Beyond the “Constitutional Moment”: Law, Transition, and Peacemaking in Northern Ireland

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Abstract

Our focus in this Article is not predominantly on the doctrinal intricacies of the constitutional framework in Northern Ireland. In fact, while we acknowledge the considerable sophistication of that framework, one of our contentions is that an overly legalistic focus on the shape and forms of constitutional architecture masks key questions concerning the broader political and ideological role of constitution-making. We will argue that the particular exigencies of constitution-making in a post-conflict society require a broader understanding of the notion and role of constitutional law. We attempt to trace the source of constitutional ideas in the jurisdiction, and the role of constitutional and legal structures as public symbols, which chart the transition from violence. Part I of this Article considers the role of factors indigenous to the Northern Ireland conflict, which shaped the constitutional settlement, including the political fault lines and the changing view of the law among some of the key protagonists. Part II analyzes the international influence on the constitutional settlement, including the previous U.S. Administration, the European Union ("EU"), the European Convention of Human Rights ("ECHR"), and the strategy of “internationalizing” particularly difficult issues (such as weapons decommissioning), which were arguably beyond the political capacity of the local participants to agree upon among themselves. Part III considers the respective constitutional discourses of the governments of the UK (in particular, the commitment of the Labour Administration to the devolution of power), and the Republic of Ireland, which assumed the responsibility as stewards of the negotiation and implementation phases. Part IV then contrasts the current constitutional settlement with its historical antecedents, and considers how thinking of constitution-making as a process, which takes us “beyond the constitutional moment,” and enhances our understanding of the role of constitutions in the art of peacemaking.
CONSTITUTIONAL AND INSTITUTIONAL DIMENSIONS

BEYOND THE "CONSTITUTIONAL MOMENT": LAW, TRANSITION, AND PEACEMAKING IN NORTHERN IRELAND

Kieran McEvoy & John Morison

INTRODUCTION

The 1990s saw increasing scholarly attention concerning the relationship between constitutional design, conflict transformation, and democratic renewal. Since the peace process in Northern Ireland emerged in the mid-1990s, Northern Ireland has featured heavily in such discussions. The Belfast Agreement (or Good Friday Agreement), concluded after almost two years of protracted negotiations in 1998, and the Northern Ireland Act, which implemented many of its provisions, have been...
widely lauded by lawyers and political scientists for their constitutional sophistication.\(^5\) While the Agreement’s ultimate fate remains subject to the vicissitudes of party politics in Northern Ireland, the accord was and is quite a remarkable achievement. After almost three decades of a seemingly intractable political conflict, which saw more than 3,600 people killed, and tens of thousands injured,\(^6\) the Agreement was reached and endorsed by the vast majority of the people of Ireland, both North and South. The Agreement and enabling legislation established a constitutional framework for a devolved administration in Northern Ireland, with a power-sharing Executive and complex consociational voting arrangements to ensure that neither the Unionist nor the Nationalist community could dominate the local Assembly.\(^7\) New arrangements were made to regulate the relations between the jurisdiction and the governments of the United Kingdom (“UK”) and the Republic of Ireland. A range of provisions were introduced to give institutional expression to commitment within the Agreement to human rights and equality, and a variety of independent and quasi-independent mechanisms were established to deal with particularly problematic issues, including the release of politically-motivated prisoners, the decommissioning of paramilitary weapons, and policing and reform of the criminal justice system.\(^8\)

Our focus in this Article is not predominantly on the doctrinal intricacies of the constitutional framework in Northern Ireland. In fact, while we acknowledge the considerable sophistication of that framework, one of our contentions is that an overly legalistic focus on the shape and forms of constitutional architecture masks key questions concerning the broader political and ideological role of constitution-making. We will argue that the particular exigencies of constitution-making in a post-conflict so-

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8. For a useful overview of the full range of issues dealt with by the Agreement see 22 *Fordham Int’l L.J.* 1133 (1999), containing twenty-five separate contributions.
ciety require a broader understanding of the notion and role of constitutional law. We attempt to trace the source of constitutional ideas in the jurisdiction, and the role of constitutional and legal structures as public symbols, which chart the transition from violence.

Our analysis is divided into three substantive sections. Part I of this Article considers the role of factors indigenous to the Northern Ireland conflict, which shaped the constitutional settlement, including the political fault lines and the changing view of law among some of the key protagonists. Part II analyzes the international influence on the constitutional settlement, including the previous U.S. Administration, the European Union ("EU"), the European Convention of Human Rights ("ECHR"), and the strategy of "internationalizing" particularly difficult issues (such as weapons decommissioning), which were arguably beyond the political capacity of the local participants to agree upon among themselves. Part III considers the respective constitutional discourses of the governments of the UK (in particular, the commitment of the Labour Administration to the devolution of power), and the Republic of Ireland, which assumed the responsibility as stewards of the negotiation and implementation phases. Part IV then contrasts the current constitutional settlement with its historical antecedents, and considers how thinking of constitution-making as a process, which takes us "beyond the constitutional moment," and enhances our understanding of the role of constitutions in the art of peacemaking.

Before examining the sources for the constitutional settlement, it is important to establish the background to the current Article and to ask the fundamental question as to whether the Agreement and its implementing legislation may be rightly referred to as "a constitution."

I. DOES NORTHERN IRELAND HAVE A CONSTITUTION?

The notion that the Northern Ireland Act and the Belfast Agreement may be a constitution is, of course, predicated on certain key assumptions about what a constitution is.9 Within any context where British notions of constitutionalism apply, the

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idea of a constitution is a difficult one. This relates to much more than the simple assertion that the constitution is not written down in a single document. It refers more widely to ideas about the foundations of authority and the extent to which modern ideas about limited government can be said to have evolved behind the façade of Britain’s historic constitution. The notion manifests itself very clearly in the nature of the constitutional framework in Northern Ireland, where ideas of a new constitutional beginning for resolving a historic problem are overlaid with older ideas about the sovereign nature of Parliament’s power to intervene via the Northern Ireland Act 2000, when the new arrangements threaten not to operate.

The term “constitution” in the UK may be said to have at least two meanings: there are those rules that describe how power is distributed, and there is a more normative sense of constitutionalism, which describes the way in which power ought to be exercised. Clearly, in the UK there do exist rules about who exercises power lawfully. These rules, while they may not have their origin in a single document, do nevertheless make up a constitution in the limited sense of the phrase. Constitutionalism, however, in the sense of a requirement of limited government, is even less formally organized, and despite some formal sources, particularly the Human Rights Act of 1998, much depends on informal understandings and practices. This has led some commentators to declare that in the UK generally, the constitution is simply “what happens.” Indeed, constitutionalism in the UK often is reduced to the bare proposition that all sovereignty resides with the Westminster Parliament, which is free to make or unmake any law it pleases. This, in turn, leads to a view that no particular law is of higher standing than any other, or has constitutional status as such. As Dicey put it: “neither the Act of Union . . . nor the Dentists Act, 1878, has more claim than the other to be considered a supreme law.”

This fundamental adherence to notions of parliamentary sovereignty gives a particular and peculiar character to any claim

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11. Human Rights Act 1998 (Eng.).
that Northern Ireland has a constitution, as such. Although the British idea of sovereignty includes reference to the "sovereignty of the people" (in the sense that the House of Commons is popularly elected), the UK system traditionally lacks a clear understanding that legal sovereignty can reside anywhere outside the Westminster Parliament. Any grant of power to, for example, a devolved legislature is simply that — power given under licence and not power ceded in any federal sense. Indeed, the record of devolution, both in the version that occurred in Northern Ireland in 1920, and in the New Labour manifestations in Scotland, Wales, and Northern Ireland, very clearly shows that each constitutional act reserves ultimate sovereign power at Westminster. For Scotland and Wales, this is unlikely to provide much of a practical problem — at least until the political loyalties of governments in Cardiff and Edinburgh diverge widely from that in Westminster. In Northern Ireland, however, sovereignty remains an issue of lively, practical, political importance.

