codes of conduct, complaints procedures, and a police ombudsman. But these approaches are reactive; they come after the event. Police and community liaison committees are proactive, but they look at policy, and there the range for influence is necessarily limited because of the need to protect the operational independence of the police. If we were to adopt a more inquisitorial criminal process, then this matter would be quite different. If we created a legal post *similar* to the French Juge d'Instruction or the Scots Procurator Fiscal, then we would be injecting an independent element, not just into the decision to prosecute but also into the conduct of police investigations. This could obviate the increasingly elaborate complaint procedures, which absorb so much official and private time, effort, and money without, in many cases, actually improving the situation.

### 3. Early Release of Prisoners

The bulk of the Agreement relates to new institutions and to major constitutional and other legal changes, which are

clearly intended to last for some considerable time. The final two matters to mention, in contrast, are intended to be short-term matters to be dealt with over a two-year period. Yet, these short-term matters—prisoners and decommissioning—have proved so controversial that they have threatened the acceptance and implementation of the Agreement.

It was generally accepted that in the event of an agreement something would be done for prisoners. This was even accepted by Ian Paisley, who, during the Brooke talks, wrote to a loyalist prisoner, who was regarded as a go-between to the loyalist leadership in prison, saying “if we do manage to achieve an alternative to the Anglo-Irish Agreement and a democratic government is set up in Northern Ireland, matters in relation to prisoners would have to be looked at very closely indeed with all the various considerations being weighed in the balance.”<sup>14</sup>

There is an interesting paradox concerning paramilitary prisoners. In previous emergencies—the 1920 Troubles, World War II, and the border campaign in the 1950s—the administration had resorted to internment without trial because of the difficulties of obtaining convictions under normal judicial procedures. This practice was much criticized, but when the emergency was ending those interned were simply released.<sup>15</sup> In the current emergency, when criticism of internment led to a reliance on the criminal process, the release option was not easily available. Prisoners were convicted of specific offenses. These offenses, while they may have been politically motivated, were not political offenses. They involved breaches of the normal criminal law, such as murder, assault, and robbery. Consequently, releases, in addition to causing distress to persons who had suffered terrorist acts, were a direct political interference with the operation of the criminal process and raised questions

---

14. Letter from Ian Paisley (May 22, 1991). The recipient's name is erased in the published letter. On May 11, 1998, Billy McCaughey, who had served 16 years in prison for a murder committed in 1977, gave an interview to the *Irish News*. In the interview, he claimed that he had acted as liaison with the paramilitaries and stated, “I had reassurance from Paisley and Robinson that if the Talks reached a successful conclusion, then the issue of prisoners would have to be looked at. Even in 1991 the DUP was prepared to accept that the prison issue had to be resolved.”

15. Internees were able to secure their release at any time during the emergencies by giving an undertaking to keep the peace and not to engage in any acts of violence. The government was prepared to accept the word of republican internees, but very few availed themselves of this means of obtaining their liberty.

about discrimination against other offenders, colloquially known as "ordinary decent criminals."

Internment was not the only legal response in the previous emergencies. Criminal proceedings had been brought in a few cases. At the end of the so-called border campaign in 1962, there were some republican prisoners serving determinate terms for criminal offenses connected with that campaign. These sentenced prisoners were released early over the ensuing eighteen months, perhaps because it appeared unfair to continue their imprisonment while their comrades were quietly released. The talks participants were aware of the precedent, which reinforced the expectation that early releases would occur.

The Agreement provided that each government "will put in place mechanisms to provide for an accelerated programme for the release of prisoners." These terms were used because of the difference between the two states. Because of the legal regime in the United Kingdom for prisoners, an early release scheme required primary legislation. In the Irish Republic, however, all releases are a matter for government discretion, so no specific statutory scheme was necessary.

The United Kingdom scheme is given effect by the Northern Ireland (Sentences) Act 1998. Normally, prisoners are entitled to the remission of a portion of their sentences unless they misbehave in prison, when they can suffer a "loss of remission." The length of remission in Northern Ireland has varied from time to time. In England, remission had been an automatic one-third reduction of sentence, but in 1992 it was increased to one-half. That increase was extended to Northern Ireland in 1995. In effect, the 1998 Northern Ireland Act increases remission for qualifying prisoners to two-thirds and applies that increase to the period that a life sentence prisoner is considered by the Commission to have been likely to spend in prison.

