The authors of this joint memorandum are as follows:

Christopher McCrudden DPhil is a Fellow of the British Academy, Professor of Human Rights and Equality Law at Queens University Belfast, William W. Cook Global Law Professor at the University of Michigan, and a visiting professor at the University of Oxford, where he was previously Professor of Human Rights, and a practicing barrister-at-law (Blackstone Chambers).

John McGarry PhD is a Fellow of the Royal Society of Canada and Canada Research Chair in Nationalism and Democracy at Queen's University, Kingston, Ontario, and previously Professor of Political Science at the University of Waterloo. He was previously Senior Advisor on Power-Sharing to the Mediation Support Unit of the Department of Political Affairs of the United Nations.

Brendan O'Leary PhD is Lauder Professor of Political Science at the University of Pennsylvania, and Professor of Political Science at Queen's University Belfast, and previously Professor of Political Science at the London School of Economics & Political Science. He was previously Senior Advisor on Power-Sharing to the Mediation Support Unit of the Department of Political Affairs of the United Nations.

Alex Schwartz PhD is Banting Postdoctoral Fellow and Adjunct Assistant Professor with the Department of Political Studies at Queens University (Canada). He holds a doctorate in law from Queen's University Belfast, where he also taught constitutional law and European law. Previously, he was a visiting academic with the Centre for the Study of Social Justice at the University of Oxford and a postdoctoral fellow with the Canada Research Chair in Quebec and Canadian Studies at L'Université du Québec à Montréal.

Christopher McCrudden, John McGarry, Brendan O'Leary & Alex Schwartz

D'Hondt

The use of the d'Hondt system for executive formation in Northern Ireland should be preserved. It has served Northern Ireland extremely well. It ensures a proportionally composed executive. The executive is fairly composed of those parties with a sufficient mandate, and the decision to take up executive portfolios is voluntary, though that is sometimes forgotten. The d'Hondt "sequential and proportional allocation mechanism," as it is strictly described, (O'Leary, et al.: 2005) provides an automatic solution to the standard problem of government formation in a vibrant multi-party setting. The mechanism provides an elegant, transparent and democratic way of avoiding the lengthy and costly negotiations that sometimes delay government formation in countries that use proportional representation election systems. The examples of Israel, Iraq, and Belgium are well known to all MLAs.

The d'Hondt system is not, in fact, unique to Northern Ireland, if by "unique" is meant singular. The d'Hondt divisor, named after Viktor d'Hondt is the independent European invention of a method first devised by Thomas Jefferson to structure the apportioning of congressional districts among the several states for elections to the US House of Representatives (Balinski and Peyton Young: 1982). The d'Hondt (or Jefferson) divisor has been widely used in proportional representation elections to allocate parliamentary seats in proportion to votes won by parties (Taagepera and Shugart: 1989; Lijphart: 1994; Cox: 1997). The d'Hondt system has also been used to allocate committee chairs and places in the European Parliament (Hix and Høyland: 2011). Indeed its usage within the European Parliament was undoubtedly one of the inspirations for its adaptation by Northern Ireland's politicians, who first discussed the use of d'Hondt amid what were informally known as the Brooke-Mayhew talks of 1991-2. Even the use of d'Hondt to allocate executive portfolios is not unique to Northern Ireland. The method has been used in the four largest Danish municipalities of Copenhagen, Aarhus, Odense and Aalborg, with a combined population of over one million people, for decades (O'Leary, et al.: 2005). The Government of the Brussels-Capital-Region, which regulates a population larger than that of Northern Ireland, also allocates portfolios according to the d'Hondt system, while allowing for subsequent exchanges of portfolios (Source: Correspondence between Brendan O'Leary and Steven Verbanck, Brussels 2012, awaiting further confirmation). We also believe that variations

on d'Hondt have been contemplated as constructive ways of resolving conflict in Cyprus (Source: Correspondence between John McGarry, Brendan O'Leary and Dr Neophytos Loizides).

So, the system has worked, is used and proposed elsewhere, and is predictable. There have been no technical difficulties in its use. The relevant provisions of the Northern Ireland Act 1998, as amended, are well drafted. Successive Northern Ireland Assembly Presiding Officers and their colleagues have run the system professionally. The legislative drafting was careful. It considered the possibility that there could be ties among parties at various stages in the allocation process, and chose to break these ties by the parties' respective first-preference vote totals, thereby linking the electorate's preferences to the determination of ministerial portfolios in a transparent manner that is fully in keeping with our shared democratic ethos.

