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Constitutionalism and Change: Representation, Governance, and Participation in the New Northern Ireland

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Abstract

This Essay assesses the achievement of restoring representative government and also considers whether this is enough given the changes that have occurred since last there was devolved government in Northern Ireland. Finally, it examines those aspects of the Agreement that can be developed in line with a view that the constitution should now be seen much less as a structure of rule than a framework for rule within the wider task of democratizing democracy in the new Northern Ireland.

CONSTITUTIONALISM AND CHANGE: REPRESENTATION, GOVERNANCE, AND PARTICIPATION IN THE NEW NORTHERN IRELAND

*John Morison**

INTRODUCTION

The multi-party agreement, along with the agreement between the two governments, that was endorsed by an overwhelming majority of the population of Ireland—North and South—promises the solution to one of the most chronic problems remaining within modern political history. The whole Peace Deal—including the Agreements and the Northern Ireland Act of 1998 (or “1998 Act”) with its Assembly and Executive, as well as hoped for progress on policing and decommissioning—provides a bare framework around which, it is hoped, a sophisticated architecture of devolved government can be built. The provision of even these foundations is a major achievement. It would be churlish in the extreme to deny the scale of achievement or to denigrate the effort that has been expended in achieving this breakthrough. However, it remains at least possible that while the search has been on for this great prize of restoring representative government, the game has moved on. Perhaps the solution of devolved, self-government is no longer going to answer all of the issues about democratizing and ensuring participation in government in Northern Ireland. It may be that in Northern Ireland, as elsewhere, the processes of governance have changed and that now, the big issues facing society are not those that can be resolved simply by accentuating the traditional structures of representative government. Having secured the longed-for prize of a “moment of political agreement” solution that can be given institutional form, wider issues of legitimacy in a changed world may require us to think about renewing our ideas of democracy, perhaps through pursuing more participatory structures and processes.

This Essay assesses the achievement of restoring representative government and also considers whether this is enough given

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the changes that have occurred since last there was devolved government in Northern Ireland. Finally, it examines those aspects of the Agreement that can be developed in line with a view that the constitution should now be seen much less as a *structure of rule* than a *framework for rule* within the wider task of democratizing democracy in the new Northern Ireland.

I. RESTORING REPRESENTATIVE GOVERNMENT

The arrangements for restoring representative government to Northern Ireland are a tribute to the ingenuity of traditional constitutionalism in solving one of the most chronic problems of constitutionalism. For a long time, it appeared anachronistic that many of the long-standing problems of government and self-determination, from South Africa to the former Eastern bloc, seem to have been brought to a resolution whereas the issue of Northern Ireland has eluded solution. However, with the settlement envisaged by the Northern Ireland Act of 1998, it now appears that Ireland has finally caught up with most of the rest of world. Just a few years before the start of the next millennium, history in the North of Ireland can be judged to be, if not over entirely, at least finally under some sort of control. The sophisticated constitutional architecture of the Agreement and the Northern Ireland Act of 1998 seems at last to have squared many of the circles that proved intractable for so long. While none of the political actors in Northern Ireland could be said to have obtained exactly what they would wish for, both Unionists and Loyalists, as well as Nationalists and most Republican factions, can be seen as getting enough to sustain them in the present—with at least the *possibility* that longer term aims might be met in the future. It is not, of course, a question of the British Government suddenly getting the constitutional architecture correct. It is rather a matter of the wider politics of agreement coming together after so many years. Indeed, although the institutional design is to be commended for reflecting the hard-sought moment of political agreement into structures with sufficient consistency but enough flexibility to allow the politics on the ground to influence some of their detail, it is not really any more sophisticated a plan than in the past.

All the items that are traditionally on the constitutional agenda have been addressed in the familiar way. Examination of

past "solutions" shows that all have required something by way of a guarantee on the issue of the status of Northern Ireland within the United Kingdom. At the same time, past solutions have acknowledged Nationalist demands that there be some recognition at least of an all-Ireland dimension. Successive British Governments have seen the medium term solution as lying with a form of devolved government, but have worked towards ensuring that simple majoritarianism is ameliorated by a cross-community element.¹ This approach has been maintained.

With regard to the Northern Ireland Act of 1998, this has meant that, for example, the position of Northern Ireland within the United Kingdom is addressed in section 1 through a re-working of the familiar "constitutional guarantee." The all-Ireland dimension is developed through the North/South Ministerial Council, the six agreed cross-border bodies, and a British-Irish Intergovernmental Council as well as a new British-Irish Council made up of representatives from all over the British Isles. Familiar requirements about the need for a cross-community element are met by requirements in section 52(1) and section 54(2), that these bodies have participation from both Unionists and Nationalists. The Assembly itself is to be drawn from both communities with the Northern Ireland (Elections) Act of 1998 requiring that proportional representation ("STV") be used. Assembly members must register as Unionist, Nationalist, or Other to give effect to qualified voting procedure under section 4, where a vote must attract the support of a majority of designated nationalists and designated unionists, or the support of sixty percent, including forty percent of each group voting. Section 42 allows thirty or more members to make a petition of concern about any matter to be voted on by the Assembly, which then requires cross-community support.

