

Fordham International Law Journal

Volume 22, Issue 4

1998

Article 14

Legality, Legitimacy, and Democratic Renewal: The New Assembly in Context

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Abstract

This Essay examines the structure and functions of the new Northern Ireland Assembly within the context of the constitutional changes in the Britain and Ireland. Since its election in May 1997, the new Labour Government has been steadily putting in place key constitutional reforms. The changes were widely discussed, both internally while the party was in opposition and externally within the scholarly community. The Labour Government came to power on a manifesto that promised substantial constitutional reform with an emphasis on decentralization and participation. It is evident that the change of government had an impact on the process in Northern Ireland. In particular, the new Government has been willing to adopt a pragmatic approach to the process, and it is in a significantly more secure position than its predecessor. The pragmatism of new Labour has been mistakenly read by some as evidencing a lack of a unifying principle. Labour's approach, however, springs from modern trends in social democratic politics that stress the centrality of the enabling function of government. At the core of this new politics is a conception of autonomy in which the importance of participants reaching consensual outcomes in appropriate cases is accorded priority. This can be cynically cast as evasive or simply empty of content. It is suggested here that both readings are inaccurate.

LEGALITY, LEGITIMACY, AND DEMOCRATIC RENEWAL: THE NEW ASSEMBLY IN CONTEXT

Colin Harvey*

He stood there, for ages,
To wonder which side, if any, he should be on.¹

Still, for Jesus' sake,
Do me a favor, would you, just this once?
Prophesy, give scandal, cast the stone.²

INTRODUCTION

On May 22, 1998, the people of Ireland, North and South, chose to support the Belfast Agreement³ (or "Agreement") and thus signaled their desire for the process of constitutional transformation to begin. After much debate about whether commitments would be eroded during the process of translation, the Agreement is now enshrined in law in the provisions of the Northern Ireland Act of 1998.⁴ The Agreement was preceded by

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1. Paul Muldoon, *The Boundary Commission*, in *SELECTED POEMS 1968-1983*, at 48 (1986).

2. Seamus Heaney, *Weighing In*, in *THE SPIRIT LEVEL 17* (1996).

3. Belfast Agreement, Apr. 10, 1998, Cm. 3883 [hereinafter Belfast Agreement]. In Northern Ireland, 71.12% (676,966) voted "yes" and 28.88% (274,879) voted "no." In the Republic of Ireland, 94.4% voted "yes" (1,442,583) to the Agreement and to changes in Articles 2 and 3 of the constitution and 5.6% (85,174) voted "no."

4. Northern Ireland Act, 1998, ch. 47 (Eng.). The Northern Ireland Act of 1998 ("NIA") received royal assent on November 19, 1998. Note the following comment by the Secretary of State for Northern Ireland, Marjorie Mowlam, "The Bill has one simple overriding purpose – to implement the Belfast Agreement." House of Commons, Official Report, vol. 316, July 20, 1998, col. 814. The Bill was heavily amended during its passage through Parliament, reflecting the pace of the initial drafting stage and the results of various consultations. The argument was that in order to meet the tight deadlines there was no opportunity for extensive consultation before it was introduced. For a sample of the debates and the range of amendments, see House of Commons, Official Report, vol. 316, July 20, 1998, col. 814; House of Commons, Official Report, vol. 316, July 22, 1998, col. 1187; House of Commons, Official Report, vol. 316, July 24, 1998, col. 1387; House of Commons, Official Report, vol. 317, July 27, 1998, col. 55; House of Commons, Official Report, vol. 317, July 30, 1998, col. 559; House of Commons, Official Report, vol. 317, July 31, 1998, col. 633; House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 999; House of Lords, Official Report, vol. 593, Oct. 5, 1998, col. 167; House of Lords, Official Report, vol. 593, Oct. 19, 1998, col. 1177; House of Lords,

many years of both public and private discussion aimed at bringing an end to the conflict. The process of "constitution building" that has followed must be viewed within the context of wider changes taking place within Britain and Ireland, and elsewhere. While the Belfast Agreement was intended to settle an internal conflict with its own history and dynamics, it has paved the way for specific debates about the precise nature of constitutionalism and governance appropriate to the Northern Ireland context. These debates do not operate in a vacuum. There is ample historical evidence of the failings of past devolution projects and of a comparative nature to guide those wishing to construct a model that will last.

This Essay examines the structure and functions of the new Northern Ireland Assembly within the context of the constitutional changes in the Britain and Ireland. Since its election in May 1997, the new Labour Government has been steadily putting in place key constitutional reforms. The changes were widely discussed, both internally while the party was in opposition and externally within the scholarly community. The Labour Government came to power on a manifesto that promised substantial constitutional reform with an emphasis on decentralization and participation.⁵ It is evident that the change of government had an impact on the process in Northern Ireland. In particular, the new Government has been willing to adopt a pragmatic approach to the process, and it is in a significantly more secure position than its predecessor. The pragmatism of new Labour has been mistakenly read by some as evidencing a lack of a unifying principle. Labour's approach, however, springs from modern trends in social democratic politics that stress the centrality of the enabling function of government. At the core of this new politics is a conception of autonomy in which the importance of participants reaching consensual outcomes in appropriate cases is accorded priority. This can be cyn-

Official Report, vol. 593, Oct. 21, 1998, col. 1441; House of Lords, Official Report, vol. 593, Oct. 26, 1998, col. 1693; House of Lords, Official Report, vol. 593, Oct. 27, 1998, col. 1818; House of Lords, Official Report, vol. 594, Nov. 10, 1998, col. 630; House of Lords, Official Report, vol. 594, Nov. 11, 1998, col. 774; House of Lords, Official Report, vol. 594, Nov. 17, 1998, col. 1202.

5. See generally RODNEY BRAZIER, *CONSTITUTIONAL REFORM: RESHAPING THE BRITISH POLITICAL SYSTEM* 38-55 (1998).

ically cast as evasive or simply empty of content. It is suggested here that both readings are inaccurate.

With some reservations, discussed below, the constitutional process in Northern Ireland can therefore be usefully viewed within this more expansive context initiated by the new Government. This is in no way to undermine the specificity of the settlement reached, but to point to some of the public law issues that may arise in the future. The suggestion in this Essay is that many of the debates that have emerged following the conclusion of the Belfast Agreement are in fact quite familiar public law disputes (from a number of different societal contexts). Although it is beyond the scope of this Essay to go into detail here, it is apparent that tools developed elsewhere by public lawyers may be put to good use in exploring these debates.⁶ This argument is reinforced by the strong possibility that devolution will herald an increased use of legal technique in government in the future. This raises the issue of which paradigm of law should guide this new constitutional context. This Essay touches on this debate where appropriate. However, the main aim is to give a general picture of what is an ongoing process of transformation.

