

Law in Northern Ireland

Third Edition

Brice Dickson

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The Evolution of Law-Making in Northern Ireland

1.1 This opening chapter explains how Northern Ireland, and its law-making arrangements, have evolved to be as they are. As in most fields of study, a good historical perspective can help shed light on why things operate as they do today. Of necessity, political more than purely legal developments need to be considered. The chapter begins with an explanation of the origins of ‘the common law’ in Ireland, continues with an account of the creation of Northern Ireland and the arrangements for governing it between 1921 and 1998, and concludes with a summary of the Belfast (Good Friday) Agreement of 1998 and of the difficulties encountered during the ensuing 20 years in the implementation of that Agreement. Subsequent chapters look in more detail at specific aspects of the current law of Northern Ireland, starting in chapter two with an account of the constitutional law.

Brehon Law¹

1.2 Before the arrival of the Normans in 1169, the island of Ireland was largely governed by Brehon law. This was a legal system based on traditional custom, with laws being formulated and applied by respected native jurists called Brehons. Brehon law continued to apply after 1169 in areas outside the Normans’ control and even in areas within their control it continued to govern the native Irish. The Normans themselves were subject to the English ‘common law’ system, which at that time was unifying the various local legal systems throughout England following William I’s invasion and conquest in 1066: it was creating a system ‘common’ to the whole country.

¹ For more details see F Kelly, *A Guide to Early Irish Law* (Dublin Institute for Advanced Studies, 1988) and L Ginnell, *The Brehon Laws: A Legal Handbook* (Littleton, Colorado, Fred B Rothman & Co, 1993).

1.3 As the Normans extended their influence in Ireland, English law slowly became more important.² By 1300 English law applied in most of Ireland, and some 30 years later the policy of leaving the native Irish to be governed by Brehon law was reversed. By this time, however, the Irish were beginning to regroup, with the object of repelling the Norman invaders. Consequently, the influence of English law went into gradual decline. By 1500 English law extended only to the area around Dublin known as the Pale and the rest of Ireland had returned to Brehon law.

1.4 All this changed again with the Tudor re-conquest of Ireland in the sixteenth century, which culminated in the Flight of the Earls in 1607 and the Plantation of Ulster in the ensuing decades.³ The whole of Ireland was then under English control and Brehon law completely ceased to apply. In a famous piece of litigation known as *The Case of Tanistry* in 1607,⁴ Brehon law was declared to be incompatible with the common law of England and therefore incapable of remaining any part of the law in Ireland.

Common Law

1.5 The system of law which has existed throughout Ireland since the seventeenth century is called the common law system, although it is important to note that this is only one sense in which the expression 'common law' can be used. The most fundamental feature of the common law system is that judges as well as legislatures can make the law. Moreover judges in lower courts are required to apply the law that has been laid down in previous decisions by higher courts: this is known as the doctrine of binding precedent. Today, many more laws are created by legislatures than was the case a century or so ago (such laws are called 'legislation'), so there are not many matters which are regulated only by judge-made law. But part of a judge's function is to interpret the legislation applicable to an issue, and the doctrine of precedent operates just as much in the context of those interpretative decisions as it does to decisions on purely common law issues. The doctrine of precedent does not operate in so rigid a fashion in the countries of continental Europe, where a so-called 'civil law' system exists that is largely derived from concepts developed as part of the law of ancient Rome. In such countries the law is contained almost exclusively in codes and even when judges interpret these codes

² See F Newark, 'The Bringing of English Law to Ireland' (1972) 23 *NILQ* 3; T O'Higgins, 'The Irish Legal System' (1996) 31 *Ir Jur (ns)* 1.

³ See J Bardon, *The History of Ulster* (Belfast, Blackstaff Press, 1992), chs 4 and 5.

⁴ See F Newark, 'The Case of Tanistry' (1952) 9 *NILQ* 215. Tanistry was the native Irish system for passing on land to an heir; the Irish word *Tánaiste* is still used to refer to the Deputy Prime Minister of Ireland. See too N Osborough, 'The Irish Legal System, 1796–1877' in C Costello (ed), *The Four Courts: 200 Years* (Dublin, Four Courts Press, 1996) 33.

their decisions are not binding on judges in later cases. The *Code civil* in France, which dates from Napoleonic times, actually prohibits judges from making law.⁵

1.6 After the seventeenth century the law in Ireland and England developed along much the same lines in both places. The territories were administered differently, but the actual content of the law was almost identical. Precedents from both islands were cited in all the courts. Even since the partition of Ireland in 1921 the law throughout the two islands has been based on the same fundamental common law concepts (with the exception of Scotland, where the legal system is more of a mixture of common law and civil law⁶). The legal system in Wales is virtually identical to that in England, although the creation of the Welsh Assembly in 1999, coupled with the extended powers conferred on the Assembly by the Wales Act 2017, has allowed greater scope for differences to emerge.⁷