The Executive too is to share power. The more or less co-equal First Minister and Deputy First Minister must stand for election together. Section 16(3), requiring a majority from each designated group, more or less ensures that in practice, there will be representation from both communities. The ten Ministe-

1. See J. MORISON & S. LIVINGSTONE, *RESHAPING PUBLIC POWER: NORTHERN IRELAND AND THE BRITISH CONSTITUTIONAL CRISIS* 103-10 (1995). This book provides a detailed account of how each attempt at constitutional settlement has had to address four conflicting agenda items, which together map out the basic position dividing most of the local politicians and describe the outer limits of British policy. *Id.*

rial offices agreed, the maximum permitted by section 17 must also be distributed proportionally. There are safeguards in section 6 and in sections 75 and 76 about discrimination in legislative and executive action, in addition to the human rights and equal opportunities provisions in Part VII of the act. What the settlement produces is a very sophisticated model of representative government hedged around with cross-border bodies, a Council of the Isles, and other features and add-ons to help in the political task of reconciling the irreconcilable. Indeed, it is *very* representative government that is produced, and it will exist in large quantity. Northern Ireland is a very small place with a large amount of government. A population of 1.63 million has 108 representatives in its local assembly. There is one representative for every 11,000 voters, which compares to one Westminster MP for every 60,000 or 70,000 voters in the United Kingdom generally.²

In addition, Northern Ireland has the planned Civic Forum established by paragraph 34 of Strand One of the Belfast Agreement, as well as the eighteen members returned to the Westminster Parliament and the three Members of the European Parliament—a significant over-representation compared to the rest of the United Kingdom—not to mention the twenty-six local councils, albeit discharging fairly limited functions.³ The Assembly has agreed upon no less than ten departments (all with a full civil service complement) and six cross-border bodies. There will be some reduction and redeployment within the direct rule machinery, but it seems unlikely that many of the actual mechanisms for service delivery will be made redundant by the new Assembly.

Of course, there is little point in being parsimonious when

2. 809,917 votes were cast in the Northern Ireland election on May 30, 1998 from 68.9% of the total electorate. In total, this compromises a little more than 1.17 million. In the Westminster election of 1997, the highest number of voters electing a member of parliament was 101,680, and the lowest number was 22,983. See COLIN RALLINGS & MICHAEL THRASHER, *BRITAIN VOTES 6: BRITISH PARLIAMENTARY ELECTION RESULTS 1997* 189-90 (1998). The Northern Ireland constituencies voting for Westminster members contain electorates that are not too far from the average Great Britain constituency numbers although, of course, this is in addition to the Assembly representation.

3. Estimated net spending for council in 1996-97 amounts to UK£219 million out of a Northern Ireland expenditure budget of £8,009 million—approximately 2.73%. See, e.g., DEPARTMENT OF ENVIRONMENT FOR NORTHERN IRELAND (LOCAL GOVERNMENT BRANCH), *DISTRICT COUNCIL (NI) RATE STATISTICS TABLES* (1996-97).

peace is at stake. But even taking this into account, the Northern Ireland structures are extravagant.⁴ There seems to be a belief that political reassurance can be achieved through structure. A body or commission—with the chair being distributed to a Unionist or Nationalist as is politically expedient—is the almost automatic response to any issue. This has produced a new post-agreement elite to be added to the already-existing quangocracy, which carried out the business of government in the absence of political representatives.

Thus, there is not only the 108 Assembly representatives with their salaries of £36,000 plus expenses, and the various ministers and junior ministers drawn from their ranks, but also a range of new figures who make up a new elite of Peace Process functionaries. For example, there is the Police Ombudsman for Northern Ireland who earns between £70,000 and £90,000 per year and has a staff of sixty and a budget of £3million.⁵ The costs of these new Peace Process functionaries may be less (even if measured only in material terms) than a huge security presence and an ongoing conflict. However, in a relatively stagnant economy,⁶ where eighty percent of employees earn less than £23,000 per annum⁷ and one fifth of household income comes from so-

4. In South Africa, for example, the 1994 elections returned only 490 members (90 to an Upper House) from its population of 41.5 million with eleven official languages who live in a territory of some 470,689 square miles.