We may usefully contrast Northern Ireland's peace agreement and political institutions with some recent less successful settlements where the parties in conflict agreed to share power, but not on the details of how to share ministries, or particular portfolios, which later gave rise to conflict and disagreement, see e.g. Kenya's 'Serena Accord' of February 2008, or Zimbabwe's agreement of 2009 (for further critical appraisal of these cases see Cheeseman and Blessing-Miles: 2010).

We also note that, in a very constructive manner, the currently leading parties among the nationalists and unionists agreed to meet to indicate how they would express their preferences among portfolios before the actual legal determination by the d'Hondt mechanism in the Assembly. This decision, a welcome demonstration of mutual confidence-building, was intended to avoid "surprises" in the formal allocation process in the Assembly, and enabled the parties to express and resolve whatever anxieties they deemed fit to discuss. This, we think, was an exemplary case of mutual confidence building. We regard this development as entirely constructive, and see no reason why it should not act as a precedent. But we nevertheless believe it essential that the formal d'Hondt mechanism be preserved to help the parties co-ordinate close to what would be the default outcome if they could not agree to avoid springing surprises on one another.

The d'Hondt mechanism is not only working, transparent, elegant, designed to avoid deadlocks over government formation, and better than some international comparators, but also strongly inclusive. All parties with a significant electoral mandate benefit from the d'Hondt mechanism because they can then get automatic access to the executive, if that is what they seek, and

provided that they bind themselves to democratic and peaceful politics through the pledge of office. No other party can veto their presence; differently put, no one can veto those whom their voters mandated. This feature of the d'Hondt system is exceptionally important in a place which has been as deeply divided as Northern Ireland. Government formation would have been extraordinarily difficult if the parties had been obliged to negotiate not only over the number of portfolios and their allocation but also over which parties would comprise the executive and which ministers would be allocated to which ministerial portfolios.

The d'Hondt system is also democratically fair. Other things being equal, the party which wins more votes wins a stronger presence in the executive. The Northern Ireland executive, so far, has not been deadlocked by micro-parties, which famously have had excessive "pivotality" in countries such as Israel. It is true that the d'Hondt divisor (1, 2, 3… n) benefits larger parties (slightly) more than other divisors that could be used for executive portfolio allocation (e.g. Sainte-Lagüe or Webster (1, 3, 5, … n)) (see Taagepera and Shugart: 1989). Indeed, among the family of possible divisors, d'Hondt is the most frequently used precisely because it benefits larger parties. But it can be justified from an institutional design perspective because, in a modest way, it discourages excessive party fragmentation.

While some among us spoke up in previous academic engagements for both d'Hondt and Sainte-Lagüe, none of us see any strong current case for changing the divisor formula for executive formation from d'Hondt to Sainte-Lagüe. That the Democratic Unionist Party and Sinn Féin have been the recent beneficiaries of a rule that was initially agreed in negotiations between the Ulster Unionist Party and the Social Democratic and Labour Party is not a principled reason to change the system. Indeed, the case that used to be made for Sainte-Lagüe was partly based on the idea that it would help to include the DUP and Sinn Féin, then the second largest parties in their designations, a need that is now otiose. We shall consider the situation of the 'others' in due course.

We strongly believe that, without the inclusionary mechanisms of the d'Hondt system, Northern Ireland's currently largest political parties would have found it far more difficult to have come to a stable accommodation. We have seen remarkable changes from both of these parties. Sinn Féin is committed to exclusively peaceful and democratic politics; its leaders delivered IRA cease-fires and encouraged the IRA's subsequent internationally supervised disarmament and disbanding; and republicans now accept Northern Ireland's newly reformed police and work within Northern Ireland political institutions. The DUP has accepted executive power-sharing with republicans; all-island and cross-border bodies are jointly run with the Government of

Ireland; there has been significant transformation of the police; and justice and policing oversight have been devolved on a power-sharing basis (for discussions see McGarry and O'Leary: 2004; Mitchell, et al.: 2009). By any standards, these are remarkable movements towards accommodation. For that reason we think that great care should be taken to avoid the premature dismantling of the institutional machinery that helped make this possible.