The capacity of the Westminster government to suspend the institutions of devolution via powers given in the Northern Ireland Act of 2000 is very far from theoretical only. Indeed, on four occasions to date, a British Secretary of State has found it necessary to use the powers of the Northern Ireland Act of 2000 to suspend devolution on a temporary basis. Within one traditional analysis of British constitutionalism, such use of power is relatively unremarkable constitutionally — if controversial politically. This orthodox view holds that there is nothing to distinguish either the Agreement or the subsequent legislation — however important they may be in political terms — from any other act of Parliament. Such a view would suggest that the Agreement has been implemented only because the sovereign Westminster Parliament has ordained that it should be, and therefore, it can be removed by the same body in a similar fashion.

From another perspective, the Good Friday Agreement and the resulting Northern Ireland Act of 1998, are something different. In a departure from the UK tradition, a link between constitutionalism and notions of "the sovereignty of the people," has underpinned the Belfast Agreement since its inception. Popular support for the Agreement was seen as crucial, and it was for this reason, that referendums were held simultaneously in both
Northern Ireland and the Republic of Ireland. In this sense, the Agreement represents a new constitutional beginning with its origins very clearly in ideas of consent and popular sovereignty. There is also the added factor that the Agreement has an international dimension as well, in so far as it factors in the Republic of Ireland and the very different constitutional traditions and understandings there. Of course, the Northern Ireland Act of 1998 stands independent of the international strands, but here, as elsewhere in the new structures for governance in Northern Ireland, it is easy to argue that something new and different was clearly envisaged.

Thus, while some orthodox UK constitutional law approaches would reject the notion that popular support or a connection with other constitutional traditions imbues the Agreement and the corresponding legislation with any particular "constitutional" qualities, other constitutional readings might take a more expansive view. Some support for the second approach has come, perhaps surprisingly, from the courts. For example, there is one recent judgement of the House of Lords, which appears to suggest that the Agreement and the corresponding legislation should be taken as constitutional in form. In Robinson v. Sec'y of State for Northern Ireland and Others, a case concerning the interpretation of key provisions of the Northern Ireland Act

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14. As discussed below, the referendum in the Irish Republic was required to endorse the amendment of Articles 2 and 3 of the Republic's constitution, which identified the national territory as including the "whole island of Ireland." The holding of the referenda simultaneously in both parts of Ireland, also allowed Republicans to claim that the "Irish people" were exercising their right to self-determination for the first time since the country was partitioned, against the wishes of the majority.

15. In the Republic, Article 6 of its written constitution states that "[a]ll powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good." The Irish constitution of 1937 (Bunreacht na Éireann) was adopted only after a plebiscite on December 29, 1937. Article 46 states that constitutional amendment can, likewise, be achieved only with the consent of the people, as expressed in referenda (Casey 2000). At its very heart, therefore, the Irish constitution, as do many others, emphasises the importance of popular support for the institutions of government, and for any change to the structures of the State.

16. It is interesting to notice that much academic commentary that was produced around the time of the Agreement, reflects very clearly the idea that this was a new departure, as it picks up on ideas of "reconstruction," "renewal," and "transcending," that were also present in the political rhetoric of the time.

of 1998, a 3-2 majority of the House considered that the context that gave rise to the Northern Ireland Act of 1998 demanded a modified approach to interpretation. The House’s statement in this regard was, at one level, significant because it added to existing judicial statements about the special constitutional status of the wider body of devolution legislation in the UK. But much more significant was the House’s emphasis on the very unique dynamics of the Northern Ireland settlement. In finding that the provisions at issue should be interpreted purposively, and in the light of the general principles and values that underpin the Agreement, the House chose to highlight how the Northern Ireland Act of 1998 was almost without comparison. As Lord Hoffman said:

In choosing between (different) approaches to construction, it is necessary to have regard to the background to the 1998 Act. It was passed to give effect to the Belfast Agreement concluded on Good Friday 1998. This Agreement was the product of multi-party negotiations to devise constitutional arrangements for a fresh start in Northern Ireland. The 1998 Act is a constitution for Northern Ireland, framed to create a continuing form of government against the background of the history of the territory and the principles agreed in Belfast. The long title of the Act is “to make new provision for the government of Northern Ireland for the purpose of implementing the Agreement reached at multi-party talks on Northern Ireland.” According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents form part of the admissible background to the construction of the Act just as much as the Revolution, the Convention and

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18. “We should recognise a hierarchy of Acts of Parliament: as it were, ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion, a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.” Thoburn v. Sunderland County Council, [2002] 1 C.M.L.R. 50, 62 (QBD Admin. Ct.).

19. The specific issue was whether the courts should regard a six-week time limit for the election of a First and Deputy First Minister as mandatory, in the sense that fresh Assembly elections should be called on its expiry. See generally Gordon Anthony, Public Law Litigation and the Belfast Agreement, 8 EUR. PUBL. L. 401 (2002); Marie Lynch, Political Adjudication or Statutory Interpretation: Robinson v. Secretary of State for Northern Ireland, 53 N. IR. LEGAL Q. 327 (2002).
the Federalist Papers are the background to construing the Constitution of the United States.\textsuperscript{20}

This statement clearly implies that the Northern Ireland Act of 1998 — its existence, form, and purpose — cannot, and should not, be conceived of in traditional UK constitutional law terms. Orthodox constitutional approaches in the UK link the courts’ role in the interpretation of legislation to the singular objective of implementing the intentions of the sovereign Parliament.\textsuperscript{21} While Lord Hoffman’s approach does not, as such, suggest that the interpretation of the legislation should be divorced from the intentions of the legislature, his emphasis on the context that gave rise to the Belfast Agreement preceding the Act, adds a new dimension. The fact that the Northern Ireland electorate expressed support for the Agreement has, for example, also been said by one judge to provide “formidable support” for post-Agreement changes to policing.\textsuperscript{22} This does not, as yet, suggest that the Westminster Parliament is no longer sovereign over Northern Ireland affairs (viz Section 1 of the Northern Ireland Act 1998, and the corresponding fact that the Northern Ireland Act 2000 provides for the suspension of the Northern Ireland institutions, which has occurred four times since their inception).\textsuperscript{23} The fact does, however, suggest that changes in Northern Ireland politics are prompting changed judicial perceptions. Constitutions cannot, after all, be made complete in one day, and while the courts will still give effect to the most recent acts of the Westminster Parliament, the fact that subsequent legislation envisages a final return to the 1998 Act indicates that that Act remains, on account of its context, truly unique. In consequence, it can be argued that the Act will be maintained not only because it is a manifestation of the wishes of the Northern Ireland people, but also because related processes of constitutional change in the Republic of Ireland demand fidelity.

Despite the current partial suspension of elements of the Agreement (the Executive, Assembly and cross-border bodies discussed below), other elements — such as equality and human

\textsuperscript{22} In the Matter of an Application by Mark Parsons for Judicial Review (N. Ir. H. Ct.) [2002].
\textsuperscript{23} See discussion \textit{infra}, Part IV.
rights provisions, new policing arrangements, criminal justice reform, the provisions for the release of politically motivated prisoners, etc. — all remain in place. Whatever the current exigencies, the Agreement remains the constitutional template around which all future political progress will be framed. It is an international treaty signed by the sovereign governments of the UK and the Irish Republic. The judiciary has begun to address, however tentatively, the idea that the Northern Ireland Act represents something more than simply one more Act of Parliament. It represents a tangible expression of the will of the people of Ireland, North and South. It addresses not only issues about who has power, but also how power is to be exercised. It lays down the terms upon which people in Northern Ireland, from all communities, are willing to be governed. It represents, in our view, a fundamental "constitutional moment" wherein the Agreement and the Act that implemented it, are constituent acts in the establishment of a new polity.

II. THE SOURCES OF CONSTITUTIONAL PEACEMAKING: THE INDIGENOUS FACTORS

This constitutional moment has come about as a result of a complex set of conditions, processes, and initiatives operating in relation to a diverse range of actors. Constitution-building here has been about more than simply arranging how government is to be organized — it has been aimed at providing a framework for addressing fundamental ethical problems about how a divided society can reach an accommodation that will allow it to govern itself. This process of "constitutional peacemaking" is about much more than simply designing a blueprint for government: it involves managing the creation and implementation of the design and a whole series of related, if apparently unconnected, issues as the process is rolled out in practice.25

24. "The British government will simply not countenance any path other than implementing the Agreement. And we must implement the Agreement in full, because it is the choice of the people; the people here, the people in the south and the people of the United Kingdom as a whole. I honestly believe there is no other way." British Prime Minister Tony Blair, Speech on Peace in Belfast (Oct. 17, 2002), available at http://politics.guardian.co.uk.