Parliaments

1.7 In England the Parliament in London developed out of the King's Council (the 'Curia Regis'), and in Ireland the Parliament in Dublin likewise evolved, during the thirteenth century, out of the jurisdiction of the Justiciar, the King's official representative in Ireland. For two centuries there were Parliaments in both England and Ireland, each claiming the power to make laws for Ireland, and it was not until 1495 that a gathering at Drogheda declared that only legislation approved by the English Council could be passed by the Parliament in Ireland. This was the so-called Poyning's Law, named after Sir Edward Poyning, who was the Secretary for Ireland at the time. The Irish Parliament continued to exist until 1800 and it did make some unapproved laws. Yelverton's Act, passed by the Irish Parliament in 1781, was accepted by the government in England as a measure which increased the devolution of powers to Ireland.⁸ Between 1782 and 1800, when it was known as Grattan's Parliament, the Irish Parliament regained some of its former pre-eminence.

1.8 In 1800 the Parliament in London passed the Act of Union, which abolished the Irish Parliament as from 1 January 1801 and joined Ireland to what was then

⁵ Art 5.

⁶ See A Wylie and S Crossan, *Introductory Scots Law: Theory and Practice*, 3rd edn (London, Hodder Gibson, 2017).

⁷ See Ann Sherlock, 'The Continuing Development of Devolution in Wales' (2015) 21 *Eur Pub L* 329; Gwynedd Parry, 'Is breaking up hard to do? The case for a separate Welsh jurisdiction' (2017) 57 *Ir Jur (ns)* 61.

⁸ Barry Yelverton, later Lord Avonmore, was an Irish patriot (though he voted in favour of the Act of Union in 1800).

the United Kingdom of Great Britain (ie, England, Wales and Scotland). From 1801 until 1921 the only legislative body with powers to make laws for Ireland was therefore the Parliament of the new United Kingdom (UK), sitting at Westminster in London. But, while a lot of the legislation enacted for all or part of Great Britain also extended to Ireland,⁹ not all of it did so. Some Acts were applied to Ireland only at a later date or in an amended version,¹⁰ some were not extended to Ireland at all¹¹ and some were specifically enacted for Ireland and never applied in England, Wales or Scotland.¹² Some significant differences between the legislation applying in Ireland and Great Britain emerged during the nineteenth century, when attempts were made to solve the intractable land problem in Ireland, and the two islands got out of step with regard to some issues in family law. Generally speaking though, their laws remained very similar.

The Creation of Northern Ireland

1.9 In the nineteenth century extensive efforts were made in some quarters to break the union between Ireland and Britain so that Ireland could become an independent country. The government in London did propose some Home Rule Bills, which would have gone a long way towards granting autonomy to Ireland, but these were rejected by Unionist politicians in the northern part of Ireland and also by Parliament in London. Parliament did eventually pass such a measure—the Government of Ireland Act 1914—but the outbreak of World War I prevented its implementation. There followed the so-called Easter Rising in Dublin in 1916 and bitter fighting between British soldiers and Irish ‘rebels’ broke out in 1919 in the aftermath of World War I. Eventually negotiations for a transfer of power were successfully concluded and were adopted by Parliament at Westminster in the form of the Government of Ireland Act 1920. Under this settlement the island of Ireland was partitioned, with the Northern part (comprising six counties) and the Southern part (comprising 26 counties) each acquiring its own Parliament and government, both of which had extensive devolved powers. In the future there was also to be a Council of Ireland, which would allow for some all-Ireland policies to be adopted.

1.10 The 1920 Act took effect in the northern part of Ireland, but in the southern part fighting between British forces and Irish rebels continued, being brought to

⁹ eg Offences Against the Person Act 1861, sections of which are still in force today in the Republic of Ireland as well as in Northern Ireland and England; see para 7.17.

¹⁰ eg Supreme Court of Judicature Act (Ir) 1877, based on the Supreme Court of Judicature Act 1873.

¹¹ eg Matrimonial Causes Act 1857, which gave courts the power to authorise divorces.

¹² eg Landlord and Tenant Law Amendment (Ir) Act 1860 (‘Deasy’s Act’). See para 9.10.

an end only when the Anglo-Irish Treaty was signed on 6 December 1921. This treaty provided that the southern part of Ireland would become the Irish Free State and have the same kind of independence from the British Crown as had already been acquired by ‘dominions’ such as Canada and Australia, with King George V as Head of State. The provisional Parliament in Dublin, created by the 1920 Act, approved a Constitution for the new State, as did the Parliament at Westminster, and it came into existence exactly one year after the Anglo-Irish Treaty had been signed. However there was still significant opposition to the settlement in Southern Ireland and a civil war cost many hundreds of lives in the months between June 1922 and May 1923 before the pro-Treaty faction won the upper hand. In 1937 the Irish Free State adopted a new Constitution¹³ and a year later appointed its first President as Head of State, Douglas Hyde. Ireland became a full Republic in 1949, thereby severing all remaining constitutional links with the UK, and in 1955 it joined the United Nations.¹⁴