5. See, e.g., *Advertisement: Police Ombudsman for Northern Ireland* (visited Apr. 14, 1999) <<http://www.nio.gov.uk/981130z-nio.htm>> (on file with the *Fordham International Law Journal*). It is interesting that by contrast the Human Rights Commissioner attracts a salary of only £50,000 – £70,000. See, e.g., *Information for Applicants for Appointment to the Northern Ireland Human Rights Commission* (visited Apr. 14, 1999) <<http://www.nio.gov.uk/981124j-nio.htm>> (on file with the *Fordham International Law Journal*). The Human Rights Commissioner has a budget of £750,000, which will sustain a very much smaller staff. See, e.g., House of Commons, Official Report, vol. 317, July 27, 1998, col. 66 (Mr. Murphy).

6. The gross national product ("GNP") has increased in recent years with the effect that Northern Ireland no longer attracts Objective 1 status as an area of particular need within the European Union. Even so, its GDP is only 81% of the European average. SUNDAY TIMES, Nov. 22, 1998.

7. The average salary in Northern Ireland is £17,295, although 20% of the workforce earn less than £9,000 and only 10% earn more than £28,000 per annum. The salary levels of many of the new functionaries of peace will put them in the 2% of those in Northern Ireland whose salary is in excess of £40,000. See, e.g., NORTHERN IRELAND NEW EARNINGS SURVEY, DEPARTMENT OF ECONOMIC DEVELOPMENT, STATISTICS RESEARCH BRANCH (April 1998).

cial security benefits,⁸ such expenditure requires value for money at the very least. There is no guarantee that services—those issues of housing, education, jobs, and investment that actually matter most to the majority of people—are necessarily improved by this byzantine structure. Indeed, the costs may well be taken out of front-line service provision at some time in the future. If they are not, there are serious questions to be asked about fairness vis-à-vis other citizens in the United Kingdom who seem to get substantially less per head for their taxes.

The point here is not simply about the disproportionality of the rewards given to an elite or the suspicion that in some cases the process of keeping all parties on board is tantamount to bribery or even about value for money from government. It is rather about noting the fact that the Westminster system of representative government has been given full expression. There is now the full realization of the policy that successive British Governments have pursued of searching for a political compromise that could be crystallized into a constitutional structure for government. No expense has been spared to provide the most developed possible mechanisms of government. The Northern Ireland structures represent the very acme of representative government in the classic sense.

The only problem is that government in this classic sense may well be an outdated concept. As shall be argued in the next section, the processes of government in Northern Ireland, as elsewhere, have changed radically in the intervening quarter of a century since last there was a devolved administration in place. It is rather as if a long-term prisoner were to emerge from the Maze Prison after twenty-five years, satisfied that whatever long struggle that he was part of has now been deemed to be over, and expect that now things would return to what he had known where he would be able to find a job for life in the shipyard or in engineering. Just as heavy industry has largely disappeared in Northern Ireland, so too government, as it was in the 1970s, no longer exists. Hopes that traditional structures and mechanisms of representative government can by themselves resolve the complex issues of public power are no more realistic than the recruitment expectations of the unskilled ex-prisoner. The new

8. This is a higher proportion than anywhere else in the United Kingdom. *See, e.g.*, OFFICE FOR NATIONAL STATISTICS, *REGIONAL TRENDS*, 32 (1997).

Northern Ireland requires an understanding of how things have changed and an imaginative and progressive response to the challenges of change.

II. *CHANGING GOVERNANCE*

While successive British Secretaries of State, sometimes with assistance from progressive forces from the Republic of Ireland, the United States, and elsewhere, have been attempting to broker the historic deal that will restore an acceptable form of devolved government to Northern Ireland, the nature of the state and the role of government in most of the developed world has been undergoing seismic change. It is at least arguable that almost everywhere, the public sector no longer exists as a uniform set of institutions. Instead, it has been fractured into a plethora of different arrangements with little by way of common features or unifying organizational principles.

This is a general process that affects Northern Ireland no less than elsewhere. Arguably, however, Northern Ireland is different to begin with because it has a longer experience of alternative forms of governance and service delivery. The result is that the mechanics of governance are much more complicated than seems to be supposed. The idea of simply returning government to an Assembly where it can be administered as it was in the 1970s is unrealistic.

Many of the factors fragmenting government are experienced almost everywhere. The end of the millennium is marked by a whole range of contradictory elements and trends. The state seems simultaneously too small for many big issues, yet too large for local and personal concerns. These globalizing and localizing trends challenge the idea of the state as the fundamental unit of politics. Further, they undermine the traditional role of government as possessing a monopoly of public authority within a defined territory.

The scope of government to act independently and effectively is being reduced. At the same time, as the site of government has shifted to levels above and below the nation state, there has been a fundamental and on-going change in the way that the remaining functions of government are discharged. In the last decade and a half, much of the power that was once wielded by government has been privatized, contracted out, or

simply abandoned. This is true in the United Kingdom, Northern Ireland, and elsewhere. Almost everywhere, government is seen as part of the problem, not the solution. The result is a reduction of direct government involvement and responsibility in the public sector. Rather than deepening the democratic character of service delivery by accenting the politically-driven structures of government, there is an almost universal trend towards depoliticizing the public sector and undermining the idea that the political process can produce public sector machinery capable of delivering a full range of services.

