

Fordham International Law Journal

Volume 26, Issue 4

2002

Article 6

On Law, Politics and Contemporary Constitutionalism

Colin Harvey*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

On Law, Politics and Contemporary Constitutionalism

Colin Harvey

Abstract

Is the political process, with all its difficulties, merely reflective of contemporary constitutionalism? Are the problems an aspect of ongoing inter-communal dialogue? To what extent are existing difficulties exacerbated by a general failure to grasp the difference between the logic of law and political theory and practice? These questions are addressed here in three basic stages: first, the relationship between legal logic and political practice is examined; secondly, the implications of contemporary constitutionalism are explored; and, finally, the agreement and disagreements over its implementation are analyzed.

ON LAW, POLITICS AND CONTEMPORARY CONSTITUTIONALISM

*Colin Harvey**

INTRODUCTION

The Good Friday Agreement (“Agreement”)¹ remains a significant achievement.² The mood of optimism among those who voted in favor of it may now have eroded, but most participants in the political process still stress that there is no alternative to it. Whether this view of the Agreement survives the Assembly elections in May 2003 — if they take place — is open for debate. However, with both governments repeatedly stressing that there is no other way forward, it is hard to see the Agreement becoming as irrelevant as past failed political initiatives. This has as much to do with the extensive reach of the Agreement, as with the current political reality. At present, its implementation is a priority for the majority of participants in the political process. The political rhetoric is often of “crisis and collapse” and of various failures and breaches of trust which may or may not “bring down the Agreement.” This is the political language of finality, which is based on strong views of the constitutional future of Britain and Ireland. The language of law, which has its own logic, also involves finality, but in a different sense that is intrinsic to the stabilizing qualities of legal order. Are political gains (what it means to talk of a “gain” in politics is, of course, sharply contested in Northern Ireland) blunted both by the failure to translate political commitments into law, and the inability of participants to recognize the constraints of the governing legal frameworks?

The notion that this may be an extended political process, involving a complex attempt at conflict management, is fre-

* Department of Law, University of Leeds. The research for this Article was facilitated by a grant from the British Academy.

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

2. See Brendan O’Leary, *The Character of the 1998 Agreement: Results and Prospects*, in ASPECTS OF THE BELFAST AGREEMENT 49 (Rick Wilford ed., 2001) (stating that the Agreement was a major achievement for its negotiators and for the peoples of Ireland and Britain, emerging from a political desert whose only landmarks were failed “initiatives”).

quently forgotten. Perhaps this simply reflects the governing political culture of insecurity, but in Northern Ireland, it can have grave consequences. Is the political process, with all its difficulties, merely reflective of contemporary constitutionalism? Are the problems an aspect of ongoing inter-communal dialogue? To what extent are existing difficulties exacerbated by a general failure to grasp the difference between the logic of law and political theory and practice?

These questions are addressed here in three basic stages: first, the relationship between legal logic and political practice is examined; secondly, the implications of contemporary constitutionalism are explored; and, finally, the Agreement and disagreements over its implementation are analyzed.

I. *LEGAL LOGIC AND POLITICAL THEORY AND PRACTICE*

The political agreements of 1998 had to be translated into domestic law if they were to have a practical impact. Both the United Kingdom ("UK") and Irish governments had to enact domestic legal reforms in order to implement the Agreement. This raises two distinct issues.

First, were the participants in the political negotiations fully aware of the considerable constraints of established legal doctrines in both jurisdictions? In the UK, for example, the death of the doctrine of parliamentary sovereignty is much reported. International law, the European Union ("EU"), and the Acts of Union with Scotland and Ireland are often cited to prove the point. However, the main participants in the UK's constitutional legal system continue to function with the doctrine as the basic rule of the system. The judiciary, in particular, consistently makes this point, often during the process of adjudication. Although there are political and legal merits to the argument for a paradigm shift, if the key participants do not see this, then has it taken place? Legal academics (this one included) might wish that it had, but that is a different point. From an internal participant perspective, the fundamentals of the British constitution appear remarkably unaltered. The debate on whether sovereignty is continuing or procedurally self-embracing in the UK is perhaps the more interesting one, particularly given the provi-

sions of the Northern Ireland Act 1998 ("1998 Act").³ In relation to the operation of the constitutional legal system, parliamentary sovereignty, however interpreted, remains in place. In practice, the current Labour government in the UK continues to stress the centrality of the doctrine and its connection to democratic principle. Whether it is stated in the 1998 Act or not (it is), the Westminster Parliament retains ultimate legal authority over Northern Ireland. Some of the debates in Northern Ireland on the repeal of previous statute law (for example, on the Government of Ireland Act)⁴, seem to have missed this vital point, as if statute law had a more secure basis than it in fact has. The argument that the Acts of Union with Ireland provide the basis of a "higher law" is weak and would not survive a direct clash with an Act of Parliament.

