Northern Ireland
Legal Quarterly
Vol. 76 No. 3 (2025) 446–476
Articles DOI: 10.53386/nilq.v76i3.1189

Reform of a constitutional fundamental: the principle of cross-community consent and Northern Ireland's governance

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ABSTRACT

This article takes a critical look at calls for reform of the principle of cross-community consent (the consent principle) as it operates in Northern Ireland's post-1998 constitutional order. The consent principle requires that nationalists and unionists exercise power in a way that reflects a significant level of agreement from both communities' representatives. I argue that intensifying calls for significant moderation of the consent principle within a wider debate on reform of the Belfast/Good Friday Agreement framework cut against constitutional principle and, as currently framed, do not reflect political reality. Further, the article criticises the significant degree of unilateral reform – that is, amendment driven by the United Kingdom Government without cross-community support from the main Northern Ireland political parties – in recent years of the procedural devices embodying the consent principle. In doing so, I consider how varying interpretive methods have been applied by the courts in recent cases concerning the Belfast/Good Friday Agreement. A mix of positivist interpretivism and broad purposivism has combined to create contingency in constitutional principle. On the application of either a textualist or realist approach to the consent principle, it ought to be clear that, at a minimum, its abridgement requires the support of political representatives on both sides of the sectarian divide. Moreover, placing those disputes in the hands of the judiciary reduces the consent principle's *reforming* power: the doctrine, properly understood, operates as more than merely a regulatory constraint because of its capacity to enlarge Northern Ireland's powers of self-government.

Keywords: Belfast/Good Friday Agreement; principle of cross-community consent; constitutional principle; judicial method; Northern Ireland constitution.

* Lecturer in Law. The author wishes to thank Dr Katie Johnston for her immense help and encouragement as this article took shape.

INTRODUCTION

> … a balance has to be struck between properly protecting the interests of all parts of the community, and an essential minimum of workability. (British Government paper presented to the Multi-Party Talks February 1998).[1]

The *principle of cross-community consent* is a 'core pillar'[2] of Northern Ireland's framework of consociational government.[3] It operates separately from the 'foundational'[4] *principle of consent* of the 1998 Belfast (Good Friday) Agreement (the 1998 Agreement) which regulates the jurisdiction's sovereignty[5] and has its roots in British legislation and policy going back many decades.[6] By contrast, as the fulcrum of power-sharing government, the principle of cross-community consent (hereafter the consent principle) requires that nationalists and unionists exercise devolved power – particularly over contentious issues or key matters of public policy – in a way that reflects a significant level of agreement from both communities' representatives. The consent principle crystallised during the political negotiations of the mid-1990s as a marked departure not only from the unionist majority rule of Northern Ireland's first half century of existence, but also the

1 UK Government, 'Strand One (Paper One): Paper presented by the British Government, to the multi-party Talks, on the issue of the proposed Northern Ireland Assembly' (2 February 1998).

2 Northern Ireland Affairs Committee, 'The effectiveness of the institutions of the Belfast/Good Friday Agreement: Government response to the Committee's first report' (2023-24 HC 45), app 1: Letter from the Secretary of State for Northern Ireland (22 February 2024).

3 See eg Brendan O'Leary, *A Treatise on Northern Ireland, Volume III: Consociation and Confederation* (Oxford University Press 2019) 178–201.

4 Gordon Anthony, 'Lord Kerr and the Northern Ireland constitution: three key cases' in *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart 2021) 87. Though, what I have termed the 'consent principle' is often subsumed within a conception of an overarching principle of consent: see eg Christopher McCrudden and Daniel Halberstam, '*Miller* and Northern Ireland: a critical constitutional response' (2017) 8 UK Supreme Court Yearbook 299, 309: so understood, McCrudden and Halberstam deem the principle of consent to be deeply 'embedded' as a '*constitutional* principle of the first order' (emphasis in original).

5 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Art 1(iii). See also s 1 of the Northern Ireland Act 1998.

6 Northern Ireland Constitution Act 1973, s 1. See also eg Thomas Hennessey, '"Slow Learners"? Comparing the Sunningdale Agreement and the Belfast/Good Friday Agreement' in David McCann and Cillian McGrattan (eds), *Sunningdale, the Ulster Workers' Council Strike and the Struggle for Democracy in Northern Ireland* (Manchester University Press 2017) 174–178. See also, Eamonn O'Kane, 'British Government policy post 1974: learning slowly between Sunningdales?' in ibid 76–77.

quasi-consociational[7] but doomed governance experiment that ran for several months in 1974. And whereas the principle of consent affects only the ultimate and binary question of sovereignty, as determined by the preference of a simple majority, the consent principle regulates the routine exercise of government power in Northern Ireland through its requirement that a supermajority of Northern Ireland Assembly (the Assembly) members, or, in some instances, its Executive Committee (the Executive), endorse a particular measure.

The consent principle now permeates Northern Ireland's constitution and is primarily codified in the Northern Ireland Act 1998 (NIA 1998). It is also reflected in a series of political pacts beginning with the 1998 Agreement. And, yet, despite its recent recognition by the United Kingdom Supreme Court (UKSC) as a 'fundamental constitutional principle',[8] it has proven remarkably malleable as well as open to debasement by political actors, administrative *fiat*, and, ultimately, the courts. The Northern Irish courts, for example, have held – contrary to statutory wording and political practice – that the consent principle does not apply to votes on matters not within the Assembly's devolved legislative competences.[9] The UKSC did not endorse that reading but, instead, held that unilateral ministerial action from Westminster can fundamentally abridge the consent principle's practical operation: moreover, ministerial amendments of that nature were validated by an *implied* modification of statutory power foundational to Northern Ireland's constitutional framework.[10]

In the political realm, although still a long way from a critical mass, calls are intensifying from influential voices both at Westminster and within Northern Ireland's constitutionally unaligned political bloc for significant reform of the legal and procedural arrangements that reflect the consent principle, such as the petition of concern and the nomination process to the positions of First and deputy First Ministers (FMdFM).[11] Those making such calls for change argue, with much justification, that the statutory and procedural mechanisms codifying the principle impede dynamic and durable devolved government,

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7 O'Leary (n 3 above) 57. See also, Michael Kerr, *The Destructors: The Story of Northern Ireland's Lost Peace Process* (Irish Academic Press 2011) 96–100, 107–108.

8 *In re Allister* [2023] UKSC 5, paras 22, 109 (Lord Stephens).

9 *Allister and Others v Secretary of State for Northern Ireland* [2022] NICA 15, para 243 (Keegan LCJ); *In re Allister v Secretary of State for Northern Ireland* [2021] NIQB 64, para 190 (Colton J). This interpretation has also been voiced in academic commentary: see eg Brendan O'Leary, 'Consent: lies, perfidy, the protocol, and the imaginary unionist veto' in Federico Fabbrini (ed), *The Law and Politics of Brexit: Volume IV* (Oxford University Press 2022) 249.

10 *Allister* (n 8 above) para 107 (Lord Stephens).

11 See eg Alliance Party, 'Alliance leading change for everyone' (July 2024) 8–9.

particularly insofar as they operate in a political environment that remains so deeply divided. Simply put, that critique is animated by a sense that misuse of those protections significantly contributes to the ongoing dysfunction in devolved government.[12]

While there are significant and self-reinforcing flaws inherent in the mechanisms giving effect to the consent principle, this article takes a critical look at calls for its reform and, ultimately, urges great caution before any further modification. The requirement of cross-community consent in Northern Ireland's devolved administration is, as the courts have recognised, a constitutional principle of the highest order. Proposals for reform must first recognise that constitutional significance. The principle retains an irreducible core of government by consensus, from which stems regulatory mechanisms limiting the exercise of political power as a pragmatic reflection of both intractable sectarian divisions and, at least for now, the relatively low electoral ceiling of non-sectarian parties.[13] Reform of those mechanisms should only go so far as it can attract cross-community consensus, as was the case when, for example, dynamic statutory changes were enacted two years ago,[14] reflecting the *New Decade, New Approach* (NDNA) settlement.[15] Support for comprehensive reform does not currently exist. It is also difficult to see an appetite for fundamental reform emerging soon given the removal of an 'important centripetal force'[16] of the British constitutional settlement, the UK's membership of the European Union (EU), which, in turn, has deeply unsettled Northern Ireland's fragile constitutional balance.[17] More likely is that the plurality blocs of nationalism and unionism will cleave closer

12 See, generally, Conor J Kelly, Alan Renwick and Alan Whysall, 'Reform of Stormont: options for discussion' (The Constitution Unit, University College London March 2025) especially 13–15. See also, Jamie Pow, 'There's appetite for reforming Stormont, but not abandoning power-sharing' (2023) 488 Fortnight 5–7.