The Act also contains a number of safeguards. First, prisoners adhering to groups that are not maintaining a complete and unequivocal cease-fire are excluded. Second, the Sentence Review Commissioners must be satisfied that the individual proposed for release is not likely to become involved in further acts of terrorism. Third, prisoners released may be recalled to serve the unexpired residue of their sentence if they become adherents of organizations not on cease-fire or if they become in-

volved in terrorist acts. Finally, the government can suspend the entire scheme if circumstances generally change.

Lastly, the Act provides for the release of any qualifying prisoners who are still in custody on the second anniversary of the beginning of the early release scheme.

#### 4. The Last Afternoon

Not all the above safeguards appear in the Agreement, but the last provision does. It came as an unpleasant surprise when, at midday on Good Friday, April 10, 1998, we saw the final draft of the Agreement. We now understand that this was inserted by the two governments in the small hours of Friday morning, when Sinn Féin, disappointed with the other parts of the Agreement threatened to walk out.

When we examined the final draft, we had a number of concerns, but after discussion they came down to two, prisoner releases and decommissioning. As a response to those concerns, the government showed us a draft of the release scheme. The safeguards noted above were some consolation, and, although still very unhappy with the scheme, we concluded, in the knowledge that this was something that governments were always likely to do, that we could not justify treating this as a break point.<sup>16</sup>

#### 5. Decommissioning

The other major concern was more difficult. The decommissioning of illegal weapons had been an important issue right from the Downing Street Declaration in 1993. Important in itself, it was even more important as a test of whether the paramilitaries were committed to peaceful means. If they were so committed, then paramilitaries would have welcomed decommissioning as a means of putting weapons out of reach of dissidents or Mafia-type elements. On the other hand, any refusal by paramilitaries to decommission implied that they were not committed to exclusively peaceful means.

In over four years after the Declaration, the public stance of republicans had been consistently negative.<sup>17</sup> The result was

---

16. It turned out that the draft that we were shown was the only copy that the government had and we had some difficulty returning it, for a colleague had inadvertently included it in papers that he took on holiday after Easter.

17. Loyalist paramilitaries had said on entering the Talks that they would decom-



that Unionists were convinced that republicans were not genuinely committed to peace—a conclusion reinforced by the knowledge that the “political” strategy being followed by republicans was described by them in their internal documents as part of “the tactical use of armed struggle.”

A commitment to peaceful means was, of course, central to the entire Agreement; without it any “peace process” would be a mockery. Consequently, it appears prominently in the opening section of the Agreement<sup>18</sup> and is repeated in several subsequent passages. Because of our lack of confidence in republican motives, we had insisted throughout the negotiations that holding office in the new administration be clearly dependent on a commitment to peaceful means and that that commitment be cross-referenced to decommissioning.

Ultimately, the Agreement imposes the conditions that we wanted on holding office: “Those who hold office should use only democratic, non-violent means, and those who do not should be excluded or removed from office under these provisions.”<sup>19</sup> The cross-reference between Office and decommissioning is also included in the Agreement; because as it was coyly placed in the decommissioning section rather than in Strand One, many commentators have overlooked it.<sup>20</sup>

Our problem then was not with the requirement of a commitment to peace and democracy or the linkage with decommissioning as the litmus test, but with the procedures for exclusion or removal in paragraph 25. These involved a vote in the Assembly on a cross-community basis. In effect, that meant that no matter what they did, Sinn Féin would only be removed if the SDLP agreed. Many members of the Ulster Unionist Talks team believed that this meant that the requirement to be committed

---

mission in parallel with republicans. The International Commission’s Report (or Mitchell Report) on decommissioning (January 1996) said that it was satisfied that all paramilitaries were committed to decommissioning; but we do not know what assurances were given to the Commission.

18. Belfast Agreement, *supra* note 1, Declaration for Support ¶ 4.

19. *Id.*, Strand One, Democratic Institutions in Northern Ireland, Executive Authority ¶ 25.