The merits of this orthodox view are consistently questioned (by this author as much as anyone else), but the key participants in the political process (the UK government in particular) have not substantively moved away from it as a way of understanding and explaining what they in fact do. This is true also of the senior judiciary. The danger here is of confusing what one would wish to be the case with what is actually the case. Political actors should always work on the basis of the latter while striving to achieve the former. In practice, the Irish government was prepared to change some of the basic principles of its written constitution. The UK government does not appear to have committed itself to such a fundamental constitutional change. In fact, traditional British constitutionalism is a significant part of the problems of Northern Ireland. There is evidence that Republicans understood, or at least now fully understand, this particular constitutional reality.

This explains why, for example, Sinn Féin does not view the Agreement as an end in itself. This is in sharp contrast to the position of the Social Democratic and Labour Party ("SDLP"), which advances the argument that the Agreement's design will remain, even if there is a united Ireland. This perspective also draws on the implications of membership of the EU for traditional debates on national identity.

3. N. Ir. Act 1998, ch.47 (Eng.) [hereinafter 1998 Act].

4. Government of Ireland Act, 1920, as amended (Eng.). The Act has now been repealed.

Secondly, and more straightforwardly, political agreements must be translated into domestic legal form in order to have a practical impact. This is in no way to detract from international legal commitments. Yet, both States are essentially dualist systems and no enforcement mechanism was put in place at the international level to address the failure of either government to implement its commitments. It might have been useful to include some oversight on this matter, but no provision was made.

Therefore, democratic institutions in which political representatives from Northern Ireland have no control ultimately shape the implementation of the Agreement. With so much left open, it is not hard to see why the process of implementation was so extended (this matter is addressed again in the section that follows). In relation to policing, criminal justice, human rights, equality, decommissioning, and many other issues, debates continued long after 1998 — and are ongoing at the time of writing. In no sense, therefore, could the adoption of the Agreement be seen as a conclusive and comprehensive settlement of many of the contentious issues. Much of the hard work on policing, criminal justice, and human rights was left to another day.

This is not so much about constructive ambiguity as about the tension between political practice and the logic of law. In a democracy where the rule of law is a guiding principle, legal power is — in theory at least — supreme over political power. If political actors are to succeed, they have to win the political and legal argument. There is no guarantee, especially given the constitutional status of Northern Ireland, that political gains will become legal reality.

The argument is not that law is entirely autonomous. However, there are settled criteria in both the UK and Ireland for determining what is a valid legal argument. These criteria are accepted and used by all key participants in the legal systems. More generally, there is a language of law within which a person can be understood as making statements that are “legal.”

Paradigm shifts are possible, particularly in constitutional legal systems undergoing significant change, where the basic rules have been revised and are now followed and applied. A paradigm shift confined only to legal journals, while intellectually significant, probably does not merit the title. This is not an argu-

ment in defense of constitutional orthodoxy in either the UK or Ireland. It is advanced solely to highlight that a paradigm shift in UK constitutional law must come out of practice informed by reasoned debate. A shift must have in fact taken place, and participants in the legal order must function as if it has. The danger in any other approach is that political actors are misled into thinking they have gained more than they have, and in Northern Ireland, this can become problematic.

II. *CONTEMPORARY CONSTITUTIONALISM*

The general focus thus far has been on constitutional law doctrine. In order to develop the argument, some reference must be made to the broader political doctrine of constitutionalism, understood from an external perspective. This doctrine is undergoing a transformation with implications for the debate in Britain and Ireland. It should be stressed that this is part of a wider theoretical conception of how constitutionalism might be understood.

The established view of constitutionalism is of an overarching framework of rules and principles, which stands above, and is detached from, social and political life. The constitution is thus viewed as the foundation of the system and the constraining device, which defines the limits of political and administrative action. This is often how the rule of law is understood in popular usage.

This view of constitutionalism has been called into question by what, for convenience, may be termed “process-based” models. The focus of the alternative model is on constitutionalism as an ongoing and open-ended dialogue. Constitutionalism, according to this model, can function without a formal constitution and is not necessarily confined to the State. The constitution thus becomes something that is re-imagined within the processes of ongoing political and legal engagement. Rather than view this as problematic, because it does not respect the value of legal certainty, the argument is that this model respects the dynamics of political life and ensures that each generation can engage usefully with political and legal debate. As James Tully argues, people have removed modern constitutionalism