A last word is called for here in defence of the d'Hondt mechanism for executive formation before we broaden the discussion. In our view, the agreement reached at Saint Andrews to modify the rules governing the choice of the First Minister and Deputy First Minister was not only procedurally correct but was entirely appropriate for a functioning and liberalized consociation. Under the previous rule, a concurrent majority of designated nationalists and unionists as well as a concurrent majority in the Assembly had to elect the First Minister and Deputy First Minister. This rule was consociational, but it was also an example of "coercive centripetalism": it obliged nationalists and unionists actively to support one another's nominees for these positions. It therefore became a source of tension. It also made the choice of an 'other' for either position highly unlikely. By contrast, the rule now in use for the choice of the First and Deputy First Ministers is the functional equivalent of the d'Hondt system: Northern Ireland has three blocs, nationalists, unionists and others, and the premiership is shared among at least two of them. In our view the new arrangements are very close to allocating two portfolios among three parties by using d'Hondt, and therefore corresponds to what some of us previously recommended as a productive change, to let each group choose its own leaders free of the constraints of requiring the endorsement of other parties (McGarry and O'Leary: 2004; McGarry and O'Leary: 2004; McGarry and O'Leary: 2007).

The debate about d'Hondt should be seen in the broader context of a profound debate over the type of democracy that is most effective in a divided place like Northern Ireland. There are two basic models among contemporary democracies: the winner-takes-all (or majoritarian) model, illustrated by the traditional Westminster model; and a consensual (or proportional) model, such as that which operates in contemporary Belgium (Lijphart: 2012; Powell: 2000).

In the winner-takes-all model, especially suited for homogeneous societies, governments or cabinets endorsed by bare majorities in the legislature ("minimum winning coalitions") are seen as virtuous. Its defenders say that under the Westminster model the Government faces a recognized Opposition, in a predominantly two-party or two-bloc system, and is thereby held to account. The electorate is also provided an alternative Government-in-waiting.

This, of course, was the model applied to Northern Ireland under what has been called the "Stormont" system (McCrudden: 1997; O'Leary and McGarry: 1993). This adversarial model, it is widely argued, was deeply unsuited to a deeply divided place, especially when there seemed to be a permanent governing majority: none of the benefits that might have flowed from alternation in government were available. We also observe that the Westminster Parliament itself has presided over a series of changes in the United Kingdom's constitution that are significant departures from the full winner-takes all model (in the devolved institutions in Scotland and Wales), in elections to the European Parliament, in some local and regional institutions and election systems, and in the UK's key legal institutions) (see e.g. King: 2001; and Morison: 2001). There have also been minor modifications to the parliamentary committee system. Against this context, we are somewhat perplexed by calls for Northern Ireland to resemble more the Westminster model of Government-Opposition. These demands seem to us to be premature, at best.

The alternative conception of democracy to a winner-takes-all model (which easily slides into "majoritarianism") is the consensual model, which places a much higher value on inclusivity and power-sharing. There are many variations in consensual systems but the most consensual are of the 'consociational' kind (built around the core principles of parity, proportionality, autonomy and veto rights among equal communities). We are not alone in classifying the 1998 Agreement as of this kind (McCrudden, et al.: 1998; McCrudden, et al.: 1998; O'Leary: 1999). Great care, in our view, should be taken in modifying or dissolving consociational institutions, especially when they have proved their worth in helping to calm conflict and deliver stable government. That is why we entirely share the Secretary of State's view that any changes to the institutions must be consistent with the power-sharing and inclusive values of the Agreement.

We believe, in summary, that the d'Hondt system helps create an inclusive and broad-based government, one which incorporates all those, including the 'others', who win a significant mandate from the electorate. The d'Hondt system not only helps to protect today's nationalist minority against possible majoritarian excesses by the unionist majority of today, but also protects the possible unionist minority of tomorrow from the possible majoritarian excesses of a possible future nationalist majority. No change to this system should occur, legally or in practice, without cross-community consent.

Opposition & Accountability

The Review Committee will be well aware that the d'Hondt system does not oblige an all-party, comprehensive, or "grand coalition." Any party is free to choose to go into opposition. The fact that there are five parties in the current executive is a choice, not one that is forced by the rules. It is true that the largest unionist and nationalist parties will always face enormous positive incentives to join the government (and thereby obtain one of the co-equal first ministerships and an allotment of cabinet portfolios), but the point stands: membership of the government is voluntary. The constraint is that no party can demand the exclusion (or inclusion) of other parties. Through the d'Hondt system, the parties entitled to portfolios in the executive have their entitlements determined by the electorate as a whole. In future circumstances one can perfectly imagine any of the five largest parties going into opposition (along with the TUV), by refusing to take up their entitlements to portfolios on the executive.