Constitutional discourses in Northern Ireland have, since the formation of the State, been framed by the presence or threat of political violence. Following a sustained campaign of political violence against the British rule in Ireland led by the Irish Republican Army, and a parallel campaign of violence by Protestant paramilitaries in favor of it, the island of Ireland was partitioned in 1921, creating separate Parliaments in the Northeast and South of the country.\textsuperscript{26} The 1920 Government of Ireland Act introduced a devolved government to the region of Northern Ireland, granting some law-making power to the new Parliament and retaining others at Westminster. Although a number of innovative features were included in the original constitutional framework, designed to offer some solace to the Nationalist minority,\textsuperscript{27} most of these features were quickly removed or proved to be useless by the end of the 1920s.\textsuperscript{28} The Unionist party was never out of power between 1922 and 1972. A "Speakers Convention" developed at Westminster, which forbade discussion of matters within the purview of the Northern Ireland Parliament, thus ensuring little effective oversight from that quarter.\textsuperscript{29} Additionally, ever-fearful of the seditious threat of the IRA, the Unionist government enacted a wide range of permanent emergency powers, and recruited a local militia whose primary task was to vigorously suppress any potential armed opposition to the State from the ranks of the IRA or other Republican groups.

Drawing its inspiration from similar events in the United States, Europe, and elsewhere, the civil rights movement began in the 1960s to highlight the discriminatory nature of the Northern Ireland system of governance, and included demands for electoral reform, impartial policing, and equal opportunities in jobs and housing allocation. A complex combination of a violent State reaction to civil protests, the outbreak of organized


\textsuperscript{27} These included proportional representation for elections to the new Parliament, anti-discrimination provisions, and a "Council of Ireland" designed to foster links between the governments of North and South.


\textsuperscript{29} See generally James Callaghan, A House Divided: The Dilemma of Northern Ireland (1973).
political violence by Loyalist and Republican paramilitaries, and a perception that the local Unionist authorities had lost control, resulted in the suspension of the Stormont government and the reintroduction of direct rule from London in 1972.\textsuperscript{30} Despite a number of abortive attempts at reintroducing various forms of devolution,\textsuperscript{31} direct rule remained largely in place as the adopted form of governing the jurisdiction until the Agreement and Northern Ireland Act of 2000. In addition, as discussed further in the concluding section, it has become the default setting on those four occasions, when the most recent version of devolution has faltered.

Thus, oversimplifying for the sake of brevity, the basic political fault lines that shaped the settlement of 1921 were also those that contributed to the outbreak of violence in 1969, and its continuation until the cease-fires of 1994. These were:

(a) the formalization of a Unionist/Protestant majority in the State, with a guaranteed political hegemony in the governance of Northern Ireland,\textsuperscript{32} and the coercive apparatus to maintain that supremacy through emergency legislation and a partial police force;

(b) the parallel corralling of a Nationalist/Catholic minority within the State, who were excluded from political power and discriminated against by the Unionist majority ever-suspicious of their "loyalty" to the Northern Irish State;\textsuperscript{33}

(c) a residual faith among a minority within the Catholic community in the use of violence which, while largely dormant for long periods of the State’s existence, re-emerged in the wake of the State’s response to the civil


\textsuperscript{32} The original population breakdown in Northern Ireland was approximately 66% Protestant and 33% Catholic. However, demographic and population changes have seen a gradual equalizing of the respective religious blocks, with some commentators suggesting that the current population may consist of 50% Protestants, 45% Catholics, and 4% “other.” See David McKittrick, \textit{Protestants Stand on the Brink of Losing their Majority in Northern Ireland}, \textit{Independent}, Feb. 11, 2002, available at http://news.independent.co.uk/uk/ulster/story.jsp?story=119350.

rights campaign;\(^ {34}\)

(d) the continuation of pre-partition allegiances throughout the society with Unionists/Loyalists intent on maintaining the constitutional link with Britain and Nationalists/Republicans focused on the re-unification of the national territory of Ireland; and

(e) the related roles and responsibilities of the respective British and Southern Irish States that have, broadly speaking, supported the respective constitutional positions of the Unionist and Nationalist blocks since partition with the UK, maintaining an essentially pro-union position and the Irish State supporting Nationalists.

Therefore, the constitutional settlement ultimately reached as a result of the negotiations in the late 1990s, required an architecture, which could accommodate these competing dynamics and the ways in which they played out between the two predominant communities. Nationalists required some form of power-sharing arrangements, which ensured that no political party or block could dominate as under the Stormont regime; that the State system of justice and policing would be fair and impartial; that mechanisms to ensure that their human rights and capacity to participate equally in social and civic life would be put in place; and that the settlement would include some tangible expression of their Irish identity through formal constitutional links with the Irish Republic. Unionists, on the other hand, wanted to ensure that the link with Britain and their British identity would be maintained while they remained a majority in Northern Ireland; and that they, too, could gain access to the exercise of power in the jurisdiction and ameliorate the "democratic deficit," which came about as a result of the imposition of direct rule. Unionists also wanted the IRA and other Republican violence designed to drive them into a united Ireland to cease, and to minimize whatever constitutional provisions were created, formalizing the links between Northern Ireland and the Irish Republic.\(^ {35}\) For their part, the British and Irish governments (having increasingly accepted the principal that joint stewardship of the Northern Ireland problem was the most effective manage-

\(^ {34}\) See Niall O. Dochartaigh, From Civil Rights to Armelites: Derry and the Birth of Irish Troubles (1997).

\(^ {35}\) For a more detailed discussion of Unionist objectives, see David Trimble, The Belfast Agreement, 22 Fordham Int'l L.J. 1145 (1999).
ment strategy since the signing of the Anglo-Irish Agreement in 1985)\textsuperscript{36}, required a re-framing of their respective constitutional arrangements concerning the jurisdiction.

It is not our intention here to offer an exhaustive overview of the complex structure of the Agreement and Northern Ireland Act that were framed by these various dynamics.\textsuperscript{37} Rather, we offer a brief overview and then focus on a number of key themes, which are of particular relevance for our current purposes.

With regard to its internal Northern Ireland political dimensions, the Agreement is often broadly described as "consociational" in nature.\textsuperscript{38} It provides for the creation of a devolved Assembly in Northern Ireland and a power sharing Executive, chaired by a First Minister and Deputy First Minister who are, in practice, drawn from the respective Unionist and Nationalist blocks. The other ministerial members of the Executive (and, indeed, the chairs of the various Assembly Committees, who oversee the work of ministers), are allocated according to the electoral strength of their parties.\textsuperscript{39} The rules on cross-community procedures, including parallel consent and weighted majorities, are designed to protect Nationalists from Unionist domination (and presumably vice versa in the event of further demographic changes). In essence, the Assembly is free to pass legislation in any policy area, other than those classified as “excepted matters” and “reserved matters” (e.g. defence or taxation), which remain within the realm of Westminster.