from its “imperial throne and put it in its proper place.”⁵ Constitutional documents may provide the basis upon which this dialogue takes place, but they are not the sole determinants of practical outcomes. This model encourages certain scepticism about the idea of a constitutional settlement as something abstract and imposed. Rather, the constitution, which should arise from real and not imagined discussion, should operate so as to promote an ongoing dialogue. While inclusive negotiations can take place, and documents emerge, the agreement reached is not necessarily the last word. This allows room for future constitutional dialogues within which an agreement might be reached and forms of accommodation developed, which are appropriate in order, for example, to respect cultural differences. The constitution is, therefore, understood as a conversation, which can transcend the boundaries of a particular State, and involve a diverse range of political actors. While this is sometimes used as a way of understanding constitutionalism in the EU, it is equally useful in thinking about ongoing constitutional politics within the UK and Ireland. This “conversational” view of constitutionalism is open to caricature. To the critics of this view, “conversation” sounds like too smug and cozy a description of the messy world of democratic politics. But conversations are not always like this. They can be uncomfortable and contentious. The rules of civility are implied, lie in the background, and are understood to exist, even when breached. The idea of constitutionalism as an ongoing conversation has merit. In particular, it captures the open-ended nature of democratic dialogue, and also brings in voices neglected when only orthodox legal views are used as a guide to political processes.

III. *THE GOOD FRIDAY AGREEMENT, LAW AND POLITICS*

A. *The Three-Stranded Approach*

I. Consociational, Confederal and Federal: The Political Framework

The Agreement is a complex document; it is consociational, confederal, and federal in nature.⁶ From the perspective of po-

5. See JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN THE AGE OF DIVERSITY* 184 (1995).

6. See Brendan O’Leary, *The Nature of the Agreement*, 22 *FORDHAM INT’L L.J.* 1628 (1999).

litical science, Brendan O'Leary classifies it as a complex consociational agreement.⁷ He lists four consociational elements: executive power sharing, proportionality, communal autonomy and equality, and minority veto rights.⁸ The confederal elements are the all-Ireland confederal relationship and the British-Irish confederal relationship.⁹ In addition, O'Leary notes both the UK-Northern Irish federalizing process, and the Irish federalizing process.¹⁰ These elements are all linked together in the three-stranded approach of the Agreement: Strand One on democratic institutions in Northern Ireland; Strand Two on all-Ireland mechanisms; and Strand Three on British-Irish relations.

This imaginative political framework, which also reflects an international legal agreement between the UK and Ireland, had to be mapped onto domestic law and practice. The Irish government, for example, altered its constitution to reflect the new consensus on the notion of Irish unity — i.e. it did not abandon the idea. Legal changes were also made to allow the new all-Ireland bodies to function. In the UK, the 1998 Act reflected many of the key aspects of the Agreement. Subsequent legal changes have also been aimed at implementation, although there are continuing disputes as to the extent to which law reflects the spirit and substance of the Agreement. In addition, the suspension of the democratic institutions by the British government has raised the question of compliance with the Agreement. The provisions of the Northern Ireland Act 2000 (“2000 Act”)¹¹ cannot be traced to the document. Yet, they confirm the fact that parliamentary sovereignty remains one of the basic rules of British constitutional law. The 2000 Act reinforced the fact that the democratic institutions in Northern Ireland are subordinate in nature. While the Irish government, and the Nationalist and Republican political parties in Northern Ireland raised concerns, no effective legal mechanism existed to contest such action.

This raises the pressing matter of whether the available legal tools adequately capture the complexity of the Agreement and the understandings which political actors have of it. The sugges-

7. *See id.* at 1630.

8. *See id.* at 1630. *See also id.* at 1631-41 (for full discussion of these elements).

9. *See id.* at 1641-47.

10. *See id.* at 1646-49.

11. Police (N. Ir.) Act 2000, ch.32 (Eng.).

tion here is that the Agreement has not led to the same sort of constitutional re-think in Britain as it has in Ireland. One result is that the current legal framework can simply make matters worse. The confederal and federal elements of the Agreement have suffered as a result. If the Irish government does not assertively defend these aspects of the Agreement and highlight breaches, there are few other effective mechanisms available.

2. Disagreement and the New Institutions

As is well known, implementation continues to cause significant problems. At the time of writing, the institutions are still suspended. The aim here is to examine some of the disputes surrounding the implementation of the Agreement. The focus below is on disagreements within the institutions and the use of the courts to resolve them.

The first issue relates to the policy of resignation within the institutions. The First Minister of Ireland, David Trimble, resigned on July 1, 2001, as a result of his frustration over the lack of movement on Provisional Irish Republican Army ("PIRA") decommissioning. This meant that the then Deputy First Minister, Seamus Mallon of the SDLP, (succeeded by Mark Durkan), also ceased to hold office on that date, because of the requirement that the First Minister and the Deputy First Minister must both be elected and hold office jointly. The Deputy First Minister, however, in line with Section 16(7) of the 1998 Act, continued to exercise the functions of his office. Trimble designated Reg Empey of the Ulster Unionist Party ("UUP") to fulfil the functions of First Minister for this period.