I. *RESTRUCTURING THE LANDSCAPE: CONSTITUTIONAL REFORM IN THE BRITAIN AND IRELAND*

Despite claims that the problems of Northern Ireland are inherently internal, it has always been clear to some that traditional approaches to constitutionalism in Ireland and Britain would have to move in new directions if a lasting political settlement was to become viable. As indicated, the constitutional changes in Northern Ireland are not taking place in a vacuum. Devolution has been a key aspect of the reform package of the new Labour Government. In practice, the Northern Ireland Assembly will exist alongside a Scottish Parliament and a Welsh Assembly, and there have been increasing calls for the creation of regional assemblies within England.⁷ Further to this, the Labour Government has been prepared to indulge readily in human

6. For a frank exchange of views on the role of public lawyers in the United Kingdom, see Brendan O'Leary, *What Should Public Lawyers Do?*, 12 OXFORD J. LEGAL STUD. 404 (1992) and P.P. Craig, *What Should Public Lawyers Do? A Reply*, 12 OXFORD J. LEGAL STUD. 564 (1992).

7. It is reported that ministers are considering proposals to give eight newly created regions a guaranteed status in Parliament. Initially, this would involve eight stand-

rights discourse. Whether the practice matches the airy rhetoric will be seen. One result is the Human Rights Act of 1998, which incorporates the European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ ("ECHR" or "Convention") of 1950 into domestic law. This is not to ignore proposals for a Freedom of Information Act and reform of the House of Lords. All these elements combine to constitute a significant restructuring of the constitutional landscape in the United Kingdom.

Before exploring the structures of the new Northern Ireland Assembly it is worth mentioning briefly here the other devolution schemes. Devolution has been referred to as the most radical constitutional reform since the Great Reform Act of 1832.⁹ Although it is strictly legally inaccurate to describe the model that is developing as a quasi-federal one, it will be politically difficult in the future for Westminster to assert authority on transferred matters.¹⁰ Politically difficult it will be—but not impossible. History has shown that when "pathological conditions" arise, Westminster may very well intervene. Nevertheless, in practice this is a significant decentralization of power, which heralds a long overdue recognition of difference in the "union" state.

The Welsh devolution scheme was heavily influenced by the Wales Act of 1978. In fact, it appears that key elements of the 1998 act were simply borrowed from this legislation and the report of the Kilbrandon Commission that preceded it.¹¹ The leg-

ing committees made up of Members of Parliament from those regions, with responsibility to develop regional policy. *GUARDIAN* (London), Jan. 2, 1998.

8. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

9. Vernon Bogdanor, *Devolution: The Constitutional Aspects*, in *CONSTITUTIONAL REFORM IN THE UNITED KINGDOM* 9 (The University of Cambridge Centre for Public Law ed., 1998).

10. See ERIC BARENDT, *AN INTRODUCTION TO CONSTITUTIONAL LAW* 60 (1998) (using example of Government of Ireland Act of 1920 to illustrate that "[t]he point is that for nearly fifty years Stormont had been left free to regulate the internal affairs of the Province"). In relation to Scotland, Bogdanor has stated, "In practice . . . sovereignty is being transferred, and Westminster will not be able to recover it, except under pathological circumstances." Bogdanor, *supra* note 9, at 12. For an examination of both federalism and devolution as possible "solutions," see JOHN MORISON & STEPHEN LIVINGSTONE, *RESHAPING PUBLIC POWER: NORTHERN IRELAND AND THE BRITISH CONSTITUTIONAL CRISIS* 95-103 (1995).

11. Richmond Rawlings, *The New Model Wales*, 25 *J. L. & Soc'y* 461 (1998); see DAVID WILLIAMS, *DEVOLUTION: THE WELSH PERSPECTIVE* in *CONSTITUTIONAL REFORM IN*

isolation is not, however, simply a return to the 1970s; it reflects the substantial changes that have taken place in governance since then.¹² The scheme for Wales involves executive, and not legislative, devolution as is the case in Scotland. The Government of Wales Act of 1998 ("GWA") reflects the detailed arrangements for the Welsh Assembly, which is intended to assume responsibility for policies and public services previously under the authority of the Secretary of State for Wales. The National Assembly for Wales, or Cynulliad Cenedlaethol Cymru, will have sixty members elected every four years.¹³ Forty members of the Assembly will be elected using the "first past the post" system, and twenty will be elected using the Additional Member System ("AMS") from five electoral regions.¹⁴ Although the Government has argued that the system is designed to reflect the differences within Wales, the use of the AMS has been criticized for the way that it favors the major political parties.¹⁵ The "closed list" system that has been adopted is also open to criticism for its potential to perpetuate patronage.¹⁶

As to the structures of the National Assembly for Wales, a key debate was whether there should be a cabinet or committee model. The cabinet model was adopted in order to make the lines of accountability clearer and to meet criticism that the Assembly's status would be weak. A central feature of the new structure is the extent of delegation of powers and the flexibility inherent in the GWA. There will be a First Secretary elected by the Assembly members,¹⁷ who will appoint Assembly Secretaries.¹⁸ The Assembly will establish committees with elected members,¹⁹ which will in turn create subcommittees. At the core of the Assembly structure is an Executive Committee, with the First Secretary as chair.²⁰ He or she is responsible for allocating the

THE UNITED KINGDOM 41 (The University of Cambridge Centre for Public Law ed., 1998).

12. See Government of Wales Act, 1998, ch. 38 (Eng.). The Government of Wales Act of 1998 ("GWA") received royal assent on July 31, 1998. See VOICES FOR WALES, 1997, Cm. 3718.

13. Government of Wales Act, 1998, §§ 1, 3.

14. *Id.* §§ 4-7, sched. 1.

15. Rawlings, *supra* note 11, at 476.

16. *Id.*

17. Government of Wales Act, 1998, § 53(1).

18. *Id.* § 53(2).

19. *Id.* § 54.

20. *Id.* § 56.

various functions to the other members of the Executive Committee. The Executive Committee and the various other committees and subcommittees are all accountable to the Assembly. The flexibility built into the system may allow the growth of a different kind of politics from that associated with traditional Westminster cabinet-style government. There are, however, problems: most notably with the power of the First Secretary within the internal structures.²¹ Other key features of the Welsh devolution scheme worth highlighting here include provisions on equality of opportunity,²² the place of the Welsh language,²³ and the relationship between Wales, local government, Westminster, and Europe. Other issues presented by the GWA, which arise in all the devolution schemes, include the future role of the Judicial Committee of the Privy Council and the question of whether it is now time to establish a proper Constitutional Court.

Devolution to Scotland is on a different scale to that of Wales. It highlights the fact that, although legally incorrect, the political reality is that this settlement is quasi-federal. This quasi-federal characteristic reflects Scotland's already distinctive place including, for example, its separate legal system. It is not clear that this distinctiveness is enough to justify the difference in treatment for Scotland and Wales. On principle, if the aim is decentralization of power and a recognition of national identity, it is difficult to see why the schemes are so different in practice. As noted, the Labour Government has shown its willingness to be pragmatic in the design of these schemes. Rather than advance uniform devolution schemes, a sensitivity has been shown to context (e.g., the lukewarm reception given to the plans in Wales).

As with so much that surrounds concepts of belonging and identity, language and terminology matter greatly. And it is here that the differentiated nature of devolution becomes plain. For example, Scotland is a "nation" and Wales is a "region." It is beyond the remit of this Essay to probe the assumptions embedded in these linguistic practices, but their use is worth noting.