\textsuperscript{37} See supra n.8 and accompanying text.
\textsuperscript{38} See Brendan O’Leary, The 1998 British Irish Agreement; Consociation Plus, SCOT. AFF., 14 (1999); see also Robin Wilson, War by Other Means: Devolution and Community Division in Northern Ireland (paper presented at the American Political Science Association Conference in Boston, 2002), available at http://apsaprocceedings.cup.org. In this context, “consociational” means a political arrangement which meets the following four criteria: cross community executive power-sharing, proportionality rules applied to all relevant government and public sectors, community self-government, and equality in cultural life and veto rights for minorities. See AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).
\textsuperscript{39} See Rick Wilford, The Assembly and the Executive, in ASPECTS OF THE BELFAST AGREEMENT (Rick Wilford ed., 2001) [hereinafter WILFORD, ASPECTS OF THE BELFAST AGREEMENT]. Perhaps the most significant outcome of this procedure was its guarantee of two Ministerial seats for the IRA’s political wing, Sinn Fein, and its witnessing of the former IRA Chief of Staff, Martin McGuinness, becoming Minister for Education.
As regards the constitutional status of Northern Ireland in relation to the Republic of Ireland, the Agreement includes provisions for cross-border institutional arrangements between Northern Ireland and the Republic of Ireland. Given the political priorities of Nationalists and Unionists to, respectively, maximize and minimize these aspects of the accord, the negotiations of these constitutional features were among the most politically controversial.\textsuperscript{40} The Agreement establishes a North/South Ministerial Council and a range of North/South bodies that are designed to provide a forum for the development and implementation of common policies of mutual benefit to Northern Ireland and the Republic of Ireland across at least twelve policy areas (including, for example, trade and business development, food safety, and special EU matters). In order to allay the respective fears of Nationalists and Unionists, the Agreement also contains institutional “guarantees” that the North/South Ministerial Council and the Northern Ireland Assembly are mutually interdependent, and that one cannot successfully function without the other. Thus, if the Unionists refuse to properly implement the cross-border bodies, the Assembly should collapse, and, similarly, if the Assembly collapses, these bodies are not supposed to have any independent constitutional life of their own.\textsuperscript{41}

As a \textit{quid pro quo} for the Unionists for the creation of these cross-border institutions, the Agreement also provides for the establishment of a British-Irish Council, a forum for bringing together all of the devolved administrations in these islands, including the two governments and the devolved administrations in Wales, Scotland, and Northern Ireland.\textsuperscript{42} Finally, the Agreement also establishes a new British-Irish Intergovernmental Conference. The purpose of this Conference is designed to “bring together the British and Irish Governments to promote bilateral co-opera-
tion at levels on all matters of mutual interest within the competence of both governments." Historically, of course, intergovernmental relations in this regard have been dominated by the "Northern Ireland question," a feature explicitly recognized by the Belfast Agreement that refers to "the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland." In effect, it is the forum through which the two governments can continue to liaise concerning Northern Ireland matters, in particular when "normal" political relations in Northern Ireland are absent, such as during the suspension of the devolved institutions.

The self-evident political sophistication of these constitutional arrangements was far from sufficient to meet the demands created by the indigenous political fault lines of the jurisdiction. Indeed, as indicated above, although there were some important design differences, much of the basic constitutional architecture had been present in the failed Sunningdale Agreement of 1973. The principal difference in 1998 was the inclusive nature of the negotiations, and the absence of large-scale armed violence. In 1973, the central philosophy of the negotiations had been to build a center ground between Nationalists and Unionists, and to exclude the extremists, particularly those who would use violence for their political ends. Violence continued unabated outside the negotiations, and, in fact, it was the activities of Loyalist paramilitaries (together with other Unionist extremists) that ultimately led to the collapse of the 1973 Agreement. The negotiations that led to the Belfast Agreement in 1998 included the political representatives of militant Republicanism and Loyalism, and occurred in the context of "military cessations" from the main paramilitary groups. It is important, also, to chart the political changes, which occurred within those groups, particularly among Republicans, as a significant and im-

43. Agreement, supra n.3, Strand Three, para. 2 (emphasis added).
44. Agreement, supra n.3, Strand Three, para. 5 (emphasis added).
45. Seamus Mallon, former Deputy First Minister and Deputy Leader of the Social Democratic and Labour Party ("SDLP"), once famously described the Agreement as "Sunningdale for Slow Learners." For a more detailed comparison see Stefan Woolf, Context and Content, Sunningdale and Belfast Compared, in Wilford, Aspects of the Belfast Agreement, supra n.39.
perative source for developing the constitutional ideas that shaped the Agreement.

In the years preceding the Agreement, the main Republican and Loyalist paramilitary groups sought to develop "political" strategies to accompany their military campaigns. The Loyalists have achieved only partial success in this endeavour. However, with regard to Republicans, Sinn Féin (the IRA's political wing) has grown from an organization largely concerned with "selling newspapers" in the 1970s, to the largest Nationalist party in Northern Ireland and the fastest growing political party on the island of Ireland. The increased domination of the "political" element of Irish Republicanism since the early 1980s, is a complex narrative, well beyond the scope of this Article. However, what is germane in that process for our current discussion, is the increased centrality which "law" has come to play as a key part of the Republican "struggle." Republicanism has transformed itself from a movement which, in the 1970s, expected that IRA defendants would simply refuse to recognize the court while on trial (as the practical and symbolic expression of the British power in Ireland), to systematically using the law to challenge the State concerning prison conditions, torture, State killings, and securing the political rights of Sinn Féin, from the 1980s onwards. This capacity to use the law as a strategy of resistance, was a key argument for those within Republicanism, who were pressing for the abandonment of armed struggle in favour of politics.

As noted above, a key feature of the Belfast Agreement is the centrality of human rights and equality protections. For example, the Agreement makes reference to the incorporation of the ECHR, a process to which the Labour government was al-

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48. The Progressive Unionist Party, the political wing of the paramilitary Ulster Volunteer Force, secured only two seats in the Northern Ireland Assembly elections of 1998. The Ulster Democratic Party, the political wing of the Ulster Defence Association, secured no seats and has since disbanded. Despite their limited electoral success however, the leaders of these groups have received considerable accolades for their skills in attempt to steer an arguably less disciplined and certainly less politicised constituency (than the Republicans) away from political violence.

49. See generally Brian Feeney, Sinn Féin: A Hundred Turbulent Years (2002).

50. Interview with former IRA prisoner and Sinn Féin Councillor (Jan. 16 1995) (on file with authors).
ready committed throughout the UK. However, it also contains a range of special provisions for Northern Ireland. The Agreement provides for the establishment of a Human Rights Commission, one of the primary tasks of which is to draft a Bill of Rights specific to the jurisdiction.\(^5\) It also sets up an Equality Commission, which centralizes responsibility for anti-discrimination on the grounds of religion, gender, disability, and race.\(^5\) In the negotiations that led to the Agreement, Sinn Féin were thought by some to be among the strongest advocates of these measures,\(^5\) although there was support, too, among the other parties (most notably the Social Democratic and Labour Party ("SDLP"), the Women’s Coalition, and some of the smaller Unionist parties).

In sum, the complex indigenous factors in Northern Ireland required a constitutional architecture capable of addressing and balancing a number of competing relationships and dynamics. The devolved local Assembly required complex procedural rules of power-sharing and mutual consent to avoid the block domination of the past. Nationalists required formal constitutional links with the Irish Republic as a tangible acknowledge-


\(^5\) The Equality Commission also has responsibility for reviewing the operation of Section 75 of the Northern Ireland Act of 1998, a far-reaching provision which places a statutory duty on all public authorities to promote equality of opportunity, publish "equality schemes," and carry out impact assessments as to the likely equality outcomes of any decision. In effect, there is now in place a mechanism for mainstreaming equality into all aspects of policy formation and implementation in the government of Northern Ireland. This is a process, which goes well beyond the traditional anti-discrimination approach and concentrates, instead, upon government proactively, taking equality into account as it devises policy. While there are some similar developments elsewhere (particularly in Canada and within the gender mainstreaming work of the Council of Europe), the depth and breadth of the Northern Ireland equality system is new and potentially of considerable international significance. See Christopher McCrudden, Mainstreaming Equality in the Governance of Northern Ireland, 22 Fordham Int’l L.J. 1696 (1999); see also Christopher McCrudden, Equality, in Human Rights, Equality and Democratic Renewal in Northern Ireland (C. Harvey ed., 2001).

\(^5\) See Paul Mageean & Martin O’Brien, From the Margins to the Mainstream: Human Rights and the Good Friday Peace Agreement, 22 Fordham Int’l L.J. 1499, 1514 (1999). It is interesting to note how the implementation of the "human rights and equality agenda" has become a defining mantra of the modern Republican movement. This contrasts starkly with earlier versions of Republicanism, wherein not only were such claims considerably undermined by Republican violence, but they were often discounted on the basis that they were "partitionist." For further discussion see Kieran McEvoy, Law, Struggle and Political Transformation in Northern Ireland, 27 J.L. & Soc’y 542 (2000).
ment of their Irish identity and the ultimate desire for reunification. Unionists required guarantees that the cross-border bodies were not an embryonic, all-Ireland structure, and that their "Britishness" was not being corroded. Hence, the British-Irish Council was viewed as a potential counterbalance. As discussed in greater detail below, assuming that the enmity and division of the past thirty years would be unlikely to lead to a smooth sharing of power, the British and Irish governments continued to require a mechanism for their *de facto* joint political stewardship of the Northern Ireland problem through the British and Irish Intergovernmental Conference. Finally, Nationalists and Republicans in particular, required an extensive array of human rights and equality provisions to ensure that the systemic discrimination of the past could not be repeated in the new dispensation.