Section 16 of the 1998 Act sets out a six-week period for new elections to these offices, where a resignation has taken effect. Attempts were made by the British and Irish governments to address the situation, resulting in the Weston Park talks in July 2001. As a result of these talks, on July 14, 2001, the British and Irish governments produced *Achievements in the Implementation of the Good Friday Agreement*.¹² As the deadline for action approached, the Independent International Commission on Decommissioning ("IICD") reported on August 6, 2001 that PIRA had agreed on a method to put its arms completely and verifiably beyond use. This offer was withdrawn after the Secre-

12. Copy of this paper is available at <http://www.nio.gov.uk/press/010714z.htm>.

tary of State suspended devolution on August 10, 2001. The one-day suspension under the 2000 Act was used as a technical device to trigger another six weeks of negotiation. Devolution was rapidly restored. This period failed, however, to produce an agreement, and on September 21, 2001, the Secretary of State suspended devolution again for a short period, leaving another six weeks for further talks. In October of 2001, Trimble decided to withdraw his Ministers from the Northern Ireland Executive, and things looked grim for the Assembly. However, a report from the IICD on October 23, 2001, revealed that the body had witnessed an event carried out by the PIRA with which it was satisfied: the PIRA had started the process of putting its arms completely and verifiably beyond use. This was enough to encourage Trimble to bring his Ministers back into the Executive. The process of electing the First Minister and Deputy First Minister commenced.

The relevant section of the 1998 Act provides: "Two candidates standing jointly shall not be elected to the two offices without the support of a majority of the members voting in the election, a majority of the designated Nationalists voting and a majority of the designated Unionists voting."¹³ The difficulty for Trimble was that he did not command the support of his entire Assembly team. Two UUP Assembly members, Peter Weir and Pauline Armitage, stated that they were unlikely to support him in his bid for re-election as First Minister. Mallon decided not to run again and Mark Durkan (current leader of the SDLP) was proposed to replace him. The election process took place on Friday November 2, 2001.

It is worth noting that the Assembly is permitted to alter its standing orders through a cross-community vote (the support of 60% of the voting members, 40% of the designated voting Nationalists, and 40% of the designated voting Unionists). In an attempt to ensure a successful election, the Northern Ireland Women's Coalition sought an amendment to the standing orders to permit them to re-designate. They succeeded in changing the standing orders to allow a re-designation, having immediate effect after notification, in writing, to the Speaker (originally the standing orders required a notice period of thirty days). These letters were placed with the Speaker, and revealed

13. 1998 Act, *supra* n.3, Sec. 16(3).

the decision of the Women's Coalition to re-designate one MLA as a Unionist and one as a Nationalist.

The Assembly then moved to elect the First Minister and Deputy First Minister. Despite the re-designation, the attempt failed. Out of fifty-nine possible Unionist votes, twenty-nine voted "yes" (49.2%). The Assembly was adjourned. The deadline of six weeks ended at midnight on Saturday November 3, 2001. However, the Secretary of State opted to allow the Assembly to meet on Monday November 5, 2001, to have another election of the First Minister and Deputy First Minister. Focused discussions took place over the weekend in an attempt to persuade members of the Alliance Party to re-designate as Unionists. On Monday November 5, 2001, the Assembly met for further discussion. An additional amendment to the standing orders was proposed:

From 5 November 2001, until the commencement of a review under paragraph 36 of Strand One of the Belfast Agreement, Standing Order 3(8) has effect as if it read:

"A Member may change his/her designation of identity. Any such change takes effect immediately after notification in writing is submitted to the Speaker. Any subsequent change shall take effect seven days after the day of such notification."¹⁴

Because of a Petition of Concern, the Assembly did not vote on this on November 5, 2001. There was a vote the subsequent day, November 6, 2001, and the amendment was agreed upon. Meanwhile, as a result of a legal challenge, the Secretary of State accepted that he was under a duty to propose a date for elections. It became clear that with the proposed re-designation of members of the Alliance Party, the election would succeed on this occasion. On November 6, and after the vote on the standing orders was taken, three Assembly members of the Alliance Party re-designated as Unionists. On this occasion Trimble and Durkan were elected as First Minister and Deputy First Minister, respectively. Of the sixty Unionist votes, thirty-one were "yes" votes, thus giving the needed majority (51.7%). There was hope at the time that this would bring a period of stability to devolution, if not to Northern Ireland as a whole. However, the DUP