The phenomenon is a complex one involving more than just withdrawal by the state from activities that then fall to the private sector, as with privatization in its strictest sense. There is an on-going revolution in the public sector. Today, there are a whole range of alternatives to the state in its strictest sense. Often, these are premised on ideas of efficiency instead of increased taxation, individual choice rather than state monopoly, and on the state acting as an agent to empower a range of smaller providers to compete and innovate rather than itself taking on all the details of guaranteeing and actually providing the whole range of services.

In Northern Ireland, the transformation in public sector arrangements is reasonably well-developed, if somewhat uneven. Although, for example, there has been relatively little large-scale privatization other than with the electricity industry, there has been development in other ways. A project undertaken in 1995 by the Democratic Audit of the United Kingdom to investigate the governmental arrangements in Northern Ireland⁹ found that although the traditional devolved structures and their "temporary" replacements in the mechanisms of direct rule had atrophied into a democratic deficit, there were many new (and potentially more advanced) forms of governance emerging.

One of the most important forms of governance is the involvement of the third sector in the processes of government. In Northern Ireland, community and voluntary sector involvement in government has thrived for reasons that may have to do with organizations in these sectors engendering a greater degree of

9. See STEPHEN LIVINGSTONE & JOHN MORISON, *IN PLACE OF FEAR: DEMOCRATIC ARRANGEMENTS IN NORTHERN IRELAND* (1996), *reprinted in* FORTNIGHT EDUCATIONAL TRUST, *THE DEMOCRATIC AUDIT OF NORTH IRELAND*.

legitimacy than the state itself in particular quarters. *The Strategy for the Support of the Voluntary Sector and for Community Development*, produced in 1993, stressed the importance of partnership arrangements between the government and the voluntary sector and acknowledged the role of community groups in helping to formulate social policies—not least because of absence of any political party structure that had developed beyond much beyond a lobbying mentality.

Such cooperation has a relatively long record in Northern Ireland.¹⁰ *Making Belfast Work* was set up in 1987 and the *Londonderry Initiative* in 1989. More recently, they were re-cast with more emphasis on the role of voluntary and community sector. Since the early 1990s, the Department of Agriculture has led rural development programs leading to the Rural Development Council and local area-based rural regeneration strategy groups. These partnership initiatives have been characterized as maintaining an international dimension from their early days, with the International Fund for Ireland being of importance since its establishment in 1986.

The Northern Ireland Council for Voluntary Action has maintained a European Unit, which lobbies for voluntary and community sector. Most of all, however, the partnership approach has been encouraged by the District Partnerships initiative established under the European Union's EU Special Support Programme for Peace and Reconciliation.¹¹ Established between local councillors, the voluntary and community sector, trade unions, business interests, and local statutory bodies, these partnerships are funded by the Northern Ireland Partnership Board, which administers the £49 million overall budget made up from the EU Special Support Programme and matching government funds. The indications are that the Labor Government remains committed to the development of a partnership approach. Indeed, the fact that the recently completed *Compact Between Government and the Voluntary and Community Sector in*

10. As long ago as 1969, the government took the bold step of introducing the Londonderry Development Commission and the Northern Ireland Community Relation Commission, although these welcome community initiatives were rather overwhelmed by events.

11. See, e.g., THE NORTHERN IRELAND COUNCIL ON VOLUNTARY ACTION, PARTNERS FOR PROGRESS: THE VOLUNTARY AND COMMUNITY SECTOR'S CONTRIBUTION TO PARTNERSHIP-BUILDING (1996).

*Northern Ireland*¹² was produced after consultation with some 5000 organizations operating within Northern Ireland shows the scale of such community action and an acknowledgement of the need for government to work with and through existing mechanisms.

Historically, too, particular features in Northern Ireland have resulted in other forms of depoliticized service delivery existing for longer than the present round of mainly entrepreneurial reform. The Macrory Report of 1970 identified that many functions of government, even very basic ones such as housing, education, industrial development, and the provision of health care, were seen as political or even constitutional. The main thrust of that report and successive government policy was to remove these functions from the political process—at least until satisfactory and fair representative arrangements could be found. This led to the creation of many of those quangos and other quasi-public bodies, such as the Housing Executive or the Education and Library Boards, that took on functions of government and now have an existence of their own such that it is unlikely, even if it is technically possible, that their functions will be returned directly to the new Assembly.

Quangos (more accurately termed non-departmental public bodies), with both service delivery and advisory roles, are a particular feature of Northern Ireland. Arguably, they have been present in Ireland since the last century. However, since the reorganization of local government in the 1970s and the imposition of what, until recently, seemed like the state of permanent impermanence that was direct rule, they have been resorted to much more extensively than is the case in Great Britain. Functions that are significant in terms of staff and resources, such as health and housing, and wider planning and advisory roles, such as industrial investment and economic planning, have long been handed over to quangos.