13 After winning 16.8% of the Northern Irish vote in the 2019 Westminster elections, the Alliance Party fell back to 15.0% at the 2024 general election. The party received 13.5% and 13.3% of first preference votes in the 2022 Assembly and 2023 local council elections respectively, though it should be noted that its Assembly vote was a significant improvement on the party's 2017 performance when Alliance received 9.1% .

14 Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6.

15 *New Decade, New Approach* (9 January 2020), annex B.

16 Aileen McHarg, 'Unity and diversity in the United Kingdom's territorial constitution' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Bloomsbury 2017) 280.

17 C R G Murray, 'Northern Ireland's post-Brexit governance crisis: what to do when the post-1998 centre cannot hold' (2024) 75(3) Northern Ireland Legal Quarterly 584–612.

to legal protections as the constitutional upheaval of the past nine years continues to play out. In that context, that some of the mooted amendments to the principle's operation are targeted at extinguishing the very core of the principle reflects the unseriousness of advocates of reform.

Further destabilising the constitutional balance is the breadth of unilateral reform – that is, change enacted at Westminster without consensus from the main Northern Irish parties – made to the consent principle in recent years. Those modifications ought to severely dent claims of the 1998 Agreement's 'immutability': significant structural reform has occurred absent the support of Northern Ireland's main parties. As I will discuss, reform of the petition of concern mechanism enacted unilaterally in 2020 by the Johnson Government[18] in implementing the Northern Ireland Protocol (the Protocol) is a significant modification of legal principle and constitutional ordering. Moreover, the courts' validation of that amendment was made possible only through a Diceyan, or highly positivist, interpretivism applied to the devolutionary settlement, which, as has been underlined repeatedly over the past two decades, is of doubtful utility in illuminating the *sui generis* and 'anti-foundationalist'[19] basis of Northern Ireland's constitutional framework.[20] An added layer of unpredictability is provided by the oscillation in judicial approach to the consent principle, and the post-1998 constitutional order more broadly, between strict formalism and purposivism.

This article proceeds as follows. In part two, I present a necessarily concise overview of the provenance of the principle and how it evolved over the past quarter century within a constitutional framework anchored in the 1998 Agreement and as modified by statute. In part three, I outline the legal mechanisms and procedures that embody the consent principle. Then, in part four, I consider the principle's limitations, while also tracing and critiquing calls for reform of anti-majoritarian mechanisms that govern the Assembly's operation. In part five, I conclude by exploring the implications of the principle when understood as a constitutional norm of the highest order. The consent principle structures the exercise of power in a way that reflects

18 The Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

19 John Morison and Marie Lynch, 'Litigating the Agreement: towards a new judicial constitutionalism for the UK from Northern Ireland?' in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights: Essays in Memory of Stephen Livingstone* (Oxford University Press 2007) 141.

20 See eg Morison and Lynch (n 19 above) 106–107, 109; Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The frontiers of legal analysis: reframing the transition in Northern Ireland' (2003) 66(3) Modern Law Review 317–345.

the essence of the post-1998 constitutional order. As such, I argue that the imperatives underpinning government by cross-community consent cannot sustain unilateral amendment. Further, political stability requires that reform of the consent principle has the broad support of both main communities' representatives. Relatedly, it is in this sense that the consent principle should be viewed not solely as a regulatory constraint or impediment, but, instead, as enlarging Northern Ireland's power of self-government by, first, compelling broad support on matters of public policy to sustain political progress, and, secondly, giving the electorate, not the courts, the primary say on contested public policy and design of the constitutional order.

THE EMERGENCE OF THE CONSENT PRINCIPLE

The British and Irish Governments established a 'sufficient consensus' rule to structure the multi-party talks process which, chaired by George Mitchell, commenced in June 1996 and concluded with the 1998 Agreement. Where unanimity could not be achieved among the negotiating parties on a particular issue in the drafting of Strand One or Two, concerning matters internal to Northern Ireland and north–south relations respectively, the rule required that 'any decision taken [was] supported by a clear majority in both the unionist and nationalist communities in Northern Ireland'.[21] Support was measured according to 'the percentage of the valid poll each [party] received in Northern Ireland-wide' elections held in May 1996.[22]

This principle was also reflected in political frameworks developed over the quarter century prior to those talks. The two governments' *Frameworks for the Future* document issued in February 1995 proposed that the appointment of an Assembly Speaker and members of Assembly committees, as well as a Code of Practice regulating the institution, would all be agreed by weighted majority, with the latter reflected in the Assembly's standing orders and aimed at 'promoting cross-community consensus and securing an appropriate, fair and significant role for representatives of all main traditions'.[23] Contentious legislative proposals were also to be agreed by weighted

21 Ground Rules for All-Party Talks first published on 16 April 1996, as supplemented on 5 June 1996 by the 'Procedural Guidelines for the Conduct of Substantive All-party Negotiations' (annex B). This extended to endorsement by both governments in respect of Strands Two and Three, while '[t]he overall outcome across all three strands would also need to attract a sufficient consensus from the participants' (Ground Rules, para 20, 15 March 1996).

22 Procedural Guidelines (n 21 above) para 21.

23 A Framework for Accountable Government in Northern Ireland (22 February 1995) paras 7, 15, 17.

majority,[24] and, as a precursor to the 1998 Agreement's petition of concern safeguard, 'a mechanism for protecting minority rights' was proposed in the form of weighted majority voting where '25 per cent to 35 per cent' of the Assembly's elected representatives called for it:[25] 'The weighted majority required in these different circumstances would ultimately be for agreement by the parties in the Assembly but could be in the order of 65% to 75%.'[26]

A principle of decision-making taken by cross-community consent was further reflected in the terms of the pithy 'Propositions of Heads of Agreement' document issued by the two governments in January 1998,[27] and expanded upon one month later in the British Government's paper on Strand One presented to the Mitchell multi-party talks: the Blair Government recognised that the Assembly must include mechanisms in order to function 'in such a way that the main sections of the community are involved and feel their interests protected' while simultaneously being 'workable, and not readily prone to deadlock'.[28] A few months after the collapse of the Stormont institutions and introduction of direct rule in 1972, a group of senior civil servants in the Northern Ireland Office favoured a more 'integrationist' path for the jurisdiction as, in their view, any future 'devolutionary pattern would be so hedged about with safeguards and restrictions as to be of little meaning or utility'.[29] This core tension – between practical, good governance, on the one hand, and, on the other, giving effect to a tenet of consociationalism – remains as potent today as ever.

Similarly, the British Government's *Northern Ireland Constitutional Proposals White Paper* published in March 1973 identified the 'two primary purposes' of new devolved institutions in Northern Ireland to be, first, attaining *broad consensus* and, secondly, operating 'efficiently'

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24 Ibid para 8.

25 Ibid para 26.

26 Ibid para 25.

27 'Democratically-elected institutions in Northern Ireland, to include a Northern Ireland assembly, elected by a system of proportional representation, exercising devolved executive and legislative responsibility over at least the responsibilities of the six Northern Ireland departments and *with provisions to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected*.' (Emphasis added).

28 A Framework for Accountable Government in Northern Ireland, para 19.

29 An Integration Solution (Future Policy Group of the Northern Ireland Office) (25 August 1972).

and 'capable of providing the concrete results of good government'.[30] Noel Dorr, arguably the most significant Irish diplomat of his generation, later recounted that '[t]he White Paper accepted, in effect, that [the] executive would have to be based on a cross–community sharing of power'.[31] The formal genesis of that objective was a paper written in August 1972 for the Secretary of State for Northern Ireland, William Whitelaw, by the Northern Ireland Office's Future Policy Group (FPG) to consider 'the future pattern of government in Northern Ireland'.[32] The FPG was comprised of permanent secretaries and chaired by the head of the Northern Ireland Civil Service, Sir David Holden. The FPG paper provided an outline of a power-sharing devolutionary settlement that would be both 'broadly-based' and 'should, as far as possible, be functionally efficient'. Further, the FPG 'worked from the basic premise that Northern Ireland cannot again, for the foreseeable future, be governed by an Executive based on the majority party alone': instead of 'entrenched government', the executive would have to win the support of a supermajority – 'which could hardly be lower than 75%' – of Assembly members.[33] The authors cautioned, however, that the supermajority 'holds out a very real possibility of total deadlock through obstinacy'. Other votes in the Assembly, however, could be carried by simple majority.

The Strand One paper submitted in February 1998 made repeated references to the devolved government structures designed in late 1973 by the British and Irish Governments in their Sunningdale Communiqué, and which operated from 1 January 1974 until it collapsed a few months later under the pressure brought by the loyalist Ulster Workers' Council general strike. Section 2(1)(b) of the Northern Ireland Constitution Act 1973 (1973 Act) gave power to the Secretary of State for Northern Ireland to re-establish devolved government if it appeared to him that there was 'a reasonable basis for the establishment in Northern Ireland of government *by consent*': to do so required that the body would be 'likely to be widely accepted throughout the

30 Para 2d (20 March 1973). This had first been stated a few months earlier in a British Government discussion paper, The Future of Northern Ireland (30 October 1972) (emphasis in original).