In concrete terms, Scotland is to have a Parliament and not

21. Rawlings, *supra* note 11, at 482.

22. Government of Wales Act, 1998, §§ 48, 120.

23. *Id.* §§ 47, 122.

an Assembly.²⁴ Scottish devolution is legislative in nature²⁵—the laws made by the Parliament will be known as Acts of the Scottish Parliament,²⁶—and unlike the Northern Ireland Assembly, the Parliament will have tax varying powers.²⁷ Provision is made for a Scottish executive with a membership of a First Minister, Ministers (appointed by the First Minister),²⁸ a Lord Advocate, and a Solicitor General for Scotland.²⁹ The First Minister is to be appointed by the government from among the members of the Scottish Parliament.³⁰ On human rights, a member of the Scottish executive has no power to make subordinate legislation or do any other act that is incompatible with Convention rights³¹ (or for that matter with European Community law).³²

The devolution schemes are part of the more general process of constitutional reform, which was mapped out in the theories of constitutional lawyers long before implementation became politically feasible. Although at times lacking in imagination, the constitutional reform debate has produced much work of value and now, with a government more open to it, has begun to have an impressive impact in constitutional practice. The ever-increasing popularity of human rights discourse in public law debates is one aspect of this. The resort to rights-talk is useful as far as it goes. But there really has not been sufficient careful thought among public lawyers about what this means in concrete terms. One awaits a proper response to all of this rights-talk, which nudges us back to the admittedly difficult task of linking our understanding of rights to a defensible conception of popular sovereignty. This may, in practice, be raised if the legislative competence of a devolved authority is challenged on rights

24. Scotland Act, 1998, ch. 46, § 1 (Eng.). The Scotland Act of 1998 ("SA") received royal assent on November 19, 1998. See John McEldowney, *Legal Aspects of Relations Between the United Kingdom and the Scottish Parliament: The Evolution of Subordinate Sovereignty?*, in *THE LAW AND PARLIAMENT* (Dawn Oliver & Gavin Drewry eds., 1998).

25. Scotland Act, 1998, §§ 28-36.

26. *Id.* § 28(7) ("This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.").

27. *Id.* §§ 73-80.

28. *Id.* § 47.

29. *Id.* § 44.

30. *Id.* § 45.

31. This has the same meaning as in section 1 of the Human Rights Act of 1998, which received the royal assent on November 9, 1998. Human Rights Act, 1998, ch. 42 (Eng.).

32. Scotland Act, 1998, §§ 57(2), 58(1), 100.

grounds. The amount of attention lavished on the human rights aspects of the reform package, when compared with the treatment of devolution, says something revealing about the current state of public law scholarship.

The Human Rights Act of 1998³³ (or "HRA") has received ample treatment in the literature, and it is not the intention here to add to this. The HRA incorporates aspects of the ECHR into domestic law.³⁴ When in force, there will be an obligation on the courts to read and to give effect to primary and subordinate legislation in a way compatible with Convention rights.³⁵ With regard to primary legislation, the court may make a declaration of incompatibility if it is satisfied that a provision is incompatible with a Convention right.³⁶ Issues of interest that will arise include the horizontal effect of the HRA,³⁷ the precise meaning of "public authority" in section 6, and the court's use and application of individual convention rights.

The internal aspect of the conflict in Northern Ireland does not erode the bi-statal elements of the political settlement reached. The nature of the conflict meant that any agreement required recognition of this fact.³⁸ The new structures, which include increased links and cooperation with the rest of Ireland, will operate within the context of the constitutional changes that have taken place (and are promised) in the Republic of Ireland. There is also an intrinsic all Ireland dimension to the Belfast Agreement, which is discussed below. As part of the Agreement, the Irish Government committed itself to altering the Irish Constitution. Following the referendum, the government enacted the Nineteenth Amendment of the Constitution Act of 1998; which amends Articles 2, 3, and 29 of the Constitution in accord with the Belfast Agreement, and this act was signed by the President on June 3, 1998.³⁹ The changes to the Irish Constitution will not become permanent until the Government makes a dec-

33. Human Rights Act, 1998.

34. See RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL, 1997, Cm. 3782.

35. Human Rights Act, 1998, § 3.

36. *Id.* § 4.

37. See Murray Hunt, *The "Horizontal Effect" of the Human Rights Act*, 1998 PUB. L. 423.

38. See John McGarry, *Political Settlements in Northern Ireland and South Africa*, XLVI POL. STUD. 853 (1998).

39. Belfast Agreement, *supra* note 3, Constitutional Issues, Annex B. The new provisions are worth citing in full:

laration that the terms of the Belfast Agreement have been complied with. These changes signal an approach to the concept of "nation" that is more in tune with modern understandings of political and cultural diversity. This diversity may provide the opportunity to develop a "less restrictive" concept of nationality in the future.⁴⁰

The Irish Government also committed itself in the Belfast Agreement to taking further steps to strengthen the protection of human rights. The measures "would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland."⁴¹ This strengthening is to include further examination of incorporation of the ECHR⁴² and "will draw on . . . other international legal instruments in the field of human rights."⁴³ Further to this, there are a number of specific commitments in the Agreement: establishment of a Human Rights Commission with a mandate and remit equivalent to that within

Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation.

That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3

1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for shared purposes and may exercise powers and functions in respect of all or any part of the island."

Id.; see Desmond M. Clarke, *Nation, State and Nationality in the Irish Constitution*, 16 IRISH L. TIMES 252 (1998).

40. Clarke, *supra* note 39, at 256.

41. Belfast Agreement, *supra* note 3, Rights, Safeguards and Equality of Opportunity, Human Rights, Comparable Steps by the Irish Government ¶ 9.

42. See Donnacha O'Connell, *Irish Chapter*, in THE EUROPEAN CONVENTION ON HUMAN RIGHTS—THE IMPACT OF THE ECHR IN THE LEGAL AND POLITICAL SYSTEMS OF MEMBER STATES OVER THE PERIOD 1953-2000 (Robin Blackburn & Jorg Polakiewicz eds., forthcoming).

43. See *supra* note 41.

Northern Ireland;⁴⁴ ratification of the Council of Europe's Framework Convention on National Minorities; implementation of enhanced employment equality legislation; and the introduction of equal status legislation with an agreement to "continue to take active steps to demonstrate its respect for the different traditions in the island of Ireland."⁴⁵ The Irish Government has said that it will include in its legislative program the establishment of a Human Rights Commission, equal status legislation, and amendments to the Nationality and Citizenship Act of 1956. The Irish Government has also indicated that it may include reference to incorporation of the ECHR.⁴⁶

The above exploration of some of the other constitutional changes taking place is intended to highlight the transformation that is occurring generally. It illustrates the extent of the decentralization process going on in the United Kingdom and the changes that have been taking place within the Republic of Ireland. Space has precluded detailed reference to the European dimension, but this also must not be forgotten. Constitutional restructuring in Britain and Ireland is happening in the context of debates about the Europeanization and globalization of law and policy. The terms of this debate are still highly contested, and inflated claims to novelty should be treated cautiously; but this again supplies the context within which the emerging polity in Northern Ireland will have to function. All these different legal and social orders, whether examined as systems, regimes, or networks, will all be feeding into the process. Mapping this new landscape does not necessarily require new tools, but the evidence suggests that we need to continue, or in some cases begin, to think differently about the languages of constitutional law and politics that we are using.