This introduces familiar arguments about voluntarism, participation, and the benefits of non-governmental expertise against non-representation, patronage, and corruption. Such arguments all have a particular and very important application in the context of Northern Ireland, where non-partisanship in government traditionally has been particularly difficult to deliver

12. 1998, Cm. 4167.

through the electoral system alone. In many ways, the system of quango government has brought with it a sophisticated engagement between state and civil society, as represented in the non-departmental public bodies themselves, their sponsoring departments, and the other agencies as well as their client base. The policy of ensuring (at least in theory) that membership of the supervisory boards of many quangos includes Protestants and Catholics, as well as representation from women and rural communities, has produced a more balanced organization than might be hoped for from simply majority politics. Quangos have the possibility of extending membership to those who define themselves by membership of secular, ethnic, and religious minorities, as well as by having a different sexual orientation. Quangos maintain their own accountability mechanisms. These *may* be at least as good as those more direct techniques that pertain in straightforward representative government.

Techniques and best practices that are routinely used in Northern Ireland include public auditors and financial reporting through published records. They also include requirements to hold public meetings, to publish minutes, to admit the public to meetings, and to consult, maintain, and follow codes of practice.¹³ It is inconceivable that trends existing everywhere else will be reversed in Northern Ireland and that all the executive functions exercised by these bodies will be returned to an Assembly. The most that can be expected is that the Assembly will exercise a degree of *democratic* control. Whether or not this will be an obvious and immediate improvement on existing mechanisms remains to be seen.

While quangos have a history of operation in Northern Ireland, the more general hollowing-out of government, including the reorganization of the civil service and contracting out initiative, have arrived in Northern Ireland relatively later and without some of the initial enthusiasm that marked their introduction in Great Britain. However, since 1991, the principle of a split between purchaser and provider in the delivery of health services has been established. Increasingly, the Health and Social Ser-

13. See ELIZABETH MEEHAN, "SMALLER PUBLIC BODIES" IN PEOPLE AND GOVERNMENT: QUESTIONS FOR NORTHERN IRELAND 167-81 (1998). This book examines the twenty-two smaller executive bodies—thirty-six according to the CHIEF EXECUTIVES' FORUM DIRECTORY (1996). It also describes their accountability mechanisms and the relationships that they live within.

vice Boards are purchasing health and personal social services from a range of directly managed units, newly-established Trusts, GP fundholders, and private and voluntary sectors. The introduction of the Deregulation and Contracting Out (Northern Ireland) Order of 1996 parallels legislation in Britain encouraging a greater use of contracts. There is now a contract culture where government, NHS trusts, and a whole range of other quangos, along with the remains of local government, maintain a huge set of rolling contracts with private sector suppliers for ancillary services. The "Best Value" initiative introduced by the Labor Government continues developments in this general direction.

In Northern Ireland, as elsewhere, the remaining machinery of the state itself is being reorganized in a way that is determined by the package of ideas often referred to as the "new public management." Generally, this involves replacing the old command and control structures of the Civil Service with flatter, more focused structures that encourage entrepreneurial rather than bureaucratic management and more flexible personnel regimes. Essentially, the policy function in government is retained by a very much smaller civil service establishment, while the details of service delivery are devolved to agencies at the outskirts of government.

The changes that have occurred successively from the Fulton Report in 1968 through the efficiency scrutinies between 1979 and 1987, the Top Management Programme, the Next Steps initiative, and the Citizen's Charter have not necessarily represented the attainment of a coherent plan. Together, however, they have taken public administration in a marked direction. All the changes contain an element of shrinking the core functions of government and using departments as facilitators rather than providers of services.¹⁴ In Northern Ireland, there are now a large number of executive agencies operating at all levels and in all activities from the Prison Service to the Passport Office.

The Department of the Environment ("DOE") can be taken as a particular example indicating the scale and nature of the

14. The overall thrust is perhaps well-represented in THE DEPARTMENT OF TRADE AND INDUSTRY WHITE PAPER ON COMPETITIVENESS, 1995, Cm. 2867, which makes a virtue of initiatives to cut "red tape" and to establish business links, including greater customer focus, increased openness and accountability and, inevitably, a reduction in costs.

changes (and the reduced project of government that will be devolved to the new structures in the 1998 Act). The DOE is the largest of the departments whose functions are to be taken over by the new Executive structures. It spends £1.2 billion and indirectly employs 8500 people. It is the planning authority. It collects rates and taxes, keeps public records, conserves and protects the natural and built heritage, provides water and sewage services, and maintains the roads. It supports the work of the Housing Executive, the only public sector housing authority, and various housing associations. It is also responsible for transport, including ports, bus services, and rail services, as well as roads and fire services. However, the changes in establishment are such that the DOE is now organized so that there are eleven agencies involving some ninety percent of DOE staff.¹⁵