31 Noel Dorr, *Sunningdale: The Search for Peace in Northern Ireland* (Royal Irish Academy 2017) 211.

32 See the cover letter to the proposal: PRONI CAB 9/J/90/10.

33 PRONI CAB 9/J/90/10; Future Policy Group (Central Secretariat, Stormont Castle), 'A devolutionary solution' (7 August 1972). Interestingly, the paper also suggested that '[m]easures to associate with the work of the Assembly representatives of substantial non-political "interests" in the Northern Ireland community, either by forming a Second Chamber, or by including a minority of such representatives in a unicameral Assembly (with limited voting rights), or by their co-option to appropriate Functional Committees of the Assembly'.

community'.[34] That acceptance, in turn, was measured according to whether the new government could command support of, first, the elected Assembly (with its members returned under proportional representation voting) *and*, secondly, the electorate. Similarly, section 2(1)(a) of the 1973 Act delegated authority to the Secretary of State to transfer limited legislative power to an Assembly, if *inter alia*, the institution first created 'consultative committees' – reflecting the balance of the Assembly's parties[35] – to shadow government departments and, again, so long as 'government by consent' was deemed viable.

While this did represent a 'tacit rejection of one-sided majority rule',[36] the Sunningdale institutions granted no veto power to any community or party over the exercise of devolved legislative or executive power, nor did they incorporate weighted majority obligations. This is the key point of difference between the Sunningdale institutions and those created under the 1998 Agreement's institutional framework.[37]

THE CONSENT PRINCIPLE IN OPERATION

Paragraph 5 of Strand One of the 1998 Agreement specifies several institutional 'safeguards', the objective of which is to 'ensure that all sections of the community can participate and work together successfully in the operation' of the new devolved institutions and 'that all sections of the community are protected'. One such safeguard, specified in paragraph 5(d), is the requirement that 'key decisions' are 'taken on a cross-community basis'. That consensus can be reflected either through *parallel consent* – where a majority of Assembly members, including a majority of both unionist and nationalist designations voting, agree to the measure – or via a *weighted majority* where 60 per cent of Assembly members voting, including at least 40 per cent of *both* unionist and nationalist designations, agree.[38]

Paragraph 5(d) states that 'key decisions' must include the 'election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations'.[39] An exceptionally wide range of decisions giving expression to the principle was put on a statutory footing. In the weeks between the signing of the 1998 Agreement and enactment of the NIA 1998 the Irish Government noted that it was Sinn Féin (then representing around two in five of

34 Emphasis added.
35 Northern Ireland Constitution Act 1973, s 25(5).
36 O'Leary (n 3 above) 54.
37 See also Hennessey (n 6 above) 185.
38 See also NIA 1998, s 4(5).
39 See also ibid s 39(7).

nationalist voters) that had been 'emphatic' in arguing that 'parallel consent should run through the [Assembly's] decision-making process at all levels'.[40] In the Irish Government's assessment, this reflected the party's anxiety about a perceived 'SDLP/UUP "stitch-up" and British favouritism towards the UUP'.[41] This would rather suggest that, even at this early stage of Northern Ireland's latest experiment in consociationalism, archetypal politicking lay behind attachment to the consent principle as a blocking mechanism at least as much as concerns over sectarian majoritarianism. Ultimately, as I explore in the next section, the principle *has* repeatedly been invoked by both designations to frustrate devolved government on matters far removed from those with a sectarian dimension.

Translated into statute, section 4(5) of the NIA 1998 defines parallel consent and weighted majority voting as the express measures of the Assembly's 'cross–community support', which, again, are defined by paragraph 5(d) of Strand One of the 1998 Agreement. The consent principle permeates both the NIA 1998 and the Assembly's standing orders. A comprehensive overview of areas in which cross-community support is required under the NIA 1998 and standing orders is provided here. It includes votes on: reserved and transferred matters[42] (with parallel consent specifically required in respect of the transfer of a policing and justice matter);[43] alteration to the size of the Assembly;[44] the denial of ministerial power to allow for extension periods to the election to the positions of FMdFM;[45] the appointment of a justice minister to the Executive;[46] the number and functions of ministerial offices as prescribed by the FMdFM;[47] approval of, and alterations to, the Ministerial Code;[48] the exclusion by the Assembly of a minister from office or of a political party from holding such office,[49] the censure of a minister,[50] and, relatedly, the reduction of both a specific minister's remuneration[51] and financial assistance paid to a particular

40 National Archives of Ireland TAOIS/2021/100/11: 'Meeting with Sinn Féin on Strands One and Two: Belfast, 28 May 1998: Summary Report'.
41 Ibid.
42 NIA 1998, s 4(3).
43 Ibid s 4(2A).
44 Ibid s 7A(1).
45 Ibid s 16A(3C).
46 Ibid s 21A(3).
47 Ibid s 17(5).
48 Ibid s 28A(4).
49 Ibid s 30(8).
50 Ibid s 51D(5).
51 Ibid s 47A(9).

political party;[52] and, the making of standing orders relating to the Assembly;[53] and some finance[54] and budgetary matters.[55]

Further, parallel consent or a weighted majority is required before the Assembly may agree to findings of an Ad Hoc Committee on Conformity with Equality Requirements concerning draft legislation.[56] Nominations by the FMdFM of ministers to participate in North–South Ministerial Council and British–Irish Council meetings,[57] and the British–Irish Intergovernmental Conference,[58] must also ensure cross-community participation in a way that meets the 1998 Agreement's requirements.

The nomination process for FMdFM has undergone significant revision since 1998 and now requires cross-community consent only in an indirect sense. This is despite express reference in the 1998 Agreement to the process as one of several '[k]ey decisions requiring cross-community support'.[59] Until 2006, a joint nomination vote underpinned by parallel consent for both positions ensured that one member from both the Assembly's unionist and nationalist designations would fill the two offices. That 'centripetal' rule[60] was controversially abolished in the St Andrews Agreement concluded in October 2006 between the main parties and two governments and which paved the way for the return of devolved government in 2007 after several years in abeyance. The NIA 1998 was thereby amended[61] and two distinct nomination processes, neither of which require an Assembly vote, were implemented. The first process ultimately affords[62] the Assembly's largest political party the right to nominate an elected member to take the position of First Minister.[63] Similarly, in a separate process, the

52 Ibid s 51A(8).
53 Ibid s 41(2).
54 Ibid s 63.
55 Ibid s 64(2).
56 Standing Orders of the Northern Ireland Assembly, Order 36. See also NIA 1998, s 42(6)(b).
57 NIA 1998, s 52A(7).
58 Ibid s 54.
59 Strand One, para 5d.
60 O'Leary (n 3 above) 182.
61 Northern Ireland (St Andrews Agreement) Act 2007, s 1(1).
62 Ss 16A(4) and 16B(4) state that the process is undertaken by the largest party from the Assembly's three political designations: however, s 16C(6)(a) effectively states that where the largest designation is not also comprised of the Assembly's largest party, the largest party retains the right to nominate for First Minister. Therefore, the most straightforward interpretation, in my view, of the nomination process's sequencing is that which I have stated here.
63 NIA 1998, s 16C(6)(a).

largest party within the largest of the other two community designations may nominate a member for the position of deputy First Minister.[64]

While no overt expression of cross-community agreement is required within the dual nomination processes, the principle is evident in the significant degree of cross-community cooperation now required (and as revised by amendments to the NIA 1998 made two years ago) for government to function normally: specifically, should either the First Minister or deputy First Minister resign from office, their counterpart must also immediately leave office but can continue to exercise executive functions for up to 24 weeks.[65] In those circumstances the Executive cannot meet as the committee is jointly chaired by the FMdFM,[66] while all other Executive ministers can continue to hold office for up to 48 weeks[67] but may not take new decisions of any real significance during that period.[68] Similarly, Executive ministers may remain in office for up to 24 weeks after an Assembly election if appointments are not made to both offices of FMdFM.[69]

The provisions have the practical effect, then, of enabling functional government only where the largest party from each of the Assembly's two largest designations agrees to participate in the Executive by taking one of the First Minister or deputy First Minister positions. Importantly, the Secretary of State for Northern Ireland must propose an Assembly election if the two apex Executive posts are unoccupied 24 weeks after either an election or resignation from one of those offices.[70] That rule, however, is exposed to significant ministerial discretion as reflected in successive British governments' practice of legislating during crises for extensions to statutory deadlines for holding elections.[71] The logic of applying that discretion is often clear as it provides the protagonists with space to reach an agreement, while any new election is unlikely to meaningfully change the Assembly's