The current system also provides for ministers to be held to account by statutory committees. We may be mistaken, or out of date, but it has been our joint and sustained reading of the Northern Ireland Act 1998 that section 29 (5) requires the Standing Orders of the Assembly to provide that, in making nominations for chairs and deputy chairs of statutory committees, the relevant party nominating officer "shall prefer a committee in which he does not have a party interest to one in which he does." We have assumed that the "shall" here is mandatory, and that therefore parties are obliged not to nominate members to be chairs or deputy chairs of committees which are scrutinizing ministers who come from their party. The wording on the documents sent to us was equivocal on this matter, which is why we raise the matter. In short, we assume (a) that section 29(5) applies with the meaning we construe it to have, and (b) that this is a good thing. In winner-takes-all systems it was historically rare for opposition parties to chair anything other than public accounts committees (as a check on corruption). Indeed, in such systems governments have usually been very careful to ensure that they keep control over virtually all committees. So, nothing in the Northern Ireland arrangements is prima facie constitutionally odd, even by the majoritarian standards of winner-takes-all systems, except that Northern Ireland's arrangements are both more inclusive and potentially open up the executive to more scrutiny. Unusually, Northern Ireland's new system specifically provides for ministers to be faced by committee chairs and deputy chairs who are not from their own party on key committees. These chairs and deputy chairs have good reasons to hold the relevant minister to account and are likely to be in receipt of both formal and informal information that is likely to enable them to perform their tasks well. We think that this is a good arrangement, and would want evidence that it is not working before being persuaded of the need for change.

We also note that the ratio of executive members to non-executive MLAs is not high. When there are two first-ministers, ten ministers, and two junior ministers, then approximately 13 per cent of the MLAs would be in the government. That would leave a very high proportion of the Assembly, 87 per cent, outside of the executive. In addition, each ministerial member of the executive typically faces a committee comprised of a majority from other parties, hardly a position that automatically favours the executive. Precisely because Northern Ireland's programme of government (and the other obligations ministers owe one another, legal and prudential) are not as binding as those imposed by rigorous collective cabinet responsibility under winner-takes-all we suggest that Northern Ireland's ministers are possibly *more* exposed to scrutiny (by MLAs whose parties are also in the executive, as well as without) than their Westminster counterparts. We are therefore not persuaded that Northern Ireland suffers from a lack of a powerful Opposition because of the rules and institutional design of the Northern Ireland Act 1998, as amended.

A last point on the committee system: the existing institutional design permits a party that does not take up its entitlement to executive portfolios to nominate its members to chair and deputy-chair committees in the relevant d'Hondt sequential order. This system certainly does not punish a decision to go into opposition, and has no counterpart in the Westminster model.

Northern Ireland is governed differently from the rest of the United Kingdom partly because it is different. One clear difference is the remarkably effective joint leadership embedded in the First Minister and Deputy First Minister. There can be no meaningful singular Leader of the Opposition to these two post-holders, without generating the spectacle of a First Leader of the Opposition and a Deputy First Leader of the Opposition. The First Minister and Deputy First Minister jointly run the executive but only control their own ministers on the executive. The First Minister and Deputy First Minister are, however, open to interpellation. They answer questions for half an hour on Mondays. Answers are rotated sequentially between the two post-holders. MLAs do not decide which of them answers their questions. The Speaker determines which questions are to be asked through random computer selection.

We know of one recently published study regarding the questioning of ministers in the Northern Ireland Assembly by Dr. Conley, a political scientist at the University of Florida, and just published in Irish Political Studies, and it seems most impressive (Conley: 2013). Conley demonstrates a decline in the number of questions posed to the executive over the period 2007-

2011, but convincingly shows that the cause was not an example of increasing executive reluctance to be questioned (a pattern first found in empirical research in this vein on the questioning of British prime ministers since 1868 (Dunleavy, et al.: 1990)). Rather, the recent Northern Ireland experience reflects the successful determination of the Assembly to obtain more substantive answers from ministers through procedural reforms that decreased the number of questions and expanded the time available for Ministers to answer.