All of these agencies, like others existing throughout the government in Northern Ireland, have the familiar structure whereby there is a quasi-contractual framework document spelling out the relationship between the agency and the Minister within the department. This involves a somewhat problematic division of labor, attempting to separate out policy setting, which remains the job of the Department, from policy implementation, which is the task of the agency. This distinction has been widely criticized for being somewhat artificial.¹⁶ With an inexperienced Assembly, there may well be additional dangers whereby professionalized agency staff may seek to exceed a strict definition of their role. Alternatively, naive political ambition within the new departments may result in an overestimation of the political role. Of course, working out new relationships is all part of the democratic process. Even "teething" problems must be welcomed as part of a return to normal politics.

However, issues of financial and political accountability remain, and these too may be problematic. Usually, within an agency structure, the Chief Executive is the accounting officer. As such, he is accountable, together with the departmental accounting officer (usually the Permanent Secretary), for expendi-

15. Construction Service, Driver and Vehicle Licensing Northern Ireland, the Driver and Vehicle Testing Agency, the Environment and Heritage Service, Land Registers of Northern Ireland, the Rate Collection Agency, the Roads Service, and the Water Service.

16. *See, e.g.*, CHRISTOPHER FOSTER & FRANCIS PLOWDEN, *THE STATE UNDER STRESS* (1996) (focusing on chapter nine).

ture. This can be maintained within the Assembly plan. Although agency staff remain the employees of the Department, they are not civil servants in the traditional sense. More importantly, although there is accountability to the National Audit Office and the Public Accounts Committee, there are difficulties over ordinary parliamentary accountability with regard to the distinction between operational and policy issues, with only the latter being regarded as the proper subject of parliamentary or Assembly interest.

Beyond the placid limits of the relatively ineffectual mechanisms of traditional accountability as applied to these new circumstances, there are other possibilities. Some of these have been working effectively and should not now be discarded. For example, the agency will have a corporate and a business plan, which may include performance targets and perhaps a charter statement. There are, in addition, a number of other secondary accountability mechanisms. It has been acknowledged that informal, professional mechanisms of accountability are often the most effective.¹⁷ There must be concerns about how an ambitious Assembly will work with or against the grain of these other mechanisms.

Overall, the introduction of the new Assembly brings many challenges. There is no sense in which all the problems of governance are solved simply by the existence of the longed-for structures of representative democracy. The new agreed structures cannot wholly replace the complex alternatives that have arisen both in response to the absence of a democratic alternative and as a reaction to more general trends. Indeed, the new Assembly and its Executive may find its real competence to be considerably less than that indicated formally by the Northern Ireland Act of 1998. Rather than simply taking over legislative competence as described in Part II of the act, the new Assembly and its Executive will need to develop and negotiate new relationships with already existing mechanisms of governance that will not disappear. The new government structures may find their remit much more limited than expected. Although the resource framework will be set by the Assembly generally, it will be determined by macro budget decisions in London. Further-

17. See TREASURY AND CIVIL SERVICE COMMITTEE, *THE NEXT STEPS INITIATIVE: SEVENTH REPORT* (Session 1990-1991).

more, much of the UK£9billion budget that technically is available to the Assembly will be pre-spent in the sense that commitments to maintain existing services will diminish almost to extinction the freedom of the new Ministries and the Assembly to make take new initiatives—at least where these cost money. Existing mechanisms of service delivery are unlikely to wither away. Rather than seeking to replace them, the new Assembly and its Executive must work alongside the host of different and dynamic mechanisms from the private and voluntary sectors, as well as from the restructured public sector that are now involved in service delivery. The greatest contribution that the Assembly can make in this context is to contribute towards varied and sophisticated methods of accountability and control such as are appropriate for the complexity of modern governance. Just as it cannot hope to take back all the levers of power and to control or drive directly all the engines of service delivery, so the Assembly must not attempt simply to substitute the sort of mechanisms of accountability and control that might have been appropriate in the 1970s. It is to this role, and the potential that is in the Agreement for such post-modern democracy, that we now turn.

III. *BUILDING PARTICIPATORY GOVERNMENT*

The current agreement, however welcome, does not provide a final solution. Although the breakthrough has been made whereby sufficient political agreement was brokered to allow the creation of a structure for government, the struggle to equip Northern Ireland with adequate mechanisms for governance in the twenty-first century, with all the multi-level complexity that this entails, is not complete. It would be unrealistic and unhealthy to expect the settlement structures contained in the 1998 Act to carry out all the jobs of modern governance. The whole project of government has changed so that the traditional institutions of representative government can no longer account for or sustain the complex processes and relationships that constitute modern governance. It is unrealistic also in that it places hopes and expectations on the institutions of representative democracy that are not being met elsewhere.