II. A HISTORY OF FAILURE AND NEW BEGINNINGS?

References to the Northern Ireland experience can be found in many general discussions of devolution. There is nothing new about devolution in Northern Ireland, and lessons can

44. Note that the Agreement envisages a joint committee of representatives from the two human rights commissions to consider drafting a Charter to reflect agreed measures of human rights protection for everyone living in the island of Ireland.

45. *Id.*

46. The Labour Party in the Republic has drafted a Human Rights Bill and an Equal Status Bill with the aim of moving the debate forward.

be drawn from past shortcomings.⁴⁷ It was the stark failure of devolution in this context, highlighted by the rise of the civil rights movement in the 1960s, which exposed the weakness at the heart of Westminster-style majoritarianism and the "state" in Northern Ireland.⁴⁸ It is worth observing that much of what is to be found in the Belfast Agreement is belated recognition of the civil rights demands voiced in the 1960s. The domination by a monolithic Unionist Party and the systematic discrimination against the Catholic minority was aided by the architecture and context of devolution and neglect from the center, evident for example, in the fact that since 1923 questions relating to Northern Ireland matters were not raised at Westminster.⁴⁹ The language of devolution is again relevant. The descriptions of these arrangements as quasi-federal were strictly inaccurate, but did capture something essential about them.⁵⁰ As has been noted, the language used conjured up images of a "mini-state."⁵¹ The devolution scheme under the Government of Ireland Act of 1920 (the "1920 Act") lasted until 1972. The Northern Ireland Parliament was prorogued and abolished by the Northern Ireland Constitution Act of 1973. The Assembly established under this legislation lasted for just five months.

It is interesting to note the change in language here, with the abandonment of the terminology of statehood that had gone before. Official preferences had now shifted to give recognition to the failures of the devolutionary model that had become dominant. The shift in direction was clearly away from majoritarian

47. See generally BRIGID HADFIELD, *THE CONSTITUTION OF NORTHERN IRELAND* chs. 3, 4 (1989); Paul R. Maguire, *Why Devolution?*, in *NORTHERN IRELAND: POLITICS AND THE CONSTITUTION* 13 (Brigid Hadfield ed., 1992).

48. BRENDAN O'LEARY & JOHN MCGARRY, *THE POLITICS OF ANTAGONISM: UNDERSTANDING NORTHERN IRELAND* 277 (2d ed. 1996).

49. Cf. Government of Ireland Act, 1920, 10 & 11 Geo. 5 § 75 (Eng.) ("Notwithstanding the establishment of the Parliament of Northern Ireland - or of anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Northern Ireland and every part thereof.").

50. See Brigid Hadfield, *Scotland's Parliament: A Northern Ireland Perspective on the White Paper*, 1997 PUB. L. 660, 662.

51. See HADFIELD, *supra* note 47, at 88 ("For fifty years Northern Ireland, endowed with all the trappings of a 'mini-state' . . . had as its constitution one that it had never sought, but one to which it had rapidly adapted. In 1972 it all came to an end."); see also Brigid Hadfield, *Devolution: Some Key Issues and a Northern Ireland Searchlight*, in *CONSTITUTIONAL REFORM IN THE UNITED KINGDOM* 51-52 (The University of Cambridge Centre for Public Law ed., 1998).

democracy towards the idea of consociational democracy.⁵² The story of the collapse of this arrangement is well known.⁵³

Since then there have been a series of attempts to reach a political settlement that have, until recently, ended in failure. In that period a number of devolution schemes were proposed again with little lasting success (e.g., the Northern Ireland Act of 1982).⁵⁴ The process that led to the Agreement is well known and need not be recounted here.

The most recent attempt to secure a settlement can be traced to events leading up to the adoption of the Downing Street Declaration of 1993. Without wishing to convey the impression of a natural evolution in this short Essay, efforts to reach an accommodation intensified significantly in the years that followed. Both governments made a series of attempts to give impetus to the process, a good example being the Framework Documents adopted in February 1995. Despite reservations, the three-stranded approach, initiated in the early 1990s, proved a useful tool. The change of Government in Britain and the pragmatic approach that it adopted also gave a boost to the process. Ultimately, however, the Agreement's adoption was dependent on the consensus achieved among the political parties negotiating the final text.

The interlocking complexity of the Belfast Agreement is impressive. With the democratic legitimacy that it has been accorded by the peoples of Ireland (north and south) and its strong emphasis on human rights and equality, it presents one of the best opportunities to embed a lasting political settlement. Viewing it in the context of past failure, it brings together a complex set of interests and perspectives. The complexity of the Agreement has permitted parties to present it in different ways to their various constituencies. These are, however, partial per-

52. JOSEPH J. LEE, *IRELAND 1912-1985: POLITICS AND SOCIETY* 442 (1989).

53. *See id.* at 443.

Had all nominally constitutional parties chosen to cooperate, the lines would have been clearly drawn between constitutionalism and violence. By refusing to cooperate with Catholics in the Executive, Paisley and Craig pandered to the supremacist instincts of their grass roots, and effectively sabotaged whatever possibility there may have been of peaceful evolution.

Id.

54. *See* NORTHERN IRELAND OFFICE, *NORTHERN IRELAND: A FRAMEWORK FOR DEVOLUTION 1982*, Cm. 8541; Brigid Hadfield, *The Northern Ireland Act 1982 - Do-it-Yourself Devolution?*, 33 N. IR. LEGAL Q. 301 (1982); HADFIELD, *supra* note 47, at 150-77.

spectives on the totality of the settlement reached. Public lawyers will find these interpretative controversies familiar. It is often the starting point in the continuing conversation that is the day-to-day reality of life in functioning social democratic polities.⁵⁵ A constitution has been described as “an historical project that each generation of citizens continues to pursue.”⁵⁶ It may be that these textual arguments over the Agreement and the Northern Ireland Act of 1998 represent the stirrings of such a constitutional conversation and thus a subtle shift from dogma to engagement.⁵⁷

III. THE NORTHERN IRELAND ASSEMBLY

The conclusion of the Belfast Agreement was contingent on a number of factors and cannot be reduced purely to a story about the Westminster-driven constitutional reform project.⁵⁸ The institutions that have emerged will, however, have to function in the new constitutional landscape outlined above, and with the knowledge of previous failures. This section of the Es-

55. Cf. JURGEN HABERMAS, *A BERLIN REPUBLIC: WRITINGS ON GERMANY* 133 (1998) (“I see these democratic constitutions as so many projects on which legislators, along with the legal and administrative system, work each and every day - and whose continuation is constantly being fought for in the public political sphere.”).

56. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 107 (Charles Taylor ed., 1994).

57. The importance of engagement for the understanding of democracy defended here is captured perfectly in the following:

Truth here is what an unlimited community of inquirers would agree upon, were inquiry to be as diligently pursued as far as it could fruitfully go. Truth is a final opinion which actual participants in inquiry can never know that they have, for there is no way of knowing whether inquiry has been pushed as far as it could go.