III. THE SOURCES OF CONSTITUTIONAL PEACEMAKING: THE INTERNATIONAL FACTORS

The notion that "international involvement" is a prerequisite in seeking to resolve longstanding political conflicts, has increasingly become something of an established principle in conflict resolution.\(^5^4\) In a context of ever-increasing globalized influence on State governance in general,\(^5^5\) it is our view that peacemaking, in particular, requires sustained and strategic international support and encouragement. In the Irish context, the ways in which the ultimate constitutional settlement was shaped by international influences may be divided into four key themes, each linked to different stages of the peacemaking process. First, a number of important international influences contributed to the "scene setting" in which the negotiations occurred. Second, in terms of the constitutional architecture of the Agreement, its design drew heavily upon international ideas, norms, and values, which were seen to be directly relevant to the Northern Ireland context. Third, in terms of its implementation, the governance of the peacemaking process required direct involvement from a range of supportive international players,

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particularly in the most highly sensitive areas, where the "internationalization" of acute problems was required. In particular, with regard to a number of key matters concerned with security, the internationalization of issues, such as the release of politically motivated prisoners, the reform of policing, and the decommissioning of paramilitary weapons, became the central technique for the "management" of transition during the peace process.

The political context in which the negotiations took place, was framed by a range of important international influences. For example, the collapse of the Berlin Wall in 1989, and the effective end of the Cold War, certainly facilitated the announcement in 1990 by the then Secretary of State for Northern Ireland, Peter Brook, that Britain had "no selfish, strategic, or economic interest in Northern Ireland," thus addressing a central assumption of Republicans since the 1970s. Again, the transition from the apartheid system in South Africa was a key influence. While Republicans have previously had some ties with the African National Congress ("ANC"), the 1990s saw a broader cross-fertilization of ideas, visits, study groups, and so forth, between various political actors and members of civil society in either jurisdiction. In addition, the increased interest of the Clinton Administration in the emerging peace process, and, in particular, the granting of an entry visa to the United States for Gerry Adams, and later, Joe Cahill, have been widely viewed as central to the preparations for the IRA cessation. Finally, there was the related decision by the two governments to appoint international chairmen, led by Senator George Mitchell, to chair


first, the international body on decommissioning of weapons and then, the peace negotiations proper. This decision seemed to offer firm evidence that the two governments were committed to a joint stewardship that would be exercised (at the very least symbolically) through an international prism.

The Agreement itself relied considerably upon a range of international peacemaking ideas. For example, the centrality of human rights in the accord, evidenced by the provisions relating to the incorporation of the ECHR, the establishment of a Human Rights Commission, and the drafting of a Bill of Rights, mirror other recent constitutional peacemaking efforts which privilege such discourses. The consociational aspects of the Agreement noted above drew extensively on the work of the Dutch political scientist, Arend Lijphart. He, in turn, has argued that the intellectual precedence of such arrangements can be traced to include the work of Dutch politicians in 1917, Lebanese politicians in 1943, Austrian Politicians in 1945, Malaysian politicians in 1955, Colombian politicians in 1958, Indian politicians in the 1960s and 1970s, South Africa in the early 1990s, and Northern Ireland in 1973. While some commentators may have questioned the interpretation of the various international experiences that shaped the discourse in Northern Ireland, and indeed others have argued that the Belfast Agreement actually improved upon certain key weaknesses of models drawn from the international context, no one disputes the fact that what Belmont et al. have referred to as “the clay for the constitutional designers” of the Agreement, was distinctly international in origin.

The Agreement also saw the “delegation” of particularly difficult issues of conflict transformation to bodies that included a specific international dimension. Of particular interest were the provisions with regard to the release of politically-motivated prisoners, the creation of a new policing service, and the decommis-
sioning of illegally held paramilitary weapons. Given the obvious sensitivities of releasing early paramilitary prisoners, much of the public and private discussions in Northern Ireland on the matter drew considerably upon similar international experiences. The negotiations leading to the provisions on prisoner release were considerably influenced by a large comparative international study of similar processes in a range of other jurisdictions, carried out by a local voluntary organization.64 The Agreement detailed that prisoner release would entail the establishment of commissions in the North and South, excluded organizations not on cease-fire, contained a two-year timeframe by which all qualifying prisoners would be released, and a deadline for enabling legislation. The release process itself in the North was overseen by the Sentences Review Commission, an independent body co-chaired by a South African lawyer, Brian Currin, and a retired civil servant, Sir John Blelloch. Currin’s appointment in particular (he had chaired the Amnesty Commission in South Africa), was explicitly designed to reassure the parties associated with paramilitary groups that the Commission would be pragmatic on the question of prisoner release.65 Within the context of very specific provisions contained in the Agreement itself, this internationalizing of the prisoner issue was a mechanism for framing what was, for many people, an unpalatable aspect of the Agreement as a difficult but necessary element of conflict transformation best achieved in the most pragmatic fashion possible.66

The attempts at creating a new policing dispensation in the jurisdiction have also sought to internationalize one of the most difficult aspects of the peace process. Under the Agreement, an independent commission was established under the chairmanship of former Hong Kong Governor, Chris Patten, and included a number of prominent international policing experts tasked with making “recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread commu-

64. See Chris Ryder, Inside the Maze: The Untold Story of the Northern Ireland Prison Service 322 (2000).
nity support for these arrangements." In carrying out that mandate, the Patten Commission mirrored the work of two important earlier pieces of comparative policing research that had informed the negotiations. As well as its extensive public consultations, the Patten Commission visited police services in Canada, Spain, South Africa, the United States, as well as the Garda Siochana and a number of British regional forces. The influence of these international experiences is evident throughout the Patten Report. For example, the Patten recommendations on public order policing and the District Policing Partnership Boards draw considerably upon the South African experience. The recommendations regarding the policing board and Police Ombudsman utilize similar concepts in Canada, and much of the "partnership" discussion in the Report draws heavily on the U.S. community policing experience and literature.

Finally, the necessity of an "international" dimension to the vexed question of the decommissioning of paramilitary weapons, has always been viewed as essential by those who were genuinely interested in achieving it. The chronology of this process is particularly complex, but some detail is necessary in order to highlight the broader significance of international input into the process. The initial involvement in 1995 and 1996 of senior

67. Agreement, supra n.3, Strand Three (emphasis added).
68. See generally MARY O'RAE & LINDA MOORE, HUMAN RIGHTS ON DUTY: PRINCIPLES FOR BETTER POLICING, INTERNATIONAL LESSONS FOR NORTHERN IRELAND (1997); JOHN McGARRY & BRENDAN O'LEARY, POLICING NORTHERN IRELAND: PROPOSALS FOR A NEW START (1999).
71. Id. at 41.
72. The issue of weapons decommissioning has bedevilled the Irish peace process since the mid-1990s. Republicans view it as tantamount to a demand to surrender by an undefeated army and a deliberate attempt to demand the impossible in order to block the process of conflict transformation. Unionists view it as a litmus test of the Republicans' seriousness about peace, and the crystallization of the view that the retention of a private army is incompatible with democracy. All accept that little attention is paid to the decommissioning of Loyalist weapons, despite their ongoing campaigns of violence. In March 1995, seven months after the first IRA cease-fire, the then Conservative Government insisted that decommissioning should take place as a precondition to Sinn Féin's participation in the negotiations. In an effort to overcome the ensuing stalemate, the Mitchell Commission (discussed above) outlined compromise proposals wherein negotiating parties had to sign up to six principles of non-violence and commitment to democracy. The Commission also recommended that some decommission-
international figures in the Mitchell Commission, was designed

ing should take place during, and not before, negotiations. The British government rejected this proposal, contributing significantly to the breakdown of the first IRA cease-fire. Following the change in government in the UK, the two governments revisited the Mitchell proposals and agreed to establish a further independent body to oversee decommissioning (the Independent International Commission on Decommissioning), to be chaired by Canadian General John De Chastelain, himself a member of the Mitchell Commission. Legislation was also introduced to deal with the modalities of decommissioning.