14. Northern Ireland Assembly, Order Paper Monday 5 November 2001, *available at* <http://www.ni-assembly.gov.uk/orders/papers/order13-01revised.htm>.

launched a legal challenge to the process, arguing that the deadline had passed and the election was therefore unlawful with reference to the 1998 Act. The challenge ended up in the House of Lords. *Robinson v. Secretary of State for Northern Ireland and Others* addressed the challenge by Peter Robinson to the legal validity of the election of the First Minister and Deputy First Minister more than six weeks after the restoration of devolved government on September 23, 2001.¹⁵ Robinson lost before the Northern Ireland Court of Appeal, but opted to pursue the case all the way to the House of Lords, where he lost again. The individual judgments are worth exploring. They offer insights into judicial thinking on the Agreement and the 1998 Act.

The majority (Lords Bingham, Hoffmann and Millett) adopted a very generous interpretation of the Act, based upon a liberal reading of its underlying purpose. As Lord Bingham noted, "the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."¹⁶ Lord Hoffmann called the 1998 Act "a constitution for Northern Ireland" which is "framed to create a continuing form of government."¹⁷ The fundamental purpose of the Agreement is, according to Hoffmann, "to create the most favourable constitutional environment for cross-community government."¹⁸ The majority concluded that the election was legally valid and the Secretary of State was entitled to propose the date of May 1, 2003 for the next Assembly elections. Two judges, Lords Hobhouse and Hutton, dissented. In taking this line, they were following the dissent of the Lord Chief Justice of the Northern Ireland Court of Appeal, Sir Robert Carswell. Lord Hutton, sticking closely to the relevant statutory provisions, was not persuaded by the majority view. In fact, he implied that the majority allowed the purpose of the Agreement to override the meaning of the words in the Act. He argued that "whilst those sections continue in force un-amended, I consider that the objective of the Belfast Agreement cannot operate to alter the meaning of

15. See *Robinson v. Sec'y of State for Northern Ireland and Others*, [2002] A.C. 32, available at <http://http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020725/robin-1.htm>.

16. See *id.* at para. 11.

17. See *id.* at para. 25.

18. See *id.* at para. 30.

their words.”¹⁹ By a margin of three to two, the First Minister and Deputy First Minister overcame this particular legal hurdle. The judgment was greeted with relief by John Reid, the-then Secretary of State for Northern Ireland.

The architecture of the Agreement has taken on a legal form, where law is used as a tool to promote political co-operation. Given this fact, it was always predictable that disagreements would be resolved in the courts. The “contractual” approach of Sinn Féin, in particular, is perhaps understandable given the limited bargain it in fact struck in 1998. This was highlighted when the First Minister refused to nominate Sinn Féin’s Ministers to the North-South Ministerial Council meetings. Bairbre de Brun and Martin McGuinness sought judicial review of the refusal to nominate them. The case ended up in the Northern Ireland Court of Appeal (“NICA”).²⁰ The relevant legal provision was section 52 of the 1998 Act, read in conjunction with paragraphs five and six of Strand Two of the Agreement. In October and November of 2000, the First Minister refused to sign the relevant nomination papers. His reason was that “such an approach will be likely to persuade Sinn Féin to use any influence it may have to secure decommissioning of paramilitary arms in accordance with the Belfast Agreement.”²¹ The decision raised fears about a failure to recognize the interlocking nature of all the dimensions of the Agreement. Concern was expressed during the negotiations that led to the Agreement that there might be interference with the North-South dimension. The attempt to give the North-South Ministerial Council an autonomous existence failed. The First Minister, in his attempt to achieve his political aims, thus triggered some deep-seated concerns. Trimble’s decision (then acting First Minister Reg Empey continued to enforce the ban) was declared unlawful by both the High Court and NICA. The First Minister had effectively sought to use the institutions to achieve the strategic political objectives of his party and community. The end result was clear — the First Minister had acted unlawfully.

The case turned on the meaning of the relevant provisions of the 1998 Act, viewed in the light of the Agreement. The

19. *See id.* at para. 61.

20. *See* *In re Bairbre de Brun*, [2001] NICA 43, available at <http://www.courtsni.gov.uk/judgments/carf3482.htm>.