64 Ibid s 16C(6)(b). See also ss 16A(5) and 16B(5).
65 Ibid s 16B(2).
66 Ibid s 20(2).
67 Ibid s 18(A1).
68 Northern Ireland Executive, *Ministerial Code* (2006) paras 2.3–2.4.
69 NIA 1998, s 18(A1).
70 Ibid s 32(3).
71 See eg Northern Ireland (Executive Formation Act) 2022, s 1A.

configuration given the ossified nature of the two largest designations since the milestone 2003 elections.[72]

Also giving statutory expression to the principle is the provision that three Executive ministers may compel that a particular vote by the Executive attracts cross-community support before it can pass,[73] while 30 Assembly members may petition the Assembly's Speaker (Presiding Officer) that a ministerial decision was taken in a way that either contravenes the Ministerial Code or concerns a matter of public importance:[74] such a petition may ultimately be referred to the Executive if the Speaker, having consulted all of the political parties with representation in the Assembly, also deems it to be a matter of public importance.[75]

The second key procedural safeguard reflecting the principle in paragraph 5(d) is the petition of concern mechanism, which is codified in section 42 of the NIA 1998. The petition of concern permits that 'a significant minority' may demand that an Assembly vote, albeit with some modest exceptions,[76] can only pass with cross-community support as represented by parallel consent or a weighted majority. The required number of Assembly members in order to trigger a petition remains 30,[77] as has been since 1998, despite the reduction in the number of Assembly members from 108 to 90 in 2016[78] and statutory measures to temper its operation enacted three years ago.[79] Under the NDNA agreement signed in January 2020, Northern Ireland's five largest parties made a commitment to table or support a petition of concern 'only in the most exceptional circumstances and as a last

72 In the Assembly election held in November 2003, the DUP cannibalised the vote of smaller unionist parties to overtake the Ulster Unionist Party as the largest unionist party for the first time, while, within nationalism, Sinn Féin took votes directly from the Social Democratic and Labour Party in leapfrogging it to become the largest party within that bloc. Two decades on, there is very little sign of an end to the electoral dominance of the DUP or Sinn Féin within their respective communities: while the DUP has lost some ground in recent years, this has primarily been to the benefit of the Alliance Party.

73 NIA 1998, s 28A(8)(c).

74 Ibid s 28B(1). As per s 28B(2), only one petition can be issued in respect of a particular decision.

75 Ibid s 28B(3).

76 Ibid s 42(4): matters which relate to the sanctioning of an Assembly member, a vote before the second stage of a proposed bill, standards motion, and a motion or question that has no express legal or procedural effect: see also Standing Order 69B of the Northern Ireland Assembly.

77 NIA 1998, s 42(1).

78 Assembly Members (Reduction of Numbers) Act (Northern Ireland) 2016, s 1.

79 NIA 1998, s 42(4) (as amended by Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6).

resort'.[80] The agreement in NDNA that a petition of concern should require support from representatives of at least two political parties,[81] as well as the introduction of a '14-day period of consideration' before the cross-community voting procedure can be triggered,[82] were both subsequently put on a statutory footing.[83]

LIMITATIONS AND REFORM

The 'mandatory coalition' constraint has invariably produced the points of deepest instability in Northern Ireland's post-1998 self-government. Most recently, the Executive was effectively suspended for a total of nearly five years, across two separate periods, between early 2017 and early 2024 when relevant parties failed to nominate for the position of First or deputy First Minister. Use of the petition of concern to block measures that seem far removed from the mechanism's underlying purpose has also spurred calls for its reform. In what is likely the most controversial such example, petitions of concern were presented several times to frustrate legislative enactment of same-sex marriage in the mid-2010s.[84] As mentioned in the preceding paragraph, modest amendments to the petition of concern were recently implemented after winning support from the five main parties under the auspices of NDNA.[85] Moreover, the principle's entrenchment in Northern Ireland's constitutional framework has been blamed for hardening sectarian divisions and incentivising polarisation.[86] It may also be the case that strict adherence to the principle is anachronistic given recent growth in electoral support for constitutionally agnostic parties.

In 2008, former deputy First Minister, and then MP for Foyle, Mark Durkan, described the 1998 Agreement's cross-community decision-making protections, and the system of community designation, as 'ugly scaffolding'.[87] A year later, Durkan recalled the hope of the 1998 Agreement's architects that some of its provisions 'would be

80 *New Decade, New Approach* (n 15 above) 12.

81 NIA 1998, s 42(3) (as amended by Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6.

82 Ibid s 6.

83 Northern Ireland (Ministers, Elections and Petitions of Concern) Act 2022, s 6.

84 See eg Conor McCormick and Thomas Stewart, 'The legalisation of same-sex marriage in Northern Ireland' (2020) 71(4) Northern Ireland Legal Quarterly 557–570, 558–561.

85 NIA 1998, s 42(3).

86 See eg Rick Wilford and Robin Wilson, *The Trouble with Northern Ireland: The Belfast Agreement and Democratic Governance* (New Island Press 2006) 10, 32; Alliance Party, *Together We Can: Alliance Party Assembly Manifesto 2022* (April 2022) 90–91.

87 British Irish Association Conference, New College, Oxford (5 September 2008).

biodegradable so that, as we created a new political environment, some of the artificial protections could be dispensed with by agreement'. But Durkan also argued that such a change could only occur with strong statutory rights protections which 'might offer more productive and articulate protection … in a new democratic society than vote-locks and tit-for-tat vetoes in perpetuity'.[88] In its absence, Durkan said, 'obviously people will want to hang on to all sorts of protections that are built into the decision-making process'.[89] Though it may equally be true that strong judicial review of Assembly decisions taken on a majoritarian basis for compliance with a local rights instrument would lead to different forms of administrative impasse. Judicial review may also foster a culture in which contested policy matters are routinely resolved beyond the democratic realm.

Durkan's comments reflected the hope of the 1998 Agreement's key architects that core parts of the consociational framework were necessarily provisional and would soften over time. The intention was that the power-sharing arrangements would evolve and congeal over time.[90] Robust reform processes are, however, conspicuously lacking in the agreement reached. In recent reflections George Mitchell spoke of the 'tremendous pressure' faced by negotiators in early 1998, particularly as terrorist activity intensified in that period, and his regret that a formal review process 'for determining progress or suggesting ways forward' had not been included.[91]

What transpired over the past quarter century is piecemeal reform of the 1998 Agreement, some of which has been substantial, but prompted only by the crisis *du jour*. Suggested reforms, like those made by Durkan, have also been published *ad hoc* and with varying degrees of specificity. As Murray notes, the 'governance architecture' of Northern Ireland established by Strand One has proven 'adaptive to the changing needs of society as the lived reality of the conflict recedes', but reform packages have been highly reactive fixes to rolling crises rather than the product of codified review.[92]

Just months after the 1998 Agreement was reached, then Alliance Party leader Sean Neeson, writing with a senior figure in the party, Stephen Farry, made a case for an 'integrative model' of government in Northern Ireland – 'a milder form of consociationalism' – which

88 Ibid.

89 HC Deb 4 March 2009, vol 488, col 897.

90 Joint Committee on the Implementation of the Good Friday Agreement, *Lessons from the Architects of the Good Friday Agreement* (March 2023) 45–46, paras 95–96.

91 Evidence to Oireachtas Joint Committee on the Implementation of the Good Friday Agreement (27 October 2022).

92 Murray (n 17 above) 600.

would focus on 'inter-group cooperation, establishing majoritarian but ethnically neutral decision-making and devising ethnically blind public policies'.[93] Neeson and Farry preferred 'non-qualified weighted majority' Assembly votes on contentious issues[94] and in regulating the Executive's formation:[95] all of which would reduce, in the authors' view, the 'dubious assumption of the rigid existence of "two communities"' said to pervade the 1998 Agreement[96] and the 'profoundly illiberal vision' of 'two rigidly differentiated peoples, separate but equal' apparently espoused by John Hume.[97]

Alliance's first preference vote in Assembly elections doubled from 6.5 per cent to 13.5 per cent between 1998 and 2022, with the total 'other' vote also doubling from 8.1 per cent to 16.5 per cent. In the same period, unionist and nationalist first preference votes moved from 51 per cent and 39 per cent respectively to the low 40s for both blocs. That a quarter of a century on from the 1998 Agreement well over 80 per cent of voters opt to lend overtly nationalist or unionist candidates their first preference vote may show that we are quite a distance from the 'truly integrated non-sectarian society' that Neeson and Farry boldly imagined in their 1999 article.[98] But it is true that the growth of 'others' in the Assembly is significant, and if that recent trajectory continues it will ultimately necessitate some form of institutional reform.