When the Agreement was signed in April 1998, it required the signatories to reaffirm their commitment to disarmament, to "work constructively to use their influence to achieve decommissioning within two years of a referendum and in the context of the implementation of the overall settlement." Various initiatives were then attempted to "sequence" the guns versus government quandary, with the Ulster Unionists insisting that Sinn Féin could not take up seats on the Executive, unless decommissioning had begun, and Republicans insisting that they were entitled to the ministerial seats on the basis on their mandate and their good faith in seeking to influence decommissioning, as specified under the Agreement. Two attempts were made by the British and Irish governments to, in effect, impose a solution in April 1999 and July 1999. These were rejected by Republicans and Unionists, respectively. After a further independent review chaired by Senator Mitchell, the sequencing issue was resolved by an agreement that devolution should take effect, then the Executive should meet, and then the paramilitary groups should appoint their authorized representatives to meet with the Independent Commission, all on the same day, in that order.

Powers were devolved to the Northern Ireland Assembly and the power-sharing Executive on December 2, 1999, but the government was short-lived. Disagreement over progress on decommissioning led to the suspension of the Executive in February 2000. After protracted negotiations, the IRA announced it was ready to begin a process to put its weapons "completely and verifiably" beyond use and checked regularly by two international arms inspectors, the former ANC negotiator, Cyril Ramaphosa, and the former Finnish president, Martti Ahtisaari. Powers were restored to the Assembly and the Executive on May 22, 2000. On June 26, 2000, it was announced that the two international arms inspectors had examined three IRA arms dumps and verified that they were beyond use. By October 2000, the Ulster Unionist Party was still unhappy with the IRA's failure to engage constructively with the Independent International Commission on Decommissioning ("IICD"), and banned Sinn Féin ministers from attending cross-border ministerial meetings. The IRA broke off contacts with the decommissioning body. After further intensive negotiations, the IRA agreed to recommence contacts. Further international inspections failed to satisfy Unionists' demands and on July 1, 2001, David Trimble resigned in protest at the IRA’s failure to decommission. In October 2001, the IRA announced that a process of putting arms beyond use had begun, and this was subsequently verified by the IICD. The legislation on decommissioning was amended in January 2002, extending the deadline for another year, with the option for further annual extensions up to 2007. In October 2002, the Executive was suspended for the fourth time following the withdrawal of the Ulster Unionists, and the IRA broke off contacts with the IICD once more. See generally Kieran McEvoy & Brian Gormally, Seeing is Believing: Positivist Terrorology, Peacemaking Criminology, and the Northern Ireland Peace Process, 8 CRITICAL CRIMINOLOGY 9 (1997); Colin McInnes, A Farewell to Arms?: Decommissioning and the Peace Process, in COX, A FAREWELL TO ARMS?, supra n.56; Kirsten Schulze, Taking the Gun Out of Politics: Conflict Transformation in Northern Ireland and Lebanon, in McGarry, NORTHERN IRELAND AND THE DIVIDED WORLD, supra n.1.
explicitly to circumnavigate the obvious difficulties, for Republicans in particular, of even discussing the notion of decommissioning weapons with the British government. The international character of this element of the process has been continuously stressed through the nomenclature and personnel involved. These include the body charged with overseeing the modalities of decommissioning (the Independent International Commission on Decommissioning, chaired by Canadian General De Chastelaine), and the individuals tasked with inspecting and verifying that a number of IRA dumps were beyond use (the International Arms Inspectors, former ANC negotiator Cyril Ramaphosa and former Finnish President Martti Ahtisaari). At each stage in this tortuous process, the ability of each of the protagonists to \textit{publicly} depend on the integrity and reliability of international honest brokers, has been crucial in moving their respective constituencies forward in the process.

Finally, Northern Ireland has been supported and encouraged by material assistance from the EU. Some commentators have argued that the structures of the EU created a framework, which assisted both the British and the Irish governments to approach the Northern Ireland problem as a joint managerial one.\footnote{One commentator has gone so far as to argue that "one of the striking things about the Agreement is that, to anyone who knows the European Union, one immediately recognises that it was written by people who also know the European Union and have worked its systems quite extensively." Rory O’Donnell, \textit{Fixing the Institutions, in No Frontiers, North-South Integration in Ireland} 70 (R. Wilson ed., 1999) (\textit{cited in} Elizabeth Meehan, \textit{Europe and Europeanisation of the Irish Question, in Cox, A Farewell to Arms?}, supra n.56; see also Gordon Anthony & Andrew Evans, \textit{Northern Ireland, Devolution and the European Union, in Human Rights Equality and Democratic Renewal in Northern Ireland} (Colin Harvey ed., 2001).} Beyond this, the EU has provided significant funding through its Special Support Programmes, established in response to the peace process and implemented through the PEACE I (1995–1999) and PEACE II (2000–2004) programs. The aim of the former was to "reinforce progress towards a peaceful and stable society and to promote reconciliation, by increasing economic development and employment, promoting urban regeneration, developing cross-border co-operation and extending social inclusion."\footnote{European Commission, \textit{Special Support Programme for Peace and Reconciliation in Northern Ireland and the Border Counties of Ireland} 1995–1999, Eurolink Supp., No. 9. (1995).} PEACE II carries forward the over-
all aim of its antecedent, but with a new economic focus. District partnerships have been replaced by Local Strategy Partnerships, which are responsible for locally-based regeneration and development strategies, and for addressing grassroots needs with local delivery mechanisms (PEACE II - priority 3). Other EU Community initiatives, some of which predate the peace process, (such as the INTERREG cross-border program), have also contributed by focusing, in particular, upon overcoming problems of social exclusion and rural regeneration on a cross-border basis in the border counties.75

In sum, international interest has been central to the process of conflict transformation in Northern Ireland. During the conflict, we have appeared to revel in our complexity, celebrate our uniqueness, and assent to the insolubility of our conflict. Placing the Northern Ireland peace process on the international stage has been crucial in removing that burdensome mystique. International influences on constitutional peacemaking have been contextual, intellectual, and processual. Changes in the international political configurations, including the end of the Cold War and the willingness of an American administration to become directly involved, certainly changed the context in which the negotiations occurred. The constitutional architecture of the Agreement itself drew heavily upon international experience and political science expertise. The process of completing the negotiations and managing the post-conflict transformation concerning a number of particularly difficult issues have been explicitly internationalized, not in the least in order to allow the various protagonists to take their respective bases further than they might have originally envisaged. Of course, this process has not been one-way traffic. Northern Ireland politicians have been internationally feted for their achievements, two have become Nobel Peace Laureates, others have been called to prestigious gatherings to offer advice on other peace processes in areas such as the Middle East — acclaim and prestige, which has (in theory at least) further wedded our indigenous politicians to the pathway of peace.

The final series of influences that contributed to the process of constitutional peacemaking are the projects of constitutional reform in the UK, and, to a lesser extent, the Republic of Ireland.

A. Constitutional Reform in the UK

Constitutional reform in the UK is traditionally viewed as an incremental process of informal change to an informal structure. Given this, it may be only a slight exaggeration to describe Tony Blair as the most far-reaching and radical reformer of the formal edifice of the constitution since Oliver Cromwell. The ambition and scale of the Labour government’s reform project is as remarkable as its speedy implementation. Promises of a human rights act, freedom of information legislation, House of Lords reform, and an elected authority for London, were given formal expression within a year of the election of 1997. Other significant constitutional changes, such as the announcement of the independence of the Bank of England in 1997, were achieved even more quickly, although less directly. A variety of more long-term reforms of aspects of the constitution have been handed over to a variety of bodies for further consideration, with, for example, the Neill Committee considering the funding of political parties, the Jenkins Commission reporting on proportional representation, and the Royal Commission, chaired by Lord Wakeham, reporting on the future of the House of Lords.