Conley's other research findings include the following items among many which could have been selected:

- The First Minister and Deputy First Minister, who have no control over the questions they face, give substantive answers and do not refer matters to other ministers. They are, however, given ample time to prepare under Standing Orders that oblige them to answer as clearly and fully (a clear shift from Westminster-style adversary politics).
- The SDLP's and the UUP's MLAs were the most active in holding the executive to account on general government questions (more than 20 per cent of the SDLP's and more than 30 per cent of the UUP's questions concerned the functioning of the executive). These data suggest, in Conley's words, that the "minor designated parties often assumed the role of the 'loyal opposition.'"
- The MLAs systematically vary by party regarding what subjects they raise (e.g. Sinn Fein's specialty is in social policy, whereas Alliance specializes on social cohesion).
- Constituency concerns constituted a full one-third of the questions posed to the First Minister and Deputy First Minister.

Conley's research results suggest an emergent and mature consociational system, attuned to Northern Ireland's political requirements, in which the need to incentivize 'co-operation' has been successfully balanced against the benefits of incentivizing 'accountability.' At least regarding Question Time, we think that creating occasions for more dramatic debating pyrotechnics could increase heat rather than light and would not necessarily be good for the people of Northern Ireland, who might welcome a period of dullness in executive-legislative relations.

We also think it would be perverse if the Assembly sought to reward parties because they went into opposition (rather than choosing to cooperate), when they currently have the opportunity both to co-operate and oppose. We therefore see no clear need for enhancing the resources (whether in money, time or positions) for exclusively opposition parties (i.e. those not

in the executive) as opposed to enhancing the research and information-processing capabilities of all MLAs (e.g. through giving them the capability to hire more highly skilled assistants to aid them in scrutinizing policy issues and the public administration, as opposed to handling constituency matters).

The consociational principle of proportionality suggests that parties should have resources commensurate with their popular support. It would be odd to reward largely uncalled-for-adversary politics by giving those who deliberately go into opposition, or who fail to win significant electoral support, disproportionate resources. We suggest, in short, that non-executive parties in opposition should have no more call on public resources than a consistent proportionality rule would suggest (and that MLAs in parties in the executive should enjoy the same, proportional support). Similarly, time for non-executive business should be proportionally linked to the size of non-executive parties, but no more.

We are also not persuaded by the suggestion that there should be more "votes of no confidence." Under sections 32(1) and 32(2) of the *Northern Ireland Act 1998* the Assembly may dissolve itself through a qualified majority. We have a strong preference for executive stability, and believe that the qualified majority aids stability. Elections will remain polarized in Northern Ireland. There is no need to increase their number or frequency, though occasionally elections may resolve a deep crisis within the executive. It remains true that under section 32(3) of the *Northern Ireland Act 1998* (as amended) that the First Minister or the Deputy First Minister can trigger an election if they resign and their party refuses to fill the vacated post. We would prefer that the resignation of either a First Minister or a Deputy First Minister could not take place without the relevant party having nominated the successor. Executive stability is a good thing, provided the executive is representative and accountable. Northern Ireland certainly does not need to become like France's fourth republic or Italy's first republic, where the executive often formed and reformed more often than once a year, and where the same personnel often simply moved around ministerial offices. It is neither good for government nor good for attracting inward investment.

Perhaps the suggestion is that there should be votes of no confidence in particular ministers. There is already provision, however, to admonish and suspend ministers in breach of the pledge of office. With cross-community consent a party can be excluded from access to the office if it has breached the pledge of office. Is more needed? Our perspective is that the d'Hondt executive formation system in Northern Ireland is closely analogous to Switzerland's election of its federal executive council. Though the Swiss voting is majoritarian in form it is consensual in

substance, and once the federal executive council has been elected it is like a presidency (Steiner: 1982), that is, it cannot be replaced until the next general election, although individuals may lose office because of criminal conduct which disqualifies them. Likewise in Northern Ireland we think that one appropriate way to conceive of the emerging political system is that the public through its votes determines Northern Ireland's executive for the next legislative term. Parties may replace individual ministers, and are wise to do so if their ministers are inadequate or have been engaged in maladministration. They should surely suffer electoral retribution if they do not replace ministers who have disgraced themselves; and that should be quite sufficient for them to act.