20. In paragraph 1 of the Decommissioning section, the participants reiterate that the resolution of decommissioning is indispensable and “recall the provisions of paragraph 25 of Strand 1.” *Id.*, Decommissioning ¶ 1. It should be remembered that the Agreement is a political document, which in a number of cases adopts face-saving circumlocutions where a legal document would have instead insisted on clarity.

to peace and democracy would be a dead letter, just like the original Mitchell Report on decommissioning and the resolutions on decommissioning in the talks of September 1997.

Late on Friday afternoon, the principal members of the Ulster Unionist Talks team—myself, John Taylor, Ken Maginnis, Reg Empey, and Jeffrey Donaldson—went to see the Prime Minister and urged him to strengthen the procedure in paragraph 25. We pointed out that it was a strand one matter concerning the internal affairs of the United Kingdom and so a matter within his power to change. He took the view that it could not be changed without the agreement of others. I then drew attention to the transition period, which was then expected to be about ten months or so, and indicated that the problem could be solved during that period. The Prime Minister said that he would reflect on the matter and see what comfort he could offer.

#### 6. The Blair Letter

Shortly after the meeting, we received the following letter from the Prime Minister.

I understand your problem with paragraph 25 of Strand 1 is that it requires decisions on those who should be excluded or removed from office in the Northern Ireland Executive to be taken on a cross-community basis.

This letter is to let you know that if, during the course of the first six months of the shadow Assembly or the Assembly itself, these provisions have been shown to be ineffective, we will support changes to these provisions to enable them to be properly effective in preventing such people from holding office.

Furthermore, I confirm that in our view the effect of the decommissioning section of the Agreement, with decommissioning schemes coming into effect in June, is that the process of decommissioning should start straight away.

Yours

Tony Blair

It was then on the basis of this letter, which was immediately published, that we indicated our support for the Agreement. Before doing so, I pointed out that I was accountable to the party's executive and council for my actions. The executive met the following day and endorsed the Agreement by a two-thirds margin, and the following Saturday, April 18, seventy percent of

the eight hundred strong Ulster Unionist Council also endorsed the Agreement. On April 10, Sinn Féin reserved their position. During the referendum, however, they campaigned for the Agreement.

#### 7. Afterwards

The referendum on May 22, 1999 resulted in a "yes" vote of 71.2% in Northern Ireland. Opinion polls indicated that some ninety-five percent of Catholics voted "yes," but that the "yes" vote among Protestants was around fifty-five percent. All commentators agreed that anger over prisoner release and doubts about decommissioning were the main reasons for Protestant opposition to the Agreement. In the Assembly elections on June 25, 1998, thirty pro-Agreement unionists were elected (twenty-eight Ulster Unionist and two PUP) and twenty-eight anti-Agreement unionists (twenty DUP, five UKUP, and three independent unionists). Since then one Ulster Unionist Assembly member has defected to the anti-Agreement unionists.

The transitional period has thrown up many problems, most of which have, at the time of writing, been resolved. I believe that the remaining problems will also be resolved, even if we cannot now predict precisely how and when that will happen. I also believe, whatever happens to the Agreement or particular aspects of it, that on April 10, 1998, society in Northern Ireland turned the corner and things can now only get better.

I see no reason to alter the words that I spoke on behalf of the Ulster Unionist Party at the final plenary session of the talks after the Agreement had been adopted by the participants under the "sufficient consensus" rule.

Mr. Chairman, I know we rise from the table with the Union stronger than when we first sat here. With one exception, the consent principle is accepted by nationalists, and will soon, I trust, be enshrined in the fundamental law of the Irish Republic.

We also rise with the prospect of democratic accountability restored in a new Assembly in which the interests of all can be protected, and having created a unique consultative and co-operative structure, which will enable all the regions of the British Isles to reflect in their interactions the many strands, social, political, cultural and economic that exist.

We see this Agreement as addressing the wounds which

have damaged our society, ensuring that our diverse traditions attract respect and, above all, laying the foundations for a healthy, vibrant democracy to replace the stagnation, frustration and powerlessness of the last three decades.

Whether it succeeds depends on our efforts in succeeding days. The opportunity is there. I believe the people of Northern Ireland will make their choice and leave behind those still mired in violence and hate.

Let us govern Northern Ireland together for the benefit of all our citizens for it is we who know best the hearts and minds of our own people and let us offer a vision of peace and prosperity to our children.