As the second term of the New Labour government progresses, and difficulties continue over the exact shape of a

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newly reformed House of Lords, the emphasis has moved away from the large-scale reform of the formal apparatus of the constitution. Now, the focus is mainly on a process of “modernization” of the public sector.\(^{80}\)

Of course, standing above all these reforms is the devolution of power from the center to some of the constituent regions or countries within the UK.\(^{81}\) For some commentators, modernization and devolution are closely related. Burrows, for example, argues that “it is clear that New Labour equates modernisation . . . with the devolution of power to what might be termed the non-English regions of the United Kingdom.”\(^{82}\) Notwithstanding the degree of linkage between the two major reforms, devolution stands as perhaps the most significant legacy of the New Labour government. Since 1998, there has been an asymmetrical system of devolution operating in the UK. Scotland has its own Parliament with extensive legislative powers, as well as a limited tax-raising capacity, and an Executive drawn from a coalition of the main political parties. Wales has a form of administrative devolution with a National Assembly (Cynulliad Cenedlaethol Cymru), which has executive and subordinate legislative powers in more limited areas. Devolved government, in effect, has been restored to Northern Ireland, although in a different form than before. England remains the exception, insofar as devolution for the various regions remains

\(^{80}\) The initial phase of modernization heralded by an important White Paper, *Modernising Government*, CM 4310 (1999), is now developing through a second phase. Some of the initial modernization programs have been retained, some have mutated, and some have withered away. *See also* http://www.cabinet-office.gov.uk/eeg/second phase.htm. A new document, *Reforming Our Public Services: Principles into Practice* (Mar. 2002), offers “four principles of public sector reform,” which turn out to involve national standards, devolution and delegation, flexibility, and expanding choice. *See also* http://www.number-10.gov.uk/output/page5624.asp. This overall program is based, essentially, on developing consumer focus, improving public sector performance, and taking advantage of new information and communication technology. The idea of modernization provides a “brand” to describe a general process of change in the health service, education and, particularly, local government. It also, however, involves a more general orientation in the organization of government, requiring a new approach or style in government operations. This is oriented essentially around reinvigorating public services by bringing in different concepts of efficiency, including elements of private sector efficiency, but without ceding control to the same extent as with earlier versions of privatization.


only a possibility. However, it is one that may gather impetus following the White Paper on regional government published in 2002.

The devolution program is a significant change to the structure of government in the UK. As Burrows concludes, devolution adds another layer of government to what is already a multi-layered legal and political society, and because devolution is uneven across the UK, it also creates a multi-textured State. Yet, it is interesting to consider exactly how the changes in Northern Ireland are presented within this, the general program of constitutional reform.

In a sense, the Northern Ireland peace process stands above and apart from all of these modifications to the structures and processes of government in the rest of the UK. The peace process that began in 1993, is best seen as an historic effort at removing the Irish from British politics, if not yet the British from Irish politics. In many ways, and in direct contrast to the pattern of other reforms, it is a political act represented as a constitutional one. Perhaps for this reason, constitutional writers have difficulty placing it within their accounts of the changing constitution. Northern Ireland has always been a rather uncertain subject within UK constitutional writing, either being forced uncomfortably within a framework of analysis that pertains mainly in the rest of the UK, or ignored altogether. A survey of major textbooks on the constitution reveals these approaches to be continuing in relation to the Northern Ireland version of devolution. Some textbooks take the opportunity to remedy a general neglect of Northern Ireland by detailing the devolution settlement in Northern Ireland in direct comparative context of Scotland and Wales, as though it were basically similar. Others are less comfortable about seeing Northern Ireland as simply another instance of devolution and modernization within the UK mold, and stress that while the background and history make it distinct, "Northern Ireland may be grouped with England and Wales as

83. Id. at 1.
providing an instance of devolved government." Finally, there is an approach that simply continues to see Northern Ireland as too difficult. For example one quite major textbook, while carrying the subtitle "A Critical Introduction," simply ignores Northern Ireland altogether and is content to offer only a chapter entitled "Scots and Welsh Devolution."

Clearly from a British perspective generally, Northern Ireland is a constitutional oddity: it is not exactly external to the British experience, but it is not firmly a part of it either. Northern Ireland does not fit readily into New Labour views of "modern" Britain. It is not perhaps overly cynical to see the medium-term solution for Britain in terms of removing the Northern Irish problem from the agenda of British politics, and the current peace process as an exit strategy. Indeed, the history of interventions since the 1970s has shown a search for a constitutional "big fix" that will satisfy Nationalists, placate Unionists, and remove a politically and financially draining problem. Indeed, so great is the prize of getting rid of the Northern Ireland problem that whenever a solution seems possible there have been few limits on resources expendable to achieve this — whether they be blueprints from civil servants, personal interventions from the Prime Ministers, or another layer of commissions or inquiries to head off a potential political difficulty. In this way, the Northern Ireland version of devolution is about much more than regional government. Devolution in Northern Ireland coincides with devolution elsewhere in the UK, but it is performing a much greater political function where the stakes are higher, the risks more intense, and the costs even greater.

88. It is relatively easy to find examples of how various factions have used the peace process to broker a whole range of costly solutions to what elsewhere might be regarded as fairly minor problems. See, e.g., John Morison, Democracy, Governance and Governmentality: Civic Public Space and Constitutional Renewal in Northern Ireland, 21 Oxford J. Legal Stud. 287, 290-95 (2001). Managing issues of more obvious importance, such as the Bloody Sunday Inquiry, has also proved extremely expensive. The cost of the Saville Inquiry is estimated to be around £120 million, and senior barristers representing the families receive a daily fee that is twenty-four times the average daily income of those who work, and forty-one times the daily benefit of an unemployed married couple with two children. See Paddy Hillyard, Invoking Indignation: Reflections on Future Directions of Socio-Legal Studies, 29 J.L. & Soc’y 645, 649 n.12 (2002).
B. Constitutional Reform in the Irish Republic

Since the partition of the island and the drafting of the Irish Free State Constitution in 1922, constitutional discourses in the southern part of the island have always been central to the prospects for peace in the North. The definition of the “national territory” in Articles Two and Three of the 1937 constitution, which includes the six counties of the North East, was viewed as proof positive by Unionists of the hostile intent of the Irish Republic. Unionists were angered that the Republic’s territorial claim was given particular focus in the two major attempts in the 1970s and 1980s at reaching some British-Irish consensus on the resolution of the Northern problem. The abortive Sunningdale Agreement in 1973 provoked extreme Unionist anger because, as well as power-sharing arrangements in Northern Ireland, it envisaged a “Council of Ireland” with a linked advisory assembly. While the exact status of these bodies was hotly contested, such discussions became academic when the Executive collapsed in 1974. Of more impact, however, was the Anglo-Irish Agreement, signed in 1985. This Agreement gave the Irish government, for the first time, a consultative role in the governance of the North in return for increased security co-operation, in order to more effectively tackle Republican paramilitarism. Despite widespread Unionist protest, the Anglo-Irish Agreement remained in place until the signing of the Belfast Agreement in 1998. In effect, the Irish Republic’s position on Articles Two and Three of its constitution and the Anglo-Irish Agreement became central to the overall package negotiated in the late 1990s.

Articles Two and Three came to particular prominence in 1988, when two Ulster Unionist brothers, availed of their rights as Irish citizens, challenged the constitutionality of the Irish government’s signing of the Anglo-Irish Agreement. Their argument was essentially that the signing of the Agreement contravened Articles Two and Three, which defined Northern Ireland as part of Irish national territory. The Irish Supreme Court ruled that the reintegration of the national territory of Ireland

89. Unionists have also argued that the Irish constitution is sectarian by pointing to the preamble to the 1937 constitution which refers to “the Holy trinity” and the fact that, until 1972, the constitution afforded a privileged position to the Catholic Church.
90. Anglo-Irish Agreement, supra n.36.
was a "constitutional imperative," and that the limitations outlined in Article Three of the laws enacted by the Irish Parliament did not derogate from the "claim as a legal right to the entire national territory." Unionists viewed this ruling as providing justification for the IRA's campaign of violence, something akin to "Eire's claim to Lebensraum — the equivalent to Hitler's claim over Czechoslovakia."