Predictably, Alliance called for such reform just weeks after its strong result in the May 2022 Assembly elections. The party proposed an 'immediate' end to the two largest parties' effective veto on executive formation in the nomination phase of FMdFM (and mooted the creation of two 'Joint First Ministers').[99] Alliance also argued for the use of weighted majority voting to replace parallel consent in determining cross-community consent under the NIA 1998,[100] and a diminution of the grounds for submitting both a petition of concern in the Assembly and a cross-community support vote in the Executive.[101]

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93 Stephen Farry and Sean Neeson, 'Beyond the "band-aid" approach: an alliance party perspective upon the Belfast Agreement" (1998) 22(4) Fordham International Law Journal 1221–1248, 1228.

94 Ibid 1237.

95 Ibid.

96 Ibid 1241.

97 Ibid 1242. Farry and Neeson made similar remarks in respect of David Trimble.

98 Ibid 1237.

99 Alliance Party, 'Sharing power to build a shared future' (23 June 2022) 2.

100 Ibid 2–3.

101 Ibid 4–5. Both mechanisms could be used only in relation to national identity issues, Troubles-related 'legacy' matters, or 'matters which relate to the constitutional structure and institutions established under the Good Friday Agreement'.

The party's 2024 Westminster election manifesto reiterated those proposals with the stated aim of reducing the 'rights and privileges [of] those who remain wedded to binary politics at the expense of stability and progress and to the detriment of other minorities'.[102] The weighted majority requirement, which was unquantified in the party's 2022 proposals, was proposed as 'approximately two-thirds of the whole Assembly, with the precise figure to be determined after each election to ensure it includes unionists, nationalists and others'.[103]

While the much more recent recommendations by the Northern Ireland Affairs Select Committee on reform of Strand One of the 1998 Agreement track Alliance's proposals, they are more modest in scope. In late 2023 the Committee made a tentative proposal that the British Government should evaluate the executive formation process with the aim of increasing cohesiveness 'while maintaining cross-community representation'.[104] It proposed a two–thirds supermajority for the election of two holders of an office of Joint First Minister with nominations open to any two MLAs from *any* party running on a joint slate.[105] The Committee also proposed the use of a two-thirds supermajority in the election of the Assembly Speaker.[106] Beyond those modifications, the Committee did not propose alteration to the requirement of cross-community consent as a safeguarding mechanism in other areas. Rather, the Committee recommended only that the British Government should evaluate how the process of community designation in the Assembly affects the stability of 'in the broadest sense … cross-community governance'.[107]

Calls for reform to the principle's working have also been made with varying degrees of specificity from a range of other important actors. In an important recent intervention, the Taoiseach Micheál Martin spoke last year of the need for structural reform to 'make the institutions more stable and effective while, of course, retaining the [1998] Agreement's foundational commitment to meaningful power-

102 Alliance Party, 'Alliance leading change for everyone' (July 2024) 8–9. It is unclear if Alliance's admonition of those perpetuating 'binary politics' extends to the five in six Northern Irish voters who, in 2022, did not lend a first preference vote to constitutionally unaligned candidates. The result was replicated in the July 2024 general election when 84% of the electorate cast votes for overtly nationalist or unionist candidates.

103 Ibid 9.

104 Northern Ireland Affairs Committee (n 2 above) 40, para 93.

105 Ibid 38, para 89.

106 Ibid 35, para 78.

107 Ibid 42, para 98.

sharing and inclusiveness'.[108] But Martin also heavily suggested that the capacity of one party to block the formation of the Executive, as well as the St Andrews nomination process, should be eliminated. Martin asked rhetorically if the petition of concern ought to 'be returned to its original intent and process' – that is, to 'protect important minority rights and interests' – and if 'a more equitable weighted majority system' might replace cross-community consent 'where specific community interests are not at stake'. One does not have to squint between the lines of Martin's speech to find where the Irish Government now stands on the question of fundamental reform of the Stormont institutions. Academic experts[109] and civil society groups[110] have also highlighted the need in their view for revision of the petition of concern as part of a package of institutional reforms aimed at securing stable government.

While such calls for fundamental revision of the consent principle's procedural devices are prompted by legitimate frustration with how – particularly over the past decade – Stormont has functioned, implementation of significant reform would come with its own significant costs. Those costs have too often been overlooked. While Sinn Féin has not commented directly on the question, unionism is not willing to countenance fundamental reform of the mechanisms that reflect the consent principle. The Democratic Unionist Party (DUP) has recognised, albeit cautiously, the need for reform of the 1998 Agreement's institutional framework. Echoing Mark Durkan's language, its former leader spoke of his hope that the intrinsic 'crutches' of Northern Irish power-sharing can one day be abandoned as people 'develop their political perspectives and we build a degree of trust in terms of how Government works here'.[111] The party is also receptive to a reformed voting mechanism in the Assembly, but, critically, one that 'would still have a cross-community element to it, because of the nature of the weight of the vote required'. The party's former representatives on the Northern Ireland Affairs Select Committee, Carla Lockhart MP and Jim Shannon MP, went even further in November 2023 in

108 Martin made those remarks as Tánaiste before the 2024 Irish general election: 'Address by the Tánaiste Micheál Martin at the Alliance Party Conference', Belfast (1 March 2024).

109 See eg Northern Ireland Assembly, Assembly and Executive Review Committee, 'Submission of evidence by Professor Rick Wilford' (February 2013) 2, 4; Northern Ireland Assembly, Assembly and Executive Review Committee, 'Review of D'Hondt, community designation and provisions for opposition' (June 2013) 264–266.

110 See eg Committee on the Administration of Justice, 'Implementing the "petition of concern"' (January 2018); Northern Ireland Public Service Alliance (NIPSA), 'Reforming the petition of concern: from "concern" to full citizenship' (2019).

111 Northern Ireland Affairs Committee, 'Oral evidence: the effectiveness of the institutions of the Belfast/Good Friday Agreement' HC 781 Q299 (28 June 2023).

their minority report on the effectiveness of the devolved institutions. Lockhart and Shannon argued that reform of Northern Ireland's political arrangements would not only 'require cross-community consent',[112] but that, ultimately, any constitutional change would have to 'fully respect the need for cross-community consent':

> The convention that there can be no majoritarian votes at Stormont on matters of controversy goes back to 1972, not to 1998. In that sense the 1998 expression of it has to be understood in that wider context. The clear point was that majoritarian decision making on matters of controversy at Stormont was rejected without qualification.[113]

Simply put, absent unionist agreement, any further dilution of the key governance mechanisms reflecting the consent principle may place an existential strain on devolved government in Northern Ireland.

The limits of constitutionally appropriate reform are also evident in the Executive formation process. In their minority report Lockhart and Shannon argued that the most recent Executive collapse, prompted by the DUP's decision not to replace Paul Givan when he resigned as First Minister in early 2022, was spurred by the party's aim to reverse what it viewed as the British Government's departure from both the consent principle *and* the keystone principle of consent in its implementation of the Protocol.[114] As with Sinn Féin's decision five years prior to effectively suspend the devolved institutions, both parties pursued a strategy to effect significant reform in the face of perceived systemic failures of governance: Sinn Féin's focus in 2017 concerned Irish language rights, as well as the unfolding scandal that was the Renewable Heating Initiative; whereas, for the DUP in 2022, the party's grievances over post-Brexit trading arrangements for Northern Ireland agreed between the UK and EU drove its decision to pursue a phased withdrawal from the power-sharing institutions. Moreover, on each occasion, the respective parties' decisions were largely driven by grassroots discontent and ultimately drew substantial support from their core constituencies. There is no evidence on either occasion that the leadership of the two main parties relished their respective decisions to destabilise the institutions, nor is it true that (beyond a minority of dissentients) senior figures within any of the five main parties desire any long-term collapse of devolved government. Party elites, rather, remain focused on the financial benefits and relative power afforded by stable cross-community government.