21. *Id.*

Agreement and the Act deal with the nominating process and the work of the Council. Section 52(1) of the 1998 Act provides:

- (1) The First Minister and the deputy First Minister acting jointly shall make such nominations of Ministers and junior Ministers (including where appropriate alternative nominations) as they consider necessary to ensure-
 - (a) such cross-community participation in the North-South Ministerial Council as is required by the Belfast Agreement; and
 - (b) such cross-community participation in the British-Irish Council as is so required.²²

On the requirements of the Agreement, the relevant section provides:

Participation in the Council to be one of the essential responsibilities attaching to relevant posts in the two Administrations. If a holder of a relevant post will not participate normally in the Council, the Taoiseach in the case of the Irish Government and the First and Deputy First Minister in the case of the Northern Ireland Administration to be able to make alternative arrangements.²³

The current Lord Chief Justice is not known for his liberality when it comes to statutory interpretation — as the Northern Ireland Human Rights Commission discovered. In his judgment he agreed, in large part, with the conclusions reached by Kerr J. in the High Court. For example, he accepted the questionable conclusion that it was not obligatory to nominate the Minister responsible for the topic to be discussed at a particular Council meeting. The First Minister and Deputy First Minister had discretion in this area. Carswell LCJ was reluctant to spell out precisely the boundaries of this discretion. Kerr J., for example, had referred specifically to the concept of “suitability,” a term which attracted criticism as highly inappropriate. In contrast, Carswell LCJ preferred to reserve his opinion until it was necessary to decide the matter. This was unfortunate at the time, as it was the clear parliamentary intention that a refusal to participate normally would be the only exception to the formal nomination of the relevant Minister. Carswell LCJ considered, but rejected, the argument on the basis that if Parliament had intended this, it would have said so.

22. 1998 Act, *supra* n.3 Sec. 52(1).

23. Agreement, *supra* n.1, Strand Two: North South Ministerial Council, Sec. 2.

The issue on which the First Minister lost (and one not accurately represented in some of the commentary) was the collateral purpose he was seeking to achieve. Kerr J. held that the First Minister was pursuing a collateral purpose — putting pressure on Sinn Féin to persuade the PIRA of the pressing need for decommissioning — and Carswell LCJ agreed. The purpose of Section 52 of the 1998 Act is, as he stated, to facilitate the work of the North-South Ministerial Council. The First Minister and the Deputy First Minister are obliged to carry out this statutory purpose. He acknowledged that decommissioning was another substantial purpose of the Act, but that it was not the only one. Therefore, the First Minister's refusal was an incorrect exercise of his discretion under Section 52.

Other institutions were created as a result of the Agreement. One of these, the Northern Ireland Human Rights Commission, also pursued a dispute through the courts and the results are worth exploring. The Commission has experienced some resistance to its work thus far and has received criticism from a wide range of individuals and groups. *In re Northern Ireland Human Rights Commission* is a useful example of judicial attitudes to the Commission in particular.²⁴ The case arose following the Commission's attempt to intervene as a third party during the inquest into the Omagh bombing, and led to an unsuccessful judicial review action. HM Coroner, for Fermanagh and Tyrone, concluded that the Commission did not have the power to intervene as a third party. This decision was upheld by Carswell LCJ in judicial review proceedings.

The judgment was severely criticized by the Commission and runs counter to the relevant provisions of the legislation, and parliamentary intent. What is odd, is that until this time, the Commission had made several useful interventions in other cases. The appeal from the judgment of Carswell LCJ was heard by the NICA. The earlier decision was upheld. In his dissenting judgment, Kerr J. stated:

In my opinion, the Commission has been given an overall role in advancing the observance of human rights. On that account it should be permitted to apply to intervene in pro-

24. See *In re Northern Ireland Human Rights Commission* (Northern Ireland), [2002] A.C. 25, available at <http://http://www.courtsni.gov.uk/judgments/judgments+2001.htm>.

ceedings since that is reasonably incidental to the function that it has been required by the statute to perform *viz* to advance the observance of human rights.²⁵

The majority (McCollum LJ and Sir John MacDermott), however, adopted a rather narrow approach to the 1998 Act. McCollum LJ stated:

Having accepted Mr. MacDonald's invitation to read not only the Act itself but also the materials provided by the Belfast Agreement and the published commentary thereon and details of the Parliamentary debate, I am firmly in agreement with the view expressed by the Lord Chief Justice that Parliament did not intend to and did not invest powers in the Commission either to intervene as an interested party or to act as *amicus curiae*. It appears to me that the powers granted by the Act either to bring proceedings in its own name or to give assistance to individuals engaged in proceedings are quite adequate to ensure that the Commission is able to make a substantial contribution to the observance of human rights in Northern Ireland and to the involvement of the courts in that process.²⁶

The Human Rights Commission sought and was granted leave to appeal to the House of Lords. The judgments of Carswell LCJ, McCollum LJ, and Sir John MacDermott display a particular judicial attitude to human rights and statutory interpretation. They demonstrate that there may be a struggle "against the judiciary" in Northern Ireland to ensure that the Commission's work is respected and that human rights protection is accorded due recognition. On this occasion, the majority was unprepared to follow the express logic of parliamentary intention and the clear purpose of this aspect of the 1998 Act. It may thus be the case that Parliament should express its intention more precisely in this area in the future. The approach, however, reflects a critical attitude to the work of this public body and one can only speculate as to why this might be the case. Judicial resistance to public bodies established to promote progressive political and legal values is not unknown, and the Commission is not the first statutory body to engage in a "battle with the judges."