Traditional democracy is facing challenges of legitimacy everywhere. As Anthony Giddens sees it, “[t]he crisis of democ-

racy comes from its not being democratic enough.”¹⁸ In Northern Ireland as elsewhere, we must address Giddens’ challenge as to how we can democratize democracy. It is not enough to point to the sort of institutions of representative democracy that Northern Ireland can now boast in common with almost every other developed system. This can only be a beginning rather than an end to the project of providing an open, democratic, civic space where a constitutionalism of values, rather than one merely of structures, can provide a framework for proper, modern, participatory governance.¹⁹

That is not to say that there is *no* role for a state bureaucracy and that it is not worthwhile to institute the Assembly and its related structures. The argument here is not that state or regional government is dead or totally superseded. There will continue to be a role for some sort of state-run and state-funded bureaucracy. Much of the structure suggested by the 1998 Act is in keeping with wider ideas about devolution and about subsidiarity for wider decision-taking.²⁰ Rather, the argument is simply that government is not now (if it ever really was) omni-competent, and that there are more choices ahead after simply electing the representatives into the formal government structures. Indeed, even within the limits of traditional, formal government structures, the Assembly must accept that choices now present themselves as to how in detail the state bureaucracy should configure itself to take up its now more limited role.

Thus, there are political choices to be made between the conservative call for a *smaller state*, the socialist demand for a

18. See ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 71 (1998).

19. A discussion of some the wider arguments of political philosophy that might underpin claims that this is how politics ought to be organized can be found in John Morison, *The Case Against Constitutional Reform?*, 25 J. L. & Soc’y 510, 510-35 (1998).

20. Indeed, notwithstanding arguments about self-determination and national integrity within the Irish context, an administration devolved to some local level is clearly in line with trends elsewhere in the United Kingdom. The principle of subsidiarity too suggests that the British-Irish Council Agreement, as given effect by Part V of the Northern Ireland Act 1998, may be an appropriate level for some of the issues about relations within the British Isles to be dealt with within Strand Two. Relations with the European Union are perhaps less satisfactorily handled within the scheme insofar as Schedule 2 seems to deny the possibility of any direct relationship between the Assembly and Brussels, although paragraph 17 of Strand Two and paragraph 5 of Strand Three of the Agreement encourage the North/South Ministerial Council and the British-Irish Council respectively to have an EU dimension to their work.

more *responsive state*, and more radical calls for a more *empowering state* where real power is devolved to lower level organizations and to citizens. Part of this choice involves deciding between an enabling state and a contracting state. There is an element of either/or, of political choice, that is manifested in the formats of governance that are chosen. Not all of the new technology of governance is as politically neutral as some commentators would have us believe.²¹ The new institutions in Northern Ireland must not only accept the limits that now constrain the role of governments, but also decide how exactly they wish to discharge their remaining more limited function.

However, beyond these important questions of real politics that now face the Assembly, there are other equally important issues about how a new constitutionalism of process, partnership, and value can be developed to deal with the issues of wider governance as they now operate beyond the formal institutions of the Assembly and Executive. It is fortunate that there is already in place some existing governance structures and some new features, particularly within Part VII of the Northern Ireland Act of 1998, which contain at least the potential for such a constitutionalism to develop.

Such a constitutionalism will be much more indeterminate and messy than the high constitutionalism of institution building. It will concentrate on recapturing and controlling the fugitive power that has escaped from formal government to the private and voluntary sectors or to quasi-public bodies and networks. This essentially public power must be subject to the control that comes from applying basic democratic values. Thus, constitutional values of transparency and openness must be applied to existing quangos, agencies, and partnerships.

21. For example, if we accept decentralization—one of the chief nostrums of the new managerialism—it leaves us with a choice as to what *sort* of decentralization. Decentralization via markets liberates both organizations and customers. Customers express choice in the market place as with parents choosing between schools. In contrast, administrative decentralization does not seek to remove state involvement altogether but rather to create more responsive bodies and agencies, which can better factor in consumer and citizen preferences while at same time retaining control over political strategy and service distribution. Political decentralization would seek to go further and to promote “empowerment” by providing political structures where financial and decision making control is pushed down the organization and sometimes outwards to clients involving them in the operation of services. The Northern Ireland government structures need to make these sort of choices about how to operate.

The sort of reporting and accountability requirements that some of these bodies undertake as an aspect of good practice must be standardized at their highest level. Performance indicators that include not just private sector-style efficiency, but also elements of democratic sufficiency must be devised and applied. Impact assessments that look imaginatively beyond simple head-counting towards real equality must be carried out, published, and acted upon.