David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L.J. 129, 179 (1996).

58. For an assessment of the impact of the new arrangements on the Act of Union see Brigid Hadfield, *The Belfast Agreement, Sovereignty and the State of the Union*, 1998 PUB. L. 599. Note the following by Lord Dubs (Parliamentary Under-Secretary of State for Northern Ireland) on the decision to conduct a poll under § 1(2):

The Secretary of State would have to make a decision in the round, based on all the evidence available to her. I do not think it appropriate for me to indicate precisely the way she would make her decision. I believe that she would look at all the facts. Opinion polls might be helpful. Other forms of expression of opinion by people in Northern Ireland would be helpful. She would take an overall view and we would then go through the process I have indicated.

House of Lords, Official Report, vol. 593, Oct. 19, 1998, col. 1184.

say aims to provide an outline of some of the main functions of the Assembly. Much of the detail awaits final agreement by the Assembly on standing orders although some work has been done on this already.⁵⁹

Strand One of the negotiations centered on the creation of democratic institutions in Northern Ireland. The result was agreement on the establishment of a new Northern Ireland Assembly with, to borrow from the Agreement, "executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community." Elections for the 108 member Assembly took place on June 25, 1998.⁶⁰ The first meeting of the Assembly was on July 1, 1998. David Trimble and Seamus Mallon were, respectively, appointed First Minister and deputy First Minister designate.

Much debate followed the conclusion of the Agreement, and there was clearly a feeling among some that the move to legislation saw erosion of its provisions. The speed of the process certainly gave cause for concern. Recognizing this, the Government did, however, display a willingness to accept a substantial number of amendments. The provisions of the Agreement have now been translated into the Northern Ireland Act of 1998. It is noteworthy that commencement of Parts II and III of the 1998 act, dealing with the Assembly, are dependent on whether it "appears to the Secretary of State that sufficient progress has been made in implementing the Belfast Agreement."⁶¹ At the time of writing, the Secretary of State for Northern Ireland had just published her detailed legislative program for devolution with March 10, 1998, being suggested as a possible "legislative target date." The aim on Strand One is to have made the De-

59. Initial standing orders were adopted in accordance with section 10(1) of the Northern Ireland (Elections) Act of 1998. Northern Ireland (Elections) Act, 1998, ch. 12, § 10(1) (Eng.). At the first meeting of the Assembly, a Committee to draw up draft standing orders was established. The Committee on Standing Orders has issued a number of reports. See *Interim Report from the Committee on Standing Orders*, NNIA 1 (Sept. 14, 1998); *Progress Report from the Committee on Standing Orders*, NNIA 4 (Oct. 26, 1998). The eventual aim is to present the Assembly with a set of draft standing orders.

60. Northern Ireland (Elections) Act, 1998; Northern Ireland (Elections) Order of 1998, S.I. 1998, No. 1287 (Eng.). Those who question the number of Members in the new Assembly must remember that this was in the Agreement and therefore approved by the electorate. It is also worth noting Mr. Murphy's comment, "If the price of peace and political stability is 108 Members and the existence of junior Ministers, it is a price worth paying." House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1036.

61. Northern Ireland Act, 1998, ch. 47, § 3(1) (Eng.).

partments and Transfer of Functions Orders by February with a draft Order to amend existing enactments to be consistent with the agreed departmental structures to be debated in the same month. Other planned preparations include progress on the Civic Forum and the British-Irish Council, as well as agreement on the number of Ministers and their functions.

Problems have arisen over the relationship between decommissioning and the formation of the executive. The UUP has argued that Sinn Féin should not be permitted onto the Executive without prior IRA decommissioning. Sinn Féin, and other parties, have pointed to the fact that the text of the Agreement makes no direct link between the issues. Agreement has, however, been reached on the number of departments and on the implementing bodies.

Elections to the Assembly are to take place every four years with the next on May 1, 2003.⁶² The Secretary of State has the power to direct that elections take place before this time.⁶³ The Assembly also has the power to dissolve itself by a resolution supported by two-thirds of the total number of members.⁶⁴ Laws of the Assembly are to be known as Acts.⁶⁵ A provision is not law if it is outside the legislative competence of the Assembly.⁶⁶ In broad terms, this will occur if the provision⁶⁷ forms part of the law of a country other than Northern Ireland, deals with an excepted matter,⁶⁸ is incompatible with Convention rights,⁶⁹ is incompatible with European Community law, discriminates on the grounds of religious belief or political opinion, or modifies the European Communities Act of 1972, the Human Rights Act of

62. *Id.* § 31(1)-(2). There are six members of the Assembly for each Northern Ireland constituency.

63. *Id.* § 31(3).

64. *Id.* § 32 (1)-(2)

65. *Id.* § 5(1). A Bill will become an Act when it has been passed by the Assembly and received Royal Assent. *Id.* § 5(2).

66. *Id.* § 6(1); *see id.* §§ 81-83.

67. *See id.* § 6.

68. For a list of excepted and reserved matters, see *id.* scheds. 2, 3. Lord Dubs has stated, "Everything that is not set out in the schedules as being excepted or reserved is transferred, and in those fields, essentially the economic and social areas covered by the six current Northern Ireland departments, the Assembly and the new Ministers sitting in it will have the future responsibility of government." House of Lords, Official Report, vol. 593, Oct. 5, 1998, col. 171.

69. Northern Ireland Act, 1998, ch. 47, sched. 14, ¶ 1 (Eng.).

1998, or relevant sections of the Northern Ireland Act of 1998.⁷⁰ There is detailed provision in the Northern Ireland Act (and in the other devolution schemes) for court proceedings in relation to “devolution issues.”⁷¹

The detail of the precise arrangements for the scrutiny of bills will depend on the final standing orders adopted.⁷² The Northern Ireland Act does, however, provide a skeletal outline of the process. A Minister in charge of a bill will have to make a written statement, which will be published, stating that in his or her view the bill is within the legislative competence of the Assembly.⁷³ The Presiding Officer will have the power to refer a bill to the Secretary of State for Northern Ireland if the Presiding Officer considers that it deals with a reserved matter.⁷⁴ The Attorney General for Northern Ireland will have the power to refer the issue of legislative competence in relation to a specific provision of a bill to the Judicial Committee for a decision.⁷⁵ The Secretary of State will have the power not to submit a bill for Royal Assent in a number of circumstances, including when he or she considers that a provision of the bill would be incompatible with international obligations, the interests of defense or national security, or the protection of public safety or public order, or would have an adverse effect on the operation of the market in goods and services within the United Kingdom.⁷⁶ He or she

70. *Id.* §§ 43(1)-(6), 43(8), 67, 84-86, 95(3)-(4), 98.

71. The term is defined in Schedule 10 of the Northern Ireland Act to include the question of whether an Act of the Assembly is within its legislative competence. *See id.* sched. 10; *see also* Scotland Act, 1998, ch. 46, sched. 6, §§ 24-31 (Eng.); Government of Wales Act, 1998, ch. 48, sched. 8 §§ 22-28 (Eng.) (relating to proceedings in Northern Ireland on “devolution issues”).