Designation

A foundational component of the April 1998 Agreement, endorsed by the referendum of May 1998 in both parts of Ireland, was the use of designation rules to protect the interests of nationalists, unionists and others. Designation affects the election of the First Minister and the Deputy First Minister (though now in a different manner to the original design), but it has no effect on the formation of the rest of the executive (the d'Hondt algorithm is difference-blind and operates according to party strength, not designation by national identification).

One useful way to think about designation rules in a consociational system is that they reflect the tension between sometimes competing consociational principles, namely, parity between the consociational partners as communities, and proportionality as an electoral, representational and allocational rule (see McCrudden and O'Leary: 2013 Ch. 1. C. 14ff). Proportionality as such (e.g. through the single transferrable vote in multimember constituencies to elect MLAs, or d'Hondt to allocate executive portfolios and committee positions) does not prevent one community from being consistently outvoted according to simple majority voting procedures. Designation was intended to achieve parity to avoid simple-majority rule under proportional rules leading to one community's dominance, both now, and in the future should there be a demographic and electoral reversal of community fortunes. The Northern Ireland 1998 Act, as amended, produces parity through obliging concurrent majority support or weighted cross-community consent on specific matters that affect the vital interests of the partners.

Experience in the period between1998 and 2002 taught MLAs that the use of the concurrent majority requirement for the election of the first and deputy first ministers demanded too much of the partners (and of "the Others", in extremis), so the rules for electing the First Minister and the Deputy First Minister were modified with wide consent. The new rules have so far worked

without proving troublesome. The existing rules do not prevent those who choose not to identify with either the nationalist or unionist designation from holding either of the offices in question. If the "others" were to become the largest or second largest designation within the Assembly, the largest party among the "others" would then appoint one of their own as the First Minister or Deputy First Minister. In short, the rules prevent the leadership of the Executive from being captured by a single community, but do not exclude those who prefer not to designate as nationalist or unionist. In so far as "designation" is used for the appointment of the First Minister and Deputy First Minister, we therefore see no need for reform.

The question of how "designation" is used for "key" decisions or for decisions subjected to the Petition of Concern procedure is somewhat more complicated. The underlying rationale for these qualified majority-voting rules is to protect the interests of the two historically largest and most antagonistic communities in Northern Ireland by allowing each group of their representatives to veto important proposed decisions when they do not attract a significant degree of cross-community agreement. In keeping with this rationale, the rules make it impossible for the votes of any single party, regardless of how many seats they hold, to be both necessary and sufficient in attaining a winning coalition of votes.

These special decision rules are frequently said to be unfair to those who designate as "others." That is because the rules make the votes of Others less decisive (more strictly, less likely to be pivotal) than the votes of designated nationalists and unionists (McGarry and O'Leary 2004; and see Schwartz: 2011 for a treatment that applies "power indices" developed in the political science of voting). Whenever cross-community decision-making rules apply, the votes of "others" are only potentially decisive regarding the majority threshold or qualified majority thresholds, while, by contrast, the votes of nationalists and unionists are potentially decisive for both the majority or qualified majority thresholds as well as for one of the intra-nationalist or intra-unionist thresholds.

We observe first that it would not be a good solution to this question to give the "others" a parallel role as a designated community in cross-community consent procedures, because that would, at least at present, dramatically give undue weight to their voting power in the Assembly compared with their support among the electorate, and because they have not sought such a measure. We also observe that on current electoral trends, without any cross-community consent procedures, and with an Assembly run on simple majority rules, "the others" would likely be disproportionally "pivotal" in the Assembly in the decade ahead, in the same way that small parties in Germany or Israel have frequently punched above their electoral weight in

executive and legislative decision-making. We also observe, third, that there is no compelling evidence that these rules have so far functioned as disincentives for voters contemplating support for the "others." Support for the latter category has increased slightly in net terms in the fifteen years since the 1998 Agreement, whereas it had fallen in the fifteen years before the Agreement (any argument that possible growth in support for the "others" has been held back by the rules would in our view rest on highly speculative counterfactuals).

Some have suggested (and some of us have at various junctures been open to the idea) that the existing cross-community and weighted majority decision rules could be replaced by a truly "difference-blind" qualified majority decision rule, i.e. one that makes no use of community designation. Any such revised decision rule would have to be consistent with the rationale of blocking decisions that lack a significant amount of nationalist and unionist support, and should itself attract their respective support with roughly equal intensity. But, several difficult questions then arise.