Closely related to this control function, the new constitutionalism must also accentuate participation within an expanded public sphere beyond the formal institutions of government. Consultation duties and equality criteria must be imposed. The Policy Appraisal and Fair Treatment²² ("PAFT") model has particular application here. Inequalities in power and status existing along gender, class, race, and other lines must be recognized and compensated for to maximize participation in all the agencies, quangos, and networks that make up the public sphere within the new and more complex conditions of governance today. This may require the introduction of consultation requirements, vetoes, and conditions of minimum consensus, as well as a range of special rights for particular groups and special duties placed on parts of government.

Aspects of existing mechanisms, such as PAFT, the statutory duty to promote equality of opportunity in section 75, the prohibition of discrimination by public authorities in section 76 of the Northern Ireland Act of 1998, and the Equality Commission,

22. According to the guidelines, "PAFT is concerned with securing equality of opportunity and equity of treatment regardless of religious belief, political opinion, gender, marital status, having or not having a dependent, ethnicity, disability, age or sexual orientation PAFT is not confined to issues of legality but encompasses the wider issues of fairness." Central Secretariat Circular, 5//93; see *STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, EMPLOYMENT EQUALITY: BUILDING FOR THE FUTURE*, 1997, Cm. 3684. It operates (at least ideally) to mainstream equality norms at all levels of public sector activity by requiring government in all forms to be aware of and responsive to a wider agenda of equality. It has the potential to operate both at the level of contracts with private sector suppliers and with a European dimension where, for example, the EU's Special Support Programme has PAFT style commitments to ensure that partnerships between government, business, and the third sector funded under this programme pursue an equality agenda. *Id.*; see McCrudden, *MAINSTREAMING FAIRNESS? A DISCUSSION PAPER ON POLICY APPRAISAL AND FAIR TREATMENT* (1996). PAFT could provide a model for a very significant way of developing new normative, constitutional mechanisms. See, e.g., Tom Hadden et al., *EQUAL BUT NOT SEPARATE* (1998); cf. *THE WHITE PAPER ON PARTNERSHIP FOR EQUALITY*, 1998, Cm. 3890.

provide the raw material for developing controls on public power, as well as the required mechanisms for potentially guaranteeing open, fair, and inclusive civic space. However, it is important that all aspects of Part VII of the 1998 Act, where the human rights and equality agenda is addressed, are used imaginatively.

Human rights cannot be seen only as protections against an almighty and overbearing state. While the history of human rights in general, and indeed even human rights in Northern Ireland in particular, might be regarded as a history of a struggle to assert basic dignity and individual human autonomy against an often oppressive state machine made up of police and prison and government departments, the story in the present and future is somewhat different. The equality provisions of the Northern Ireland Act of 1998 have the potential to establish the foundations of a society where participation in a public civic space can take place in conditions of real equality, and where unjust differentials in power, from whatever source public or private, can be addressed in an emancipatory project, which may have a tremendous resonance world-wide. It is vital that the potential of this constitutionalism be given as much emphasis as the more eye-catching institution building.

CONCLUSION

While the political breakthrough that has led at last to the possibility of stable political institutions of government is to be given an unqualified welcome, it must be accompanied by a realization that the whole project of government has changed radically since the search for a political solution began. In place of the conditions that pertained even when devolved government was last in place in Northern Ireland in the 1970s, there is now a much more complex system of governance that brings in the private and voluntary sectors, through both partnership and contract, along with a fundamentally reordered public sector.

These changed times require that the sort of institutional solution that is predicated within most of the settlement instruments be augmented by a new constitutionalism of value and process. Some elements of existing practice, along with some aspects of the Northern Ireland Act of 1998, do contain the potential for developing such a constitutionalism of values that can

both control the new forms of power, as they now exist beyond the limits of formal government, and contribute towards creating the sort of open civic space where all voices can be heard in participatory, consensus building projects.

The creation of such an enhanced public sphere, and the widening and deepening of democracy that it involves, is of particular importance in developing and underwriting the institutional solution that the Assembly and related structures provide. Everywhere, representative democracy is experiencing the sort of legitimacy problems that require it to think about ways of "re-democratizing" itself. In Northern Ireland, there is not much of a history to support an argument that the apparatuses and institutions of the state provide by themselves an open and equal civic space. Indeed, these issues are too important to leave to the caste of professional politicians who may be tempted towards divided competencies and roles along sanitized sectarian lines—as, arguably, is encouraged by the registration and power-sharing features in section 4 and Part III of the 1998 Act.

While one may hope that the Assembly institutions referred to Part V of the 1998 Act, particularly the Civic Forum Assembly, can provide something more like a forum for normal politics as it exists in Great Britain or the Republic of Ireland, at the same time, it is important to realize that even such normal politics does not now exhaust the democratic agenda. As it rediscovers the normalcy of political argument and administration through institutions of representative government, Northern Ireland has the building blocks to construct simultaneously a new version of constitutionalism that can support and augment traditional mechanisms. It is fervently to be hoped that this opportunity will be taken.