72. *See* Northern Ireland Act, 1998, § 13 (setting out in detail what standing orders shall and may include). The proceedings of the Assembly will be regulated by standing orders, and they will only be able to be made, amended, or repealed with cross-community support. *See id.* sched. 6. On provision for standing orders for Assembly Committees that includes a formula for the appointment of members of the political parties to statutory committees, *see id.* § 29. The Assembly and its committees have the power to call witnesses and documents in prescribed circumstances. *See id.* §§ 44-46.

73. *Id.* § 9.

74. *Id.* § 10(2)(b).

75. *Id.* § 11(1). Note that a decision that a provision is within the competence of the Assembly will also apply to the Act when enacted.

76. *Id.* § 14(5); *see also id.* § 26 (providing that Secretary of State may order any act proposed by Minister or Northern Ireland Department that, *inter alia*, is incompatible with international obligations not to be taken); *id.* § 26(2) (providing that Secretary of State may order act that is required for these purposes to be taken).

has the power to revoke legislation in the same circumstances.⁷⁷ The Secretary of State will also be empowered to revoke subordinate legislation if it contains a provision dealing with an excepted or reserved matter.⁷⁸ In both these latter cases the Secretary of State must recite reasons for the revocation order. A Northern Ireland bill may also be subject to control by Westminster.⁷⁹ There are significant exceptions to these procedures. For example, the Secretary of State is not required to comply if he or she "considers that by reason of urgency it should be submitted for Royal Assent without first being laid before Parliament."⁸⁰

Within six weeks of each Assembly, the First Minister and Deputy First Minister will be elected.⁸¹ They must stand jointly and will be elected on the basis of a majority vote of designated nationalists and unionists. Both must affirm the Pledge of Office before taking their posts. The Pledge of Office, which was included as an annex to Strand One of the Agreement, and now can be found in Schedule 4 of the Northern Ireland Agreement, contains a variety of obligations. This includes a commitment to non-violence and exclusively peaceful and democratic means, as well as the pledge to serve all the people of Northern Ireland equally and to act so as to promote equality and to prevent discrimination.

Corruption in public administration has received considerable attention of late in both Britain and Ireland. The unearthing of corrupt practices has resulted in a demand for firmer regulation of the activities of elected officials. In this climate it is unsurprising that this firmer regulation is also reflected in the Belfast Agreement. Compliance with a Ministerial Code of Conduct⁸² ("Code") is required. The Code reflects developments at Westminster on the regulation of standards in public life.⁸³ The

77. *Id.* § 26(4).

78. *Id.* § 25.

79. *Id.* § 15(1).

80. *Id.* § 15(3).

81. *See id.* § 16.

82. *Id.* sched. 4.

83. *See generally* Michael Rush, *The Law Relating to Members' Conduct*, in *THE LAW AND PARLIAMENT* 105 (Dawn Oliver & Gavin Drewry eds., 1998) (discussing events at Westminster); *see also* Northern Ireland Act, 1998, § 43 (providing that standing orders are to include provision requiring register of interests as well as provision for declaration of interest by member of Assembly before he or she takes part in any proceedings of Assembly relating to that matter). The standing orders may make provision for restricting the participation of a member with a declared interest. The Code of Conduct

provisions of, for example, the standing orders on members' interests are likely to prove a useful tool in regulating the conduct of ministers.⁸⁴ It will be worth observing whether the issue of standards will become as pressing in the Northern Ireland context.

Where the Assembly wishes to create a department (or to dissolve an existing one), the First Minister and the Deputy First Minister are responsible for determining the number of Ministerial offices and their functions.⁸⁵ These determinations must be approved by a resolution of the Assembly on the basis of cross-community support. The number of Ministerial Offices is not to exceed ten. Agreement was reached on December 18, 1998, on the number of Departments. There will be ten departments: agriculture; environment; regional development; social development; education; higher and further education, training, and development;⁸⁶ enterprise, trade and investment; culture, arts, and leisure; health, social services, and public safety; and finance and personnel.⁸⁷ The Office of the First Minister and deputy First Minister will have an Economic Policy Unit and special responsibility for equality. As this indicates there is to be no Department of Equality. There will, however, be a new Equality Unit. It is claimed that the new unit will monitor, evaluate, and determine measures necessary to ensure that equality is observed throughout public administration. This approach gained favor because it was thought that it avoided alleged dangers arising from a free-standing Equality Department controlled by a "representative of one community."

This must all be read in the light of the power of the Assembly to exclude Ministers or junior Ministers for up to a period of twelve months where he or she is not committed to non-violence and exclusively peaceful and democratic means or because of any other failure with regards to the Pledge of Office.⁸⁸ The res-

and the Guide to the Rules Relating to the Conduct of Members were published on March 1, 1999.

84. *E.g.*, Northern Ireland Act, 1998, § 43(5)-(8).

85. *Id.* § 17(1).

86. *See id.* §§ 87-88 (making provision for consultation and co-ordination in areas of social security, child support, and pensions).

87. *Cf.* Belfast Agreement, *supra* note 3, Strand Two, Annex.

88. *See* Northern Ireland Act, 1998, § 30. Accusations that the Pledge of Office has been breached have already been made by Sinn Féin against the First Minister designate. This is in relation to David Trimble's calls for the Parade Commission to be dis-

olution must be moved by the First Minister, deputy First Minister, or the Secretary of State and be supported by at least thirty Assembly members and have cross-community support. There are a number of factors that the Secretary of State must take into account when deciding whether to seek a resolution of the Assembly on this matter, including whether the party is cooperating fully with the Decommissioning Body.⁸⁹

Ministerial offices are to be filled using the d'Hondt system.⁹⁰ The political party with the highest figure under this calculation may select an office and a person to hold it. The formula is applied until all the Ministerial offices are filled.⁹¹ The First Minister and deputy First Minister are not excluded from taking up Ministerial Office. The appointment of junior Ministers is largely a matter for the Assembly to determine.⁹²

There will be an Executive Committee of the Assembly composed of the First Minister, the deputy First Minister (who will act as Chair), and the Northern Ireland Ministers. The functions of the Executive Committee are set out in paragraphs 19 and 20 of the Agreement and now in Schedule Five of the 1998 Act.⁹³

banded. Mitchel McLaughlin (Sinn Féin) has stated, "David Trimble's position as First Minister-designate is incompatible with his membership of the Orange Order. His implied support for the continuing siege and intimidation of the Garvaghy residents is in breach of this pledge of office." *IR. TIMES*, Jan. 4, 1999.

89. See Northern Ireland Arms Decommissioning Act, 1997, ch. 7 (Eng.); Northern Ireland Arms Decommissioning Act of 1997 (Amnesty Period) Order, 1998 SI 1998/893; Northern Ireland Arms Decommissioning Act of 1997 (Immunities and Privileges) Order, 1997 SI 1997/2231. In the Republic of Ireland, see the Decommissioning Act of 1997.