In the documents preceding the formal negotiating of the Belfast Agreement, the Irish government made clear that while it would countenance a new treaty to replace the Anglo-Irish Agreement and introduce a referendum which would be necessary to change Articles Two and Three of the Irish constitution, this could only occur in the context of an overall settlement. The new British-Irish Agreement essentially codified a number of preceding documents between the two governments, including the Anglo-Irish Agreement (1985), the Joint Declaration (1993), and the Joint Framework Document (1995). It concerns issues such as the status of Northern Ireland, the principles of consent and self-determination, the recognition and protection of the both identities and cultures in Northern Ireland, and guarantees of dual citizenship rights in all circumstances. The agreed wording of the new Article Two of the Irish constitution redefines the Irish Nation as "all of those born in Ireland." The new Article Three reiterates the will of the Irish Nation to "unite all the people who share the territory of the people of Ireland," but adds that a united Ireland can only come about through the consent of the people in both jurisdictions. In addition, a new

93. See JOHN MCGARRY & BRENDAN O'LEARY, EXPLAINING NORTHERN IRELAND (1994) (citing Chris McGimpsey, UUP Annual Conference (Oct. 1990)) (emphasis added). The then leader of the Ulster Unionist Party, James Molyneaux, has also referred earlier that summer to the claim being equivalent to Iraq's irredentist claim over Kuwait. Id.
95. Anglo-Irish Agreement, supra n.36.
97. The Joint Framework Document, A shared understanding between the British and Irish Governments to assist discussion and negotiation involving the Northern Ireland parties (Feb. 22, 1995).
Article Three allows for the establishment of the North/South institutions and the sharing of executive powers between the two jurisdictions.

At one reading, the Irish government’s willingness to countenance significant constitutional change (including amending the constitution and the ceding of sovereignty from the Dáil to the All-Ireland bodies) may be viewed as the culmination of a series of efforts from Sunningdale onwards, to secure structures of governance for the North, which were acceptable to the Nationalist community therein. In particular, one of the driving dynamics of Irish policy with regard to the North from the 1980s onwards, was to support the position of constitutional nationalism in the North, represented by the SDLP, in order to stem the political growth of Sinn Féin. Once Republicans’ intentions regarding the ending of violence were adjudged as genuine in the early 1990s, the Irish government’s role under Albert Reynolds shifted to focusing on supporting the peace-builders within Republicanism. The Irish government’s attitudes to issues such as the “permanence” of the cessations and prisoner release in the wake of the cease-fires, were considerably more imaginative than those of the British. With no equivalent discourse to the UK’s devolutionary process (within which the peace process could at least be framed when politically suitable), the Irish government’s view of constitutional peacemaking appeared to be one of traditional statecraft based on political pragmatism. Securing and maintaining the cease-fires required (and received) political imagination from the government of Albert Reynolds. Managing the negotiations required common stewardship of the process with the British government. Movement on issues, such as the constitutional amendments, were cards to be played at the negotiating table in the securing of a key foreign policy objective.

In addition to the constitutional changes and the cross-bor-

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98. See Mansergh, supra n.94, at 21.
99. For example, in 1995 the Irish government established the National Forum for Peace and Reconciliation, chaired by Supreme Court Judge, Catherine McGuinness. Although boycotted by the Unionist parties, the Forum was attended by all of the other political parties in Ireland, including Sinn Féin, and took a wide range of submissions. As Justice McGuinness recently told one of the authors: “... the explicit aim of the Forum was to help bring the ‘Shinners’ [Sinn Féin] in from the cold.” (Interview on file with authors).
100. See McEvoy & Gormally, supra n.72.
der bodies, clearly the Agreement has additional practical implication for the governance of the Irish Republic in areas such as equality and human rights. However, what is perhaps only becoming more obvious in the wake of the implementation of the Agreement, is that while the Irish government's focus on the Agreement was primarily through the foreign policy prism (primarily through the work of the Department of Foreign Affairs), less attention may have been paid to the impact of the implementing aspects of the Agreement on domestic political life in the Irish Republic. Certainly, the Irish government's insistence on transparency and accountability, and an oft-stated commitment to the human rights and equality agenda in Northern Ireland, have been somewhat undermined by the manner of the government's implementation of key aspects of the Agreement in the Republic.

It remains to be seen whether the Agreement will have an ameliorative domestic effect on some of the less savory aspects of political culture in the Irish Republic.

**CONCLUSION**

As the Northern Ireland Peace Process moves beyond its ini-

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101. The Agreement committed the Irish government to establish a Human Rights Commission, ratify the Council of Europe Framework Convention on National Minorities, implement Enhanced Employment Equality Legislation, introduce Equal Status legislation, take further steps to demonstrate its respect for the different traditions on the island of Ireland, and establish a Joint Committee of representatives of the two Human Rights Commission. See Agreement, supra n.3, art. 9.

102. For example, the Irish government was strongly criticized for ignoring the recommendations of an independent selection committee for appointments to its Human Rights Commission, and instead, appointing individuals with close connections to the main political parties in the Republic. See Press Release, Irish Council for Civil Liberties, ICCL Expresses Dismay At Rejection Of Selection Committee’s Recommendations For Human Rights Commission (Dec. 6, 2000), available at http://www.iccl.ie/ constitution/gen/00_HRCappts.html. Such was the political furor over the appointments, that the government relented and accepted a number of the appointments put forward by the original selection committee. Similarly, despite their apparent qualification for early release under the terms of the Agreement, the Irish government has to date refused to take the politically unpopular decision to authorize the release of a number of IRA prisoners convicted of the murder of an Irish police officer. See Minister Willie O'Dea Condemns Martin Ferris's Call for Release Of Det. Garda McCabe's Killers on the Internet and the World Wide Web, available at http://www.willieodea.ie/speeches&statements.asp?StoryId=176.

tial constitutional moment, it sheds light on deeper changes in the notion of constitutionalism and especially the British version of constitutionalism. Traditionally, in the UK, constitutionalism emphasizes formal institutions, informal practices and understandings and above all, concepts of sovereignty. This has meant that generally, British versions of constitutionalism have struggled at a theoretical level to accommodate fundamental changes in the way that public power has been reconfigured by globalization—changed relations between the State, civil society, and the private sector, and a transformed notion of what a State should do. An additional challenge to traditional approaches now comes from the peace process in Northern Ireland and the new constitutional dynamic that is created there.

Previous efforts at brokering a constitutional “solution” to the Northern Ireland “problem” concentrated on providing a “big fix” in terms of a political deal which could then be rendered into an institutional form that would square the constitutional circle. Such a moment of constitutional agreement between the parties, however fleeting, could then be realized through an act of Parliament giving effect to whatever complex mechanisms are required to satisfy each of the parties. Of course, when such solutions threatened to fail, they could be revoked by a stroke of the pen by the same sovereign Parliament that introduced them. Successive British Secretaries of State would then return to the long rounds of negotiations, while civil servants and constitutional experts would be returned to their drawing boards to devise yet more elaborate structures to factor in the ever-increasing range of demands and imperatives.

At some levels, the Good Friday Agreement does provide another such grand level “constitutional fix.” It certainly does establish a highly complex mechanism for government. It also remains subject to the control of a sovereign Parliament through the Northern Ireland Act 2000, which can be invoked at will to suspend its operation. However, the settlement provided by the Good Friday Agreement and the Northern Act 1998 is fundamentally much more ambitious too. It offers a glimpse of a new model of constitutionalism within the UK approach. This new model is alive to the general international context, and the beneficial influence that aspects of this can exert. It is grounded in establishing relationships between the various elements of the increasingly disaggregated domestic polity as it seeks to link the
new devolutionary institutions in Northern Ireland with those being developed elsewhere in the UK. It is aware of the importance of other players in the conflict, particularly the government of the Republic of Ireland and it is interwoven with significant (and potentially far-reaching) constitutional change in that jurisdiction too. Above all, it is rooted in the expression of the will of the people of Ireland, both North and South, who have endorsed this not so much as an answer to the question about who has power (which remains to be resolved by the usual political means), but rather, as providing the framework within which it can be decided how power will be exercised, and the ways in which people will agree to live together. Beyond the complex structures for sharing institutional power, the important and extensive equality and rights agenda within the settlement provides the material with which to construct answers to the fundamental ethical problems of how to live together. These are truly constitutional questions and in this sense, the Agreement is truly a constitutional and constituting document. In one or two important constitutional cases that have pointed the way towards new understandings of constitutional norms that go beyond simple ideas of the sovereignty of Parliament, even the judiciary, who are conditioned to follow the will of Parliament, as expressed in ordinary words, have recognized that this act of Parliament may be different. Beyond the “constitutional moment” that is the Good Friday Agreement, it may be that there is something very important happening.