It is possible, in my view, to regard the ability of the two largest parties to block formation of government as untidy and fraught as it is in practice, as both a constitutional safety valve and catalyst for

112 Northern Ireland Affairs Committee (n 2 above) 88.

113 Ibid 89.

114 Ibid 82–83.

significant corrective reform: far from quixotic sidesteps, Stormont paralysis has jolted an otherwise largely impassive British Government into addressing weaknesses in the operation of devolved power in Northern Ireland. The 2017–2020 collapse resulted in the signing of NDNA in January 2020, while the DUP's actions brought tangible amelioration, through the Windsor Framework agreed in March 2023, of some of the most problematic elements of the Protocol, as well as the British Government's *Safeguarding the Union* paper in early 2024.[115]

Political realities are also likely to nullify the space for novel governing configurations opened by constitutional reform in the future. It is inconceivable, for example, that mooted reform of the process of appointment to the First and deputy First Minister offices – whether in the form of a return to the pre-St Andrews Agreement 'joint slate' procedure or use of a 65 per cent supermajority instead of parallel consent or weighted majority, requirement – would lead in future crises to the second largest nationalist or unionist party opting to take their place at the head of the Executive in place of the larger party within their respective designation. The political cost of such a decision would likely be too much to bear for the smaller party. Similarly, it is also implausible that the largest nationalist or unionist party would 'lock' their counterpart in the other designation out of office in favour of the Alliance Party: accusations of illegitimacy would likely put paid to such an arrangement. Further, with the coalescence of the nationalist and unionist communities around two parties, and the uncertain future electoral trajectory of Alliance,[116] it is far from clear that a two-thirds supermajority, much less a 70 per cent or 75 per cent requirement, would be sufficient to prevent Sinn Féin or the DUP from vetoing such an arrangement.

As a matter of legislative practice, there is also scant empirical evidence that use of the petition of concern materially stifles lawmaking.[117] The Assembly's failure to legislate on same-sex marriage is a striking exception. But it is also true that significant reform of the mechanism has already sharply limited its use.[118] It is also doubtful that uncontentious interests deemed unassociated with a particular community, on the one hand, and what Martin termed 'specific

115 Implemented in part by the Windsor Framework (UK Internal Market and Unfettered Access) Regulations 2024, which came into force on 20 February 2024.

116 David McCann, 'It's difficult second album time for Alliance and Naomi Long' *Irish News* (Belfast 23 October 2024)

117 Christopher McCrudden et al, 'Why Northern Ireland's institutions need stability' (2016) 51(1) Government and Opposition 30–58, 50–51.

118 Northern Ireland Office, 'The fourth report on the use of the petition of concern Mechanism in the Northern Ireland Assembly' (11 February 2022).

community interests', on the other, can be objectively disaggregated. '[T]here is no bright line between regular politics and constitutive constitutional politics in Northern Ireland',[119] which means, then, that many second order issues beyond the constitutional question still take on a sectarian hue. All of which shows both the limits *and* potential of consociational arrangements: significant constitutional reform with near-unanimous political backing is possible, but such a degree of support from the main parties is the minimum required to legitimise,[120] and thus entrench, any change how the consent principle functions. Brendan O'Leary has posited that the 'legitimacy of the cross-community consent rules would diminish' only when the constitutionally non-aligned vote exceeds 20 per cent,[121] which is now conceivable but remains some way off. Even then, however, Irish history suggests that the viability of a system in which key decisions are made absent the consent of a unionist or nationalist bloc representing, for example, 35 per cent of the electorate is very questionable.

While '[i]nter-bloc trust' may indeed be 'some distance away' in Northern Ireland,[122] there remains, as I discuss in the following section, cause for optimism that the consent principle can anchor stable, ambitious devolved governance within its current exacting parameters. Consensus is possible so long as sufficient political impetus and courage exists, and, where it does, may not only *advance* the breadth of devolution but also ensure that vexed political questions stay outside the courtroom. The key to unlocking good governance in Northern Ireland is, ultimately, organic political resolve applied from the two main political traditions *within* a constitutional system legitimised by the consent principle.

But beyond these political impediments to reform of the consent principle, and the practical operation of such change, it is also important to assess reform in the context of the principle understood as a fundamental constitutional value. I turn to do so now in the context of the unilateral amendment of the principle that has occurred since 1998. By 'unilateral', I refer to legislative change that has occurred

119 Alex Schwartz, 'How unfair is cross-community consent? Voting power in the Northern Ireland Assembly' (2010) 61(4) Northern Ireland Legal Quarterly 349–362, 359.

120 See also eg Kelly et al (n 12 above) 61, and Alan Whysall, 'Northern Ireland's political future: challenges after the Assembly elections: a discussion paper' (The Constitution Unit, University College London May 2022) 67. In respect of unionists' concerns on reform of the consent principle in the context of the post-2016 referendum constitutional turmoil, see Andrew McCormick, 'The constitutional status of Northern Ireland: consent, acquiescence, subjugation, indifference' (The Constitution Society 2024) 28–30.

121 O'Leary (n 3 above) 328.

122 Ibid.

without the cross-community consent of the main political parties, as well as judicial evaluation of the principle that bears significantly on its operation.

THE CONSENT PRINCIPLE AS A CONSTITUTIONAL FUNDAMENTAL

The High Court very recently held that the community designation component of section 4(5) NIA 1998 is compatible with the European Convention on Human Rights (ECHR). Designation, the court held in *McCord's Application for Judicial Review*, with the weighted advantage it affords in cross-community votes to Assembly members designated as nationalist or unionist, breaches neither the right to stand in an election nor the right to vote of those designated as neutral on the constitutional question.[123] In his reasons, Scoffield J stated that 'plainly valid points' could be made about the 'value, efficacy and fairness' of community designation, but that, ultimately, it was a matter of 'political debate'.[124] Scoffield J referred also to the Secretary of State for Northern Ireland's submission (as the proposed respondent in the application) that any change to the electoral system must be 'for determination through the political process'.[125]

But 'political debate', much less any outbreak of political consensus, has of late infrequently informed important changes made unilaterally to the consent principle's operation by the British Government. In that sense, the St Andrews and NDNA reforms are outliers. The consent principle has contracted as the result of ordinary statutory provisions passed without the input much less the agreement, of the Northern Irish parties. The reasoning in *McCord* also overlooks the fact that interpretive methods applied to those provisions in recent times by the courts have significantly narrowed the consent principle's operation. For a 'fundamental constitutional principle'[126] the tenet of government by cross-community agreement is remarkably malleable and ostensibly vulnerable to reform by processes impervious to the consent of the main political parties in Northern Ireland.

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123 *In the Matter of an Application by Raymond McCord for Leave to Apply for Judicial Review* [2024] NIKB 67. The applicant sought a declaration from the court pursuant to s 4(2) of the Human Rights Act 1998 that s 4(5) NIA 1998 is incompatible with Art 3 of the First Protocol to the ECHR, the right to stand for election and right to vote, and Art 14 ECHR, prohibition on discrimination in the enjoyment of Convention rights and freedoms.

124 *McCord* (n 123 above) para 50.

125 Ibid para 12.

126 *In re Allister* (n 8 above) [109] (Lord Stephens).

Turning first to amendments to the consent principle made by statutory and ministerial power, the domestic regulations giving effect to Article 18 of the Protocol explicitly negate the petition of concern. Article 18(2) of the Protocol obligated the UK to seek 'democratic consent in Northern Ireland in a manner consistent with the 1998 Agreement' on the continued application of core parts of the Protocol concerning customs, regulations over the movement of goods, and state aid (Articles 5–10). But 'democratic consent' under the Protocol does not equate to cross-community consent. The British Government met its Article 18(2) obligation by passing regulations[127] in December 2020 to facilitate a 'consent resolution' to be voted on by members of the Assembly but which cannot be made subject to a petition of concern.[128] A consent resolution supported by a simple majority of the Assembly, but which (as happened when the vote was taken in mid-December 2024)[129] fails to attract cross-community support within the meaning of section 4(5) of the NIA 1998, does not prevent Articles 5–10 from continuing to apply in Northern Ireland for at least another four years after the vote. Rather, a resolution passed on such a basis triggers an independent review of the Protocol's operation and a fresh consent resolution in four years' time. Further, the statutory requirement that the Assembly's Speaker must be elected with cross-community support was amended by the same regulation in the event that no Speaker was in place by the time the consent resolution vote had to be held.[130]

The unilateral amendment of section 42 of the NIA 1998 by the consent resolution regulations was subject to judicial review which ultimately went on appeal from the Northern Irish courts to the Supreme Court in *Allister*.[131] The statutory authority to make ministerial regulations in implementation of the Protocol,[132] including amendments to primary legislation,[133] is subject to the express limitation that such power must be exercised in a manner compatible with the NIA 1998.[134] In the conclusion of the *Allister* trilogy of review cases, the Supreme Court held in 2023 that the impugned regulations

127 Protocol on Ireland/Northern Ireland (Democratic Consent Process) (EU Exit) Regulations 2020.

128 Northern Ireland Act 1998, sch 6A, para 18(5). See also Northern Ireland Act 1998, s 56A.

129 The motion was carried by a simple majority of 48 votes to 36 on 10 December 2024: 30 nationalists voted in favour, as did 18 Assembly members designated as 'other', while all 36 unionist members who participated voted against.

130 Northern Ireland Act 1998, sch 6A, para 16(3).

131 *In re Allister* (n 8 above).