90. For an examination of the use of this system in the May 1996 Northern Ireland Election, see Paul O'Doherty, *The d'Hondt and Hare/Niemeyer Methods and the Northern Ireland Election of 30 May 1996*, XLVI *POL. STUD.* 328 (1998). Paul Murphy's remark is apt: "I had never heard of d'Hondt until I went into the talks process, but we hear of nothing else nowadays." House of Commons, Official Report, vol. 319, Nov. 18, 1988, col. 1021; see House of Commons, Official Report, vol. 319, Nov. 18, 1998, col. 1023 ("The purpose is to ensure confidence across the community in Northern Ireland, so that people know that their parties will, if they receive a sufficient mandate in the election, have the opportunity for their Members to become Ministers and play their part in the Executive Committee.").

91. If the formula results in equal figures, then there will be a recalculation based on the first preference votes cast in the Assembly elections.

92. Northern Ireland Act, 1998, ch. 47, § 19 (Eng.).

93. Paragraphs 19 and 20 of Strand One of the Belfast Agreement state:

19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Min-

A Minister of Northern Ireland Parliament will have no power to make, confirm, or approve subordinate legislation or any act that, for example, is incompatible with Convention rights or European Community law or discriminates against a person or class of person on the ground of religious belief or political opinion.⁹⁴ This limitation on power also applies to actions that aid or incite another person to discriminate on the same ground as well as legislation that illegally modifies an existing enactment.

There will be a body corporate to be known as the Northern Ireland Assembly Commission.⁹⁵ It is the job of the Commission to ensure that the Assembly is provided with property, staff, and services.⁹⁶

As stated elsewhere in this Essay, it is inappropriate to view the settlement purely as an internal matter. The bi-statal aspects of the conflict were a key element in reaching a settlement. Strands Two and Three of the Agreement reflect the bi-statal aspects of the conflict.⁹⁷ Strand Two makes provision for a new North/South Ministerial Council and Strand Three provides for the establishment of a British-Irish Council⁹⁸ and a British-Irish Intergovernmental Conference. The First Minister and deputy First Minister will make nominations as to the Ministers and junior Ministers to take part in the activities of these bodies.⁹⁹ It will

isters, for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships).

20. The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.

Belfast Agreement, *supra* note 3, Strand One, Democratic Institutions in Northern Ireland, Executive Authority ¶¶ 19, 20.

94. Northern Ireland Act, 1998, § 24.

95. *Id.* § 40.

96. *Id.* § 40(4).

97. See O'LEARY & MCGARRY, *supra* note 48, at 367 ("Contrary to the school of thought which sees the conflict in Northern Ireland as internal we regard its dynamics as centrally connected to the rhythms and strains of wider British and Irish politics . . .").

98. For discussion of the ideas behind this institution, see RICHARD KEARNEY, *POSTNATIONALIST IRELAND: POLITICS, CULTURE, PHILOSOPHY* 92-95 (1997). Note the comments of UUP Assembly member Esmond Birnie that the Council was one of the central reasons why his party had supported the Belfast Agreement. Clare Murphy, *UUP Man in Call to Establish Council*, *IR. TIMES*, Dec. 7, 1998.

99. Northern Ireland Act, 1998, § 52(1).

be a Ministerial responsibility to participate in these meetings,¹⁰⁰ and the relevant individual is required to make a report to the Executive Committee and to the Assembly.¹⁰¹ On December 18, agreement was reached on the matters for cooperation and implementation within the context of the North/South Ministerial Council.¹⁰² The six implementation bodies are in the areas of inland waterways, food safety, trade and business development, special European Union programs, language (Irish and Ulster Scots), and aquaculture and marine matters. The six areas of cooperation include aspects of transport, agriculture, education, health, environment, and tourism. Proposals on the British-Irish Council¹⁰³ and the Civic Forum¹⁰⁴ were delayed. The aim at the time of writing was for the two governments to have finalized treaties on these matters by February and to consult with the parties on the draft orders on the implementation bodies in the same month, again within the general framework of a March 10 deadline.

IV. *THE CHALLENGES AHEAD*

The above analysis is a modest sketch of some of the legal arrangements for the new Assembly. At this stage in the proceedings there are few certainties and much remains to be done. It is nevertheless worthwhile posing some questions about the prospects and problems for this new institution. There will be a number of interesting issues that will arise in the coming years if the Assembly begins to operate properly.

A point of departure here is that the importance of this new constitutionalism rests not in a court-centered interpretation of legality, but in the fact that the terms for governing the common existence of people in Northern Ireland have been agreed and established. This is at its core a promise that all public officials, including the courts, will ensure to all people that these constitutional principles are upheld in practice. Where they fail in this

100. *Id.* § 52(2).

101. *Id.* § 52(6)-(7).

102. *Cf.* Belfast Agreement, *supra* note 3, Strand Two, North/South Ministerial Council ¶ 8.

103. Northern Ireland Act, 1998, § 54.

104. *Id.* § 56 (providing that First Minister and deputy First Minister will make arrangements for obtaining views of Forum on "social, economic or cultural matters"). Note that the arrangements are subject to the approval of the Assembly.

duty, they must be accountable to the public. This “civic republicanism,” while of more general applicability, is particularly appropriate in this context.

One pressing issue is the relationship between the Assembly and civil society. While the elites were trying over the years to design a “solution” to the crisis, many individuals and groups worked to nurture a form of micro-level constitutionalism. This trend is not specific to Northern Ireland.¹⁰⁵ The fact that interest in political parties and parliamentary politics has been declining does not mean that individuals are any less “political.” Rather significant interest has shifted to social movements and single-issue groups.¹⁰⁶ Reflecting trends among many social movements the world over, this shift involved both local action and work that by-passed the state. The environmental movement has been a notable example. The work of social movements is crucial to the healthy development of the political public sphere, and social democratic renewal is not possible without the energy and innovation that they bring.¹⁰⁷ History has demonstrated their importance in bringing ideas from the periphery to the center of debate. Giddens’s reservations here are worth citing:

Yet the idea that such groups can take over where government is failing, or can stand in place of political parties, is fantasy. The nation-state and national government may be changing their form, but both retain a decisive importance in the present-day world One of the main functions of government is precisely to reconcile the divergent claims of special-interest groups, in practice and in law.¹⁰⁸

The lesson from this is that to see constitutionalism exclusively as the work of elites trying to develop frameworks of governance underplays the fact that a form of process-based sub-

105. ULRICH BECK, *THE REINVENTION OF POLITICS: RETHINKING MODERNITY IN THE GLOBAL SOCIAL ORDER* 142-147 (1997) (“The signs indicate that a storm is coming; in all ‘participation democracies,’ the party of non-voters is the only party that can record robust growth.”).

106. See ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 53 (1998); see also ULRICH BECK, *DEMOCRACY WITHOUT ENEMIES* 152 (1998) (referring to emergence of “round-table state”).

107. HABERMAS, *supra* note 55, at 133-134; see also SEYLA BENHABIB, *Towards a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67 (Seyla Benhabib 1996).