25. See *In the Matter of an Application by the Northern Ireland Human Rights Commission for Judicial Review*, [2002] NICA 17, available at <http://www.courtsni.gov.uk/judgments/mcc3369.htm>.

26. See *id.*

The majority in the House of Lords took a rather different view of the Commission. *In re Northern Ireland Human Rights Commission* essentially provided clarification of the powers/capacities of the Commission. It ended in a victory for the Commission with the majority (Lords Slynn, Woolf, Nolan, and Hutton) prepared to adopt a generous approach. This case is a valuable lesson for the government: if you want something, it should, in the future, be inserted into statutory provisions. All this could have been avoided if the government had accepted an amendment proposed by Kevin McNamara MP during the passage of the legislation. As noted, a majority in the Northern Ireland Court of Appeal had dismissed the Commission's appeal. In other words, the Commission lost at that stage. Thus, the case eventually ended up before the House of Lords. At the core of the case, was the issue of whether the Commission had the power/capacity to intervene in court proceedings (as an intervener or *amicus curiae*). The majority decided that the Commission did have the capacity to intervene. As Lord Slynn stated: "[i]f the court wants or is willing to have such submissions, the Commission has the capacity to make them as part of the function of promoting the understanding of human rights law."²⁷ The Commission won its case, but the matter never should have ended up in the courts.

What might we learn from these cases? The obvious lesson is the significance of the judicial role in settling disputes, which have arisen in the institutions. Note also that the current Lord Chief Justice was on the losing side in two of these cases. In contrast, Justice Kerr was singled out for positive comment in the House of Lords. Several matters stand out. First, the Northern Irish judges were not afraid to rule against the First Minister when the law required them to do so. Secondly, the majority in the House of Lords appeared to be prepared to adopt a generous interpretation of the 1998 Act and the Agreement based upon the understanding that they constitute a constitution for Northern Ireland. Finally, the approach to the Human Rights Commission was again more generous in the House of Lords than in Northern Ireland. Perhaps these judges in London, just like many politicians at Westminster, desperately want to see the democratic experiment work.

Unlike questions over suspension, or broader political chal-

27. See *In re Northern Ireland Human Rights Commission*, *supra* n.24, at para. 25.

lenges to the interpretation of the Agreement, the disputes examined above were resolved by the courts. These judgments did not significantly alter political behavior. Threats of non co-operation and of possible resignation continued. But a mechanism did exist to contest political action taking place within the terms of the law. This “new constitution” has therefore acted as a constraining device, if only to provoke political actors into adopting different strategies for achieving their objectives. In addition, political actors have had to translate their political arguments into legal ones in order to succeed. There is evidence, from some of the judges, of a willingness to understand the purpose of the Agreement and to facilitate it. This does not bring finality, but does offer a mechanism to encourage the ongoing process of implementation.

CONCLUSION

The direct implication of the argument advanced here is that the implementation of the Agreement will be a long and drawn-out process, which will inevitably be contested at almost every stage. Taking contemporary process-based understandings of constitutionalism seriously, the argument is that this is not as fatal a prospect as is often stated. In fact, the language of “crisis and collapse” has become a central aspect of the wider constitutional process itself and often forms part of a tactical approach to politics. There are, of course, those who argue strongly against the Agreement and who see all of this as a symptom of failure. They fall into two broad camps.

The first group finds consociationalism distasteful and argues that it promotes “sectarianism.”²⁸ In crude terms, this group would like to see a move to a more “civic” notion of democracy in Northern Ireland. Members of this group, however, are prepared to take up positions within the new institutions and make their case from within. The extent to which this group,

28. See John McGarry, “Democracy” in *Northern Ireland: Experiments in Self-Rule from the Protestant Ascendancy to the Good Friday Agreement*, in *NATIONS AND NATIONALISM* 451 (2002). McGarry argues convincingly that this view is mistaken. Some are not persuaded. See also Donald L. Horowitz, *The Northern Ireland Agreement: Clear, Consociational, and Risky*, in *NORTHERN IRELAND AND THE DIVIDED WORLD: POST-AGREEMENT NORTHERN IRELAND IN COMPARATIVE PERSPECTIVE* 89-108 (John McGarry ed., 2001). See also Rick Wilford, *Designing the Northern Ireland Assembly*, 53 *PARLIAMENTARY AFF.* 577 (2000).

sometimes neglected, can undermine the Agreement should not be underestimated.