132 European Union (Withdrawal) Act 2018, s 8C(1).

133 Ibid s 8C(2).

134 Ibid s 10(1)(a).

facilitating the consent mechanism were lawfully made[135] as the statutory basis of the petition of concern had been adapted almost a year previously in January 2020 with the enactment of primary legislation giving domestic effect to the Withdrawal Agreement (including the Protocol) that facilitates Brexit.[136] The court reasoned that, first, the British Government's Article 18 obligation took domestic effect under section 7A of the European Union (Withdrawal) Act 2018, and, secondly, it had to meet the Protocol's 'modalities' which specified[137] a 'democratic consent' mechanism measured by majority vote.[138] Section 7A provides not only that the terms of the Withdrawal Agreement take direct effect domestically but also that they take precedence over all other legal provisions. The Supreme Court in *Allister* held that 'any conflict between the Protocol any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations' brought into the domestic legal order by section 7A.[139] '[A]ccordingly',

> section 42 of the NIA 1998 … .is to be read and has effect subject to the 'obligation' on the UK government to legislate for a democratic consent process based a [sic] simple majority of those Members of the Assembly present and voting.[140]

The legalistic reasoning applied in *Allister* – where section 7A of the Withdrawal Act was interpreted as permitting significant alteration by ministerial *fiat* even to 'constitutional' statutes[141] such as the NIA 1998 – has been criticised for its prioritisation of 'atheoretical workability' at the expense of a richer normative account of the constitutional order.[142] In *Allister* the sweeping power provided by section 7A was not construed against core constitutional principles, not least the burgeoning, but ostensibly now immaterial, doctrine

135 *In re Allister* (n 8 above) paras 107–108.

136 European Union (Withdrawal) Act 2018, s 7A.

137 Protocol on Ireland/Northern Ireland, para 5. See also Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland, para 3.

138 *In re Allister* (n 8 above) para 108.

139 Ibid para 66.

140 Ibid para 108.

141 *Thoburn v Sunderland City Council* [2003] QB 151, paras 37, 60 (Laws LJ). Cf Kacper Majewski, 'Re Allister: the end of "constitutional statutes"? (*UK Constitutional Law Association Blog* 21 February 2023).

142 Mark Elliott and Nicholas Kilford, 'Nothing to see here? *Allister* in the Supreme Court' (2024) 28(1) Edinburgh Law Review 95–102, 96.

of constitutional statutes' resistance to implied repeal.[143] The court applied an orthodox view of parliamentary sovereignty through which section 7A was afforded total primacy. The statutory text, ultimately, was deemed determinative. Constitutional *meaning* was derived exclusively from that text, with constitutional *authority* flowing only from a highly positivistic account of Parliament's lawmaking authority that eclipsed the distinctive values embedded in the post-1998 Northern Irish constitutional order which distinguish it from ordinary devolutionary settlements. 'A problem arises', Campbell et al wrote two decades ago, 'when legal technique is unable to capture the complexity of the political context' in Northern Ireland.[144] The eviscerating response of DUP members of the House of Lords immediately after the December 2024 democratic consent vote shows again the deep well of discontent that exists in political unionism following, as viewed from that perspective, a constitutionally illegitimate statutory imposition that undermines the imperative of consensual power-sharing.[145]

But even on the formalistic reading of constitutional doctrine employed by the Supreme Court, it is not clear that section 42 of the NIA 1998 should have been deemed open to amendment in the sense that it was. The Protocol's procedural 'modalities', for which section 7A of the Withdrawal Act is a 'conduit'[146] in domestic law, state that democratic consent on the continued application of Articles 5–10 must be measured 'in a manner consistent with the 1998 Agreement'.[147] Disapplication of the petition of concern is very arguably incompatible with a core principle of Strand One of the 1998 Agreement in the sense that cross-community decision-making, including on 'key decisions', is foregrounded in that instrument, which then serves as the basis for the enactment of section 42 of the NIA 1998. The Assembly's expression of its view of the suitability of customs arrangements applicable in Northern Ireland after a constitutional rupture on the scale of Brexit cannot be classified as anything other than a key decision.

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143 See eg David Feldman, 'The nature and significance of "constitutional" legislation' (2013) 129 Law Quarterly Review 343–358; Mark Elliott, 'Embracing "constitutional" legislation: towards fundamental law?' (2003) 54(1) Northern Ireland Legal Quarterly 25–42.

144 Campbell et al (n 20 above) 323. See also Gordon Anthony, 'The Protocol in Northern Ireland law' in Christopher McCrudden (ed), *The Law and Practice of the Ireland–Northern Ireland Protocol* (Cambridge University Press 2022) 126–127.

145 See eg HL Deb 10 December 2024, vol 841, cols 1685–1686.

146 The term employed by the UKSC in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 80, to describe the highly analogous s 2 of the European Communities Act 1972.

147 Protocol on Ireland/Northern Ireland, Art 18(2).

It must also be noted that the Supreme Court in *Allister* did not accept a finding made in the Northern Irish courts that would have further significantly reduced the operation of section 42 of the NIA 1998. Colton J at first instance,[148] and Keegan LCJ and Treacy LJ on appeal,[149] in *Allister* held that a petition of concern cannot apply to the democratic consent mechanism as Article 18 of the Protocol concerns an excepted matter – the UK's international relations with the EU[150] – which is not transferred to the Assembly and is, therefore, beyond its legislative competence. Respectfully, neither the text of section 42, nor the Assembly's practice and Standing Orders, supports the provision's disapplication on that basis.[151] While the Supreme Court did not decide the appeal on that point, it did move to:

> acknowledge the potential force of the appellants' argument that section 42 of the NIA 1998 applies to 'a matter which is to be voted on by the Assembly' so that a vote on a matter which is outside the legislative competence is still within the terms of section 42.[152]

The point will very likely require clarification in future as the Northern Irish courts' view represents a significant diminution of Assembly members' capacity to issue a petition on a non-legislative motion such as the democratic consent resolution.

The unspoken, and politically awkward, impetus behind the Article 18(2) process in its recasting of section 42 of the NIA 1998 is that the Protocol does not enjoy anything approaching majority support within political unionism.[153] In turn, one may argue that it is in unionism's best interests to implicitly acknowledge that it emerged second-best in the outworking of the constitutional binaries imposed by the form of Brexit chosen by the previous Conservative Government; to register its disapproval of the Protocol in the democratic consent motion; and, ultimately, continue in the devolved institutions while

148 [2021] NIQB 64 (n 9 above) paras 189–190.

149 [2022] NICA 15(n 9 above) paras 243–249.

150 Northern Ireland Act 1998, sch 2.

151 See also, Anurag Deb, 'The Union in court: *Allister and Others' Application for Judicial Review* [2021] NIQB 64' (2021) 72(AD1) Northern Ireland Legal Quarterly 90–114, 108–109. While I agree with Deb's argument concerning the relevance of the resolution for application of Arts 5–10 of the Protocol, and the distinction with international relations, the question on this point can be answered much more straightforwardly, in my view, by reference to the statutory text of the NIA 1998 and its underlying political basis in the 1998 Agreement.

152 *Allister* (n 8 above) para 89. The court also referred to Jim Allister's affidavit in which he provided the example of the use of a petition of concern in a 2009 Assembly vote concerning Israel.

153 By *political* unionism, I refer not to those with pro-Union sentiment in the constitutional sense but, rather, in the much narrower sense of voters of avowedly unionist parties.

arguing for further changes – along the lines of the Windsor Framework and, more debatably, *Safeguarding the Union* – through the mandated independent review. Indeed, the consent resolution may well be the most pragmatic solution to preserve the post-1998 constitutional order in the face of such stark constitutional choices. Viewed in that sense, the deeply expedient *legal* accommodation of hard political realities was made possible only by a highly formalistic interpretation of the legal text. This may be a case in which judicial pragmatism was necessitated not by the purposivism evident in early key cases such as *Robinson*,[154] but by much more austere legalist method. A similar mode of reasoning has prevailed in recent cases concerning ministerial power and conduct.[155]

Even if it is the case that protection of the democratic process in Northern Ireland, as well as the smooth implementation of post-Brexit trading arrangements between the UK and EU, required a narrow interpretive approach of that nature, it cannot be overlooked that the positivist construction of the statutory text in *Allister* permits unilateral, and ostensibly unbounded, government power to reshape constitutional doctrine.[156] This extends, of course, to tenets of the Northern Irish constitutional order that underpin cross-community governance. The approach taken in *Allister* to the petition of concern also usefully shows the uncertainty caused by mutable judicial methods applied to constitutional adjudication in Northern Ireland over the past two decades. Constitutional meaning has often been revealed through much more purposive approaches than that evident in the *Allister* trilogy of cases. In moments of political crisis, deeply pragmatic judicial outcomes have also been prompted by the construal of statutory text against values identified as embodied in the post-1998 constitutional order. In the seminal *Robinson* judgment in 2002, Lord Bingham wrote that the NIA 1998 should be 'interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody'.[157] Those values were said to centre on 'shared political institutions' and 'democratic ideal[s]'.[158] More recently, a similar approach was applied by the Court of Appeal in *Buick's Application*.[159]

154 See Anthony (n 4 above).

155 Anurag Deb, 'The Northern Ireland Executive: politics, law and a rethink of judicial intervention' (2024) 75(2) Northern Ireland Legal Quarterly 267–297, 291–293.