108. GIDDENS, *supra* note 106, at 53.

national constitutionalism was to some extent operating in practice.¹⁰⁹ In reality, things were getting done. The Assembly must “fit in” to this picture just as much as civil society must adjust to the new arrangements. Care must be taken here, however, not to collapse the normative into the factual. Social democratic theory counsels against the turn to irrationalism in some modern scholarship. It is inaccurate to view resort to rationality as a mask for strategic manipulation, yet this is the clear implication of following some intellectual trends today. What must be stressed, therefore, is that this form of constitutionalism is based around a recognition of the normativity of existing discourses rather than being wholly removed from the “bigger picture.” This can, of course, be cast exclusively as strategic action, but it is suggested here that there is more to it than that. Rational discourses aimed at mutual understanding involve normative presuppositions to which participants are bound and which cannot be evaded without contradiction.

This “real constitution” of multiple networks functions in dynamic tension with the normative order. For many social movements, this has involved utilizing discourses of constitutionalism and human rights immanently to critique flawed practice. This is the very “modern” secular enterprise of bringing normativity to bear on shortcomings in reality. The law here reveals its Janus-faced nature. It legitimizes arrangements while at the same time containing principles that can be drawn upon by social movements to ensure that everyone measures up. Collapsing the normative into the factual misses the fact that this is an embedded tension. It is suggested here that there are strong reasons for public lawyers to defend a reconstructed democratic concept of the rule of law that makes use of existing legal discourses to regulate the terms of social existence.¹¹⁰ This essen-

109. See generally John Morison, *The Case Against Constitutional Reform?*, 25 J. L. & SOC'Y 510 (1998).

110. For an argument in defense of this position, in historical context, see W.E. SCHEUERMAN, *BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW* (1994). In addition, see W.E. Scheuerman, *Carl Schmitt's Critique of Liberal Constitutionalism*, 58 REV. POL. 299 (1996), and W.E. Scheuerman, *Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt*, XVII HISTORY OF POLITICAL THOUGHT 571 (1996). A similar position has been defended by DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER* (1997). See the review of this book by M. Salter in 1998 PUB. L. 340 for an explicit linkage of these themes to contemporary constitutional law debates. Additionally, see

tially social democratic understanding of law reflects the paradigm shift to what can be variously described as an enabling or facilitative concept of law and democracy.¹¹¹ Beck's concept of the "round-table" state captures some of this.¹¹² Contrary to an argument heard occasionally in some "critical" quarters, this entails neither a commitment to "liberal legalism" nor an exclusive concern with civil and political rights.

It will be worth tracking the ongoing relationship between the Assembly and civil society. This includes, but is in no sense confined to, the Civic Forum. Will the Assembly be prepared to engage with civil society on fair terms? What does engagement mean for the internal politics of social movements? To what extent will the Assembly be colonized by "experts" whose interests are far from progressive? In particular, it is, for example, already evident that corporate power is investing substantially in the lobbying process. When making future assessments of these trends, it is important not to operate with an undifferentiated conception of civil society. This applies also to the importance of recognizing the multicultural nature of Northern Ireland. The institutionalization of the "both communities" model may well reflect harsh political realities, but serious effort needs to be invested in allowing what is already a more fluid picture to emerge properly in the political public sphere.

More general points may be made about the intellectual context in which this transformation is occurring. Encouraging meaningful participation is fine, but does not negate the need to embed processes for identifying regressive tendencies. Celebrating pluralism in this context is not enough. A rational basis must operate for diagnosing reactionary movements in civil society. Despite some modern intellectual trends, rational adjudication of competing claims remains possible. On this issue it should be stressed that no culture, organization, or tradition has

David Dyzenhaus, *The Legitimacy of Law: A Response to Critics*, 7 *RATIO JURIS* 80 (1994), and David Dyzenhaus, "Now the Machine Runs Itself": *Carl Schmitt on Hobbes and Kelsen*, 16 *CARDOZO L. REV.* 1 (1994). Cf. BENT FLYVBJERG, *RATIONALITY AND POWER: DEMOCRACY IN PRACTICE* (1998) (illustrating that these "worrying" trends in intellectual thought are alive and well today).

111. For a thought-provoking examination of what this might mean in relation to public expenditure in Northern Ireland, see *DEMOCRATIC DIALOGUE ET AL., HARD CHOICES: POLICY AUTONOMY AND PRIORITY-SETTING IN PUBLIC EXPENDITURE* (forthcoming 1999, DD/EHSSB/NIEC).

112. See generally BECK, *supra* note 106.

the unconditional right to be protected against the welcome, yet corrosive, qualities of critique.¹¹³ Universalism has become deeply unfashionable in some quarters, yet without a critical standard of moral universalism can we really even explain why difference should be celebrated in the first place?¹¹⁴

The relationship between the Assembly and the rest of Ireland will be worth noting, as will the work of the envisaged British-Irish Council. It has been suggested here that devolution will involve the rise of legal technique, in its broadest sense, in the process of governance. It will be interesting to observe whether there will be an increased use of legalism, both in the sense of resort to the courts and in political discourse, if the Assembly becomes fully operational. Appeals to legality, from unlikely quarters, on the decommissioning debate have been particularly revealing. Increased use of the courts to settle disputes is also likely, and one wonders whether the culture of the administration of justice will be transformed in line with developments in other areas. Other matters that will be of interest include the relationship with Westminster, the internal dynamics of Assembly practice, and the role of Europe. There are no plans to reduce Northern Ireland representation at Westminster, as it is generally believed not to be over-represented as is the case in Scotland. Given that important powers remain vested in Westminster (e.g., on criminal law, police, and prisons), Northern Ireland Members of Parliament will continue to have a role to play there.

CONCLUSION

These are exciting times for anyone interested in current debates in constitutionalism. The ground is shifting impressively and the implications of change are not, as yet, fully understood. No one can speak with certainty about where the events that have been set in motion will lead. An attempt has been made in this Essay to locate the establishment of new institutions in Northern Ireland within the context of constitutional change in

113. On this issue, see SHANE O'NEILL, *IMPARTIALITY IN CONTEXT: GROUNDING JUSTICE IN A PLURALIST WORLD* 181-99 (1997). O'Neill's discussion of the need for critical flexibility and reinterpretation of the Unionist identity is of particular interest in the light of the extreme fragmentation evident within Unionism in recent years. *See id.*

114. *Id.*; *see* Colin Harvey, *The Procedural Paradigm of Law and Democracy*, 1997 *PUB. L.* 692.

Britain and Ireland. The suggestion here is that the complexity of the Agreement reflects the number of interlocking dimensions to the conflict. Change in all identified areas will be important in ensuring that the settlement becomes embedded in practice. Whether it all works will depend, however, to a significant extent on how the Assembly operates. This Essay has outlined aspects of the legal arrangements for this institution and suggested a number of issues that may be of concern in the future. It is, however, too early to reach any firm conclusions.

The Essay has also raised broader issues about constitutional law in this context. In particular, it is suggested that when surveying the field, an understanding of the relationship between law and democracy is important. It is beyond the bounds of this Essay to elaborate fully on this, but some fruitful lines of inquiry are mentioned. At the end of the day, legality and legitimacy are about more than justifying coercion and elite rule. A democratic understanding of legality is central to guaranteeing that the constitutional conversation about the legitimacy of the norms that govern the terms of social existence continues.