The second main group is Unionist in political outlook. The argument here has the virtue of political honesty. This group does not like the Agreement because it is alleged to be a bad deal for unionism. In addition, the argument now is that there is no longer majority support within the Unionist community for it. One implication of contemporary constitutionalism is that if a community simply does not accept a constitution and in fact views it as an unwelcome imposition, then a constitutional dialogue must take place. An implication of contemporary constitutionalism therefore, which many find problematic, is precisely that nothing is "off the agenda" forever, in the way suggested by traditional constitutional thinking. This may become relevant in Northern Ireland, however, because the ongoing dialogue is about the implementation of the Agreement and making the institutions work. The two governments, in particular, have ruled out the idea of re-negotiation of the Agreement. The ongoing practical dialogue will therefore take place within the agenda set by this document.

By way of conclusion, there are two suggestions here, both equally tentative. First, the logic of the Agreement will "work itself out" in ongoing and continuing political and legal dialogue. This is the way that constitutionalism now works. This means that even when some of the institutions are not functioning, the debate tends to occur within the new political language created by the Agreement. Most of those who refuse to participate, do so on the basis of insufficient implementation of the Agreement. The politics of "crisis and collapse" is not as fatal for the long-term politics of Northern Ireland as some have suggested. A process is underway, even when the institutions are not operational. This process started long before 1998. However, where a political community rejects the imposition of a constitution, these views, if well founded, must be taken seriously. Ways must then be found to bring that community fully within the ongoing constitutional dialogue.

Secondly, while legal mechanisms are useful in highlighting the constraints of the normative order, insufficient attention was paid in the Agreement to the reality of established constitutional legal doctrine in the UK. The UK was effectively permitted to escape the sort of comprehensive constitutional re-thinking that

has taken place in Ireland. The result is that the all-Ireland confederal elements are weakened, and the distinctive nature of self-determination in the Irish context is insufficiently acknowledged. In my view, and contrary to the now dominant logic of the political process, the claims of Irish Nationalist and Republican political actors in Northern Ireland have not been accorded sufficient weight during the process of implementation. Despite the express language of the Agreement, Irish Nationalists and Republicans have found themselves locked within the dominant legal paradigm of devolutionary thinking within a wider UK context.²⁹ The terms of this existence have altered to include important guarantees on human rights and equality, but some of the basic features remain unchallenged.³⁰ It is surprising that more work was not done on this at the time the Agreement was negotiated. It may reflect a tacit acknowledgement of political reality, but it was not presented that way. However, it is not the Agreement which is at fault here. The significance of the changes proposed in the Agreement was simply never fully recognized at the heart of the constitutional legal system in the UK.

29. For the contrasting views of the SDLP and Sinn Féin, see Alban Maginness, *Refining Northern Nationalism*, in *CHANGING SHADES OF ORANGE AND GREEN: REDEFINING THE UNION AND THE NATION IN CONTEMPORARY IRELAND* 33-40 (John Coakley ed., 2002) and Mitchel McLaughlin, *Redefining Republicanism*, in *CHANGING SHADES OF ORANGE AND GREEN: REDEFINING THE UNION AND THE NATION IN CONTEMPORARY IRELAND*, *supra*, at 41-47. McLaughlin states that Sinn Féin does not view the Agreement as an end in itself: "The Good Friday Agreement is not for Irish Republicans an end in itself, but an agreement with the potential to deliver full national democracy in Ireland." *Id.* at 45. McLaughlin also displays an awareness of the legal limitations, although the argument about the Government of Ireland Act is not accurate. He states: "The constitutional reality is that the British still hold jurisdiction over a part of Ireland, although that has been significantly qualified by the repealing of the Government of Ireland Act. The political reality if we are to attain our goals requires a process of transition to a united Ireland." *Id.* It should be stressed that the Agreement recognizes the right to pursue democratically national and political aspirations. See Agreement, *supra* n.1, Sec. 6, para. 1.

30. See Jennifer Todd, *The Reorientation of Constitutional Nationalism*, in *CHANGING SHADES OF ORANGE AND GREEN: REDEFINING THE UNION AND THE NATION IN CONTEMPORARY IRELAND*, *supra* n.29, at 71-83. Todd's other proposed outcome sounds more realistic. In this context, a resurgence of northern nationalism would be likely, with implications for the island of Ireland. Beyond repeating the mantra that the Agreement must be fully implemented, nationalists and republicans need to determine their substantive politics and outline precisely how the goal of Irish unity will be achieved. Northern nationalism still needs to be redefined properly within post-Agreement Ireland. In fact, Jennifer Todd argues that with a de-emphasis on Europe and greater linkages and devolution within the UK, northern nationalism could become simply a form of British regionalism, with republicans holding on to the objective of Irish unity.