156 This point is also made by Elliott and Kilford (n 142 above) 100–101.

157 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, para 11. See also Lord Hoffmann in *Robinson* at paras 25, 30.

158 Ibid paras 11–12.

159 *In Re Buick's Application* [2018] NICA 26 [41] (Morgan LCJ and Stephens LJ).

Problematical for that mode of anti-positivist reasoning is that such values invariably overlap and when applied to a specific dispute their constitutional force can point to conflicting, but equally legitimate, outcomes. Lord Bingham recognised in *Robinson*, for example, that the 'democratic ideal' of popular elections, and their use in 'resolving political impasses', as embodied in sections 32(1) and (3) of the NIA 1998, may sometimes be in tension with the principle of stable government and responsive political leadership.[160] Application of that latter category of values ultimately prevailed in Lord Bingham's reasons in view of the specific nature of the political dispute at issue. Also in *Robinson*, Lord Hoffmann wrote that the 1998 Agreement's 'fundamental purpose [is] to create the most favourable constitutional environment for cross-community government'.[161] Both the inherent malleability of those values, and contestation over how they are most appropriately fulfilled, add an unpredictable variable and layer of complexity to the resolution of constitutional disputes. It may also be true that the adoption of an anti-formalist view of constitutional principle in *Allister* would have provided a stronger basis for legitimising the constriction of the petition of concern. More specifically, it could have been argued that the text of section 42 must bend and, ultimately, be framed in such a way as to facilitate a transition to stable government, and a de-escalation of Brexit-induced political tension, as politicians navigated an inexorably fraught Article 18 democratic consent vote.

A purposive interpretive approach to constitutional reasoning was also evident in the Court of Appeal's approach four years ago in *Close and Others' Application* in further narrowing the operation of section 42. The litigants in *Close* had initially argued, but ultimately did not pursue, the point that a petition of concern cannot be used 'in matters seeking to advance, promote and protect human rights'.[162] The court held that 'enhanced' judicial review must be applied where a petition of concern is used to 'defeat the will of the Assembly' on an issue concerning 'a difference of treatment on the grounds of sexual orientation'.[163] No such constraint over the petition's operation appears in the text of section 42. The decision raises the possibility of bare majoritarianism, contrary to section 42, prevailing on matters of anti-discrimination.

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160 *Robinson* (n 157 above) paras 11–12.

161 Ibid para 30.

162 *In Re Close and Others' Application for Judicial Review* [2020] NICA 20 [3]. This closely aligns with the argument made by NIPSA that the petition of concern is used 'as a veto to discriminate against sections of society (see n 110 above).

163 *In Re Close* (n 162 above) para 54.

But the extent of any such interpretive reshaping of the petition is unclear: in the realm of cultural expression, for example, could a bare majority suffice to progress additional funding for Irish language schemes in the face of overwhelming unionist opposition? And would the same principle apply to draft legislation on contentious matters concerning the Orange Order if nationalist parties object? Further, what principles would the judiciary draw on to separate, and then balance, the specific interests or protections of one community – ostensibly safeguarded by the petition of concern – on the one hand, and, on the other, the advancement of rights protections, or non-discrimination measures, for others in the community? The case again reveals the great difficulty that would eventuate in hard cases in the judicial balancing of core principles – the consent principle and minority rights – found within Northern Ireland's constitutional order. Furthermore, the court acknowledged in *Close* that evidence supported the conclusion that there was 'less enthusiasm for the introduction of same sex marriage in the unionist community than among other groups in the Assembly', thus illustrating that a distinct boundary between, as Schwartz labelled it, 'regular politics and constitutive constitutional politics'[164] is often absent.

The foregoing shows the high degree to which the meaning of constitutional principle in the post-1998 order is shaped by the changing winds of judicial method. That sense of contingency is unhelpful.[165] As the fulcrum of the current Northern Irish constitutional settlement, the consent principle contains an irreducible core of equality in power-sharing that legitimates the entire governance framework. Rory Montgomery argued three years ago that any change to the mechanisms embodying the consent principle would represent a 'departure from a fundamental principle: that the institutions, and indeed all aspects of the [A]greement, require the backing of majorities of unionists and nationalists'.[166] In that sense, too, a much greater degree of stability can be achieved in constitutional reform, and in the resolution of disputes over constitutional meaning, when political actors rather than judges assume primacy in undertaking, and ultimately agreeing on, the resolution of such questions.[167]

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164 Schwartz (n 119) 359.

165 On the impact of tensions evident in judicial method in very early cases relating to interpretation of the 1998 Agreement, see Gordon Anthony, 'Public law litigation and the Belfast Agreement' (2002) 8(3) European Public Law 401–422.

166 Rory Montgomery, 'Meddle with the Belfast Agreement at your peril' *Irish Times* (Dublin 26 November 2022).

167 See also Morison and Lynch (n 20 above) 131–132.

The consent principle can also act as a lodestar for constitutional reform: indeed, a much-overlooked dimension is its positive operation beyond a solely 'defensive' or 'blocking' posture. The principle *enlarges* the self-governing powers of Northern Ireland in two key senses. First, it necessitates broad support on public policy questions from representatives across the constitutional divide to sustain political progress. The NIA 1998 provides for reserved powers to be devolved from Westminster to the Assembly where there is cross-community consent,[168] as was the case when policing and justice powers were transferred in 2010.[169] Consensus must be sought from those holding a range of constitutional viewpoints in what remains a deeply divided society.

Secondly, the mechanisms giving effect to the principle provide the Northern Irish electorate, and not the courts, the primary say on contested policy and governance matters. This is evident, for example, in the rules regulating the formation of the Executive. As unseemly as events transpired, the two most recent uses of an effective veto on the Executive functioning (Sinn Féin's action in January 2017 and those of the DUP in February 2022) reflected profound levels of discontent within sections of the community at the operation of government: both impasses were resolved, ultimately, by significant constitutional amendment (in the form of NDNA, the Windsor Framework, and *Safeguarding the Union*), and for which both parties were rewarded with strong electoral support. The courts, by contrast, have long proven an imperfect forum for the resolution of political and intra-Assembly disputes.[170] Ultimately, then, diminution of the petition of concern's operation – reflective of a core democratic principle in the constitutional order forged in 1998 and strongly endorsed in a popular referendum – can be legitimated only when the people's representatives reach a degree of consensus, the strength of which can be put to the electorate for endorsement at periodic elections.

CONCLUSION

Two decades ago, Christopher McCrudden presciently wrote that:

> the traditional and emerging British constitutional approaches are likely over time to reassert themselves, submerging the *sui generis* aspects of the Northern Ireland constitution unless the latter are continually safeguarded and reinforced … where constitutional pragmatism [has]

168 NIA 1998, s 4(3).

169 The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

170 See Deb (n 155 above).

> came to the fore, the sui generis ideological aspects of the Agreement were constantly under pressure.[171]

The *Allister* judgments embody a deep sense of constitutional pragmatism. The textualist approach applied to key provisions of Northern Ireland's constitutional settlement severely constrained the consent principle. *Close*, however, shows how a more purposive approach *may* be used to affect the consent principle in a similarly transformative sense: again, materially narrowing the doctrine's operation. It is a distortion of how the principle was envisaged to operate in the 1998 Agreement and post-1998 constitutional amendments. But it is eminently possible on both an orthodox textual construction *and* purposive interpretivism of the post-1998 settlement's provisions embodying the consent principle to conclude that it is the foundation point of that constitutional order and possesses a distinct and immutable operational core. 'That one party can exercise a veto is deeply unpalatable. But it is a consequence of a core element of the [A]greement.'[172] There is no doubt that significant change to the Northern Irish political settlement is needed in order to avoid, or at least limit, further institutional paralysis. The point of this article, however, has been to caution against reform that cannot carry the significant support of the two main political traditions in the jurisdiction: that is true regardless of whether those reforms are mooted by political actors in the 'middle ground', by government actors from Westminster, *or* have emerged from highly contestable and inconstant judicial interpretivism. Reform without that depth of support is, ultimately, contrary to the very basis of the constitutional order initiated by the 1998 Agreement.

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171 Christopher McCrudden, 'Northern Ireland, The Belfast Agreement, and the British constitution' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* 5th edn (Oxford University Press 2004) 235.

172 Montgomery (n 166 above).