The first is to choose the number at which the qualified majority rule would be fixed. On the one hand, a relatively lower threshold is a relatively less reliable means for blocking decisions that lack de facto cross-community consent. For example, given the current composition of the Assembly, a 60% threshold would not be a very secure guarantee for nationalists. The total number of nationalist MLAs is 43, i.e. about 39.8% of the Assembly. Thus, a decision which attracted no nationalist support whatsoever could still pass the Assembly under a qualified majority threshold of 60%. Allowing such a possibility is not, we suggest, why nationalists voted overwhelmingly and enthusiastically for the 1998 Agreement. On the other hand, a relatively higher qualified majority threshold risks giving a single party the power to block any motion or Bill it chooses, regardless of the subject matter. Under a 65% threshold, assuming the current composition of the Assembly, the DUP (which currently has 38 seats, or 35.1% of the MLAs) would be necessary to any possible winning coalition for legislative resolutions or enactments. In other words, the DUP would have a guaranteed veto (a party veto, not a designated community veto) even though its support falls well short of a majority of the voters. And because the DUP would also have more than 30 seats, the party could unilaterally activate this veto by organizing a Petition of Concern. Meanwhile, the voting power of the second largest party, currently Sinn Féin with 29 seats, could be effectively nullified if all the remaining parties were to vote against its preferences en bloc. Moreover, because the second largest party is also (and is often likely to be) the largest of the two nationalist parties, a winning coalition that excluded that party would have fewer than fifty per cent support among the nationalist bloc. This possibility runs counter to the Agreement's principle of inclusivity.

It would also significantly alter the bargaining power of the parties in the Assembly. Under the existing rules, both the votes of the DUP and Sinn Féin (who each currently have more than 50% of the seats from their respective community designations) are necessary (but not sufficient) for any possible winning coalition, whenever the cross-community consent rules apply. The current provisions, therefore, give these leading designation parties relatively equal veto bargaining power (i.e. "parity"). We also think that requiring a difference-blind qualified majority rule beyond two thirds of the Assembly's members would generate pathologies of its own (seen in other political systems when legislative consent requirements go past two thirds to approach unanimity).

We therefore caution strongly against any precipitate change to the rules which have so far served Northern Ireland and its generally-successful peace agreement very well. We note in passing that there is something rather misleading in the language of "difference-blind" rules. In a place as highly politicized as Northern Ireland, intelligent politicians, parties and communities are more than capable of knowing whether they are likely to stand to lose or gain under various "difference-blind" rules. In short, the situation is not one in which the parties are blind to their likely future strengths and weaknesses under the new rules. For that reason we are inclined to doubt that there is likely to be cross-community consent to change the cross-community consent rules, as would be required by the mandate of the 1998 Agreement, and by its legislative enactment. We cannot identify an equilibrium-qualified majority decision-making rule likely to be agreed by a majority among nationalists, unionists and others respectively. The existing rules protect most the communities that have been most in conflict, and the conflict-regulating effects which they have produced also serve to protect the "others" who want to advance a different politics. For these reasons, we regard the cross-community rules as fully within the margin of appreciation that should be allowed to democratic power-sharing polities (especially because in this case the others are fully protected in the franchise, access to office, their ability to expand their support, in their civil and human rights, and because we know that it can be formally mathematically proven that no voting rule or decision-rule can meet all the desirable properties that democrats would want such rules to have (Arrow: 1963 (1951)).

Lastly, we observe that although the Petition of Concern procedure can be used to subject any decision of the Assembly to these cross-community consent requirements, the procedure has been used relatively sparingly. On the last count (by Schwartz in January 2012), the procedure had only been used 22 times. We have observed that the Petition of Concern has occasionally been abused to block decisions which have nothing to do with community-specific vital

nationalist or unionist interests. Regarding this possibility, we would encourage the Assembly to consider ways in which it might give its Presiding Officer in conjunction with a suitably composed committee of the Assembly means to inhibit what we might call pseudo-petitions of concern. We would not welcome any provision for judicial review of the Petition of Concern procedure, because we think that it is vital, so far as possible, for the consociational partners to make decisions about their joint fate jointly, without calling in outside agencies, such as courts or the two sovereign governments, to resolve matters that the Agreement establishes as being within the jurisdiction of the consociational partners themselves. Should provision for judicial review of a Petition of Concern be considered important by the Assembly, which we recommend against, then we think it would be important for any such provision to be clearly set within and constrained by the language and ethos of the 1998 Agreement.

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