1.11 In accordance with the Government of Ireland Act 1920, Northern Ireland officially came into existence as a separate legal entity on 3 May 1921, when the union with Britain was re-named ‘the United Kingdom of Great Britain and Northern Ireland’. In time Northern Ireland became known as a ‘province’ of the UK, but that is not a legally recognised term. Its use is based on the fact that in ancient times the island of Ireland was divided into four provinces—Ulster, Leinster, Munster and Connacht. Most of what is now Northern Ireland lies within the ancient province of Ulster, but some parts of Ulster are today located within the Republic of Ireland, where they form the counties of Cavan, Monaghan and Donegal. Northern Ireland’s six counties are Fermanagh, Tyrone, Londonderry, Antrim, Down and Armagh.

The Stormont Parliament¹⁵

1.12 The arrangements for governing Northern Ireland after the partition of the island were set out in the Government of Ireland Act 1920. This document is often referred to as ‘the Constitution of Northern Ireland’, although it was never

¹³ The most authoritative work is G Hogan and G Whyte, *Kelly’s The Irish Constitution*, 4th edn (Dublin, Butterworth Ireland, 2003). See too M Forde and D Leonard, *Constitutional Law in Ireland*, 3rd edn (Dublin, Bloomsbury Professional, 2014). According to Art 4 of the new Constitution: ‘The name of the State is Éire, or, in the English language, Ireland’.

¹⁴ The best introduction to Ireland’s legal system is *Byrne and McCutcheon on the Irish Legal System*, 6th edn (Dublin, Bloomsbury Professional, 2014).

¹⁵ For details see T Hennessey, *A History of Northern Ireland 1920–1996* (Dublin, Gill and Macmillan, 1997); P Buckland, *A History of Northern Ireland* (Dublin, Gill and Macmillan, 1981); M Farrell, *Northern Ireland: The Orange State*, 2nd edn (London, Pluto Press, 1980); J Oliver, *Working at Stormont* (Dublin, Institute of Public Administration, 1978).

officially given that title. The Act created the first ever regional Parliament within the new UK—the Parliament of Northern Ireland. In its early days this Parliament sat in a building owned by the Presbyterian Church in Ireland near Queen's University in South Belfast,¹⁶ but in 1932 it moved to a grandiose building specially constructed for the purpose on a hill at Stormont in East Belfast. Hence the institution became known as the Stormont Parliament.

1.13 The 1920 Act conferred extensive powers on the Parliament of Northern Ireland, namely the right to enact legislation 'for the peace, order and good government' of the province.¹⁷ This was the same phrase as had been used when Britain had previously transferred powers to Parliaments in Canada, Australia and South Africa as part of the decolonisation process. In practice it meant that the Parliament of Northern Ireland had very considerable scope to make laws on matters such as criminal justice and policing, local government, health and social services, education, planning, internal trade, industrial development and agriculture. However it was still a subordinate Parliament, and the Acts it produced were therefore not 'primary' but 'secondary' legislation. The 1920 Act made it clear that certain matters could still be dealt with only by Parliament at Westminster. These matters fell into two categories. First, 'excepted matters', which were those of imperial or national concern, for which it was felt to be undesirable to enact regional variations. They included the armed forces, external trade, weights and measures and copyright law. Secondly, 'reserved matters', which were those which it was hoped would be eventually given to the proposed Council of Ireland (a body that was never in fact created). They included the postal services, the registration of deeds, some taxes (but not road tax or stamp duty) and the judicial system.

1.14 The Northern Ireland Parliament consisted of two chambers—the House of Commons and the Senate—but there continued to be elections for representatives to sit at Westminster on behalf of Northern Ireland constituencies. A person could sit in both Parliaments if elected or appointed to both. There were 52 seats in Northern Ireland's House of Commons and 26 in the Senate; the number of Northern Ireland Members of Parliament at Westminster was initially set at 13 (a reduction from the 30 seats that existed prior to partition), but was reduced to 12 in the 1940s. The government of Northern Ireland was composed of people drawn from the party which won the largest number of seats in the Northern Ireland House of Commons, with the leader of that party taking the title of Prime Minister of Northern Ireland.¹⁸ The King or Queen was represented in Northern

¹⁶ It is now called the Union Theological College.

¹⁷ Government of Ireland Act 1920, s 4(1).

¹⁸ The successive Prime Ministers of Northern Ireland were Sir James Craig (1921–40), John Andrews (1940–43), Sir Basil Brooke (1943–63), Terence O'Neill (1963–69), James Chichester-Clark (1969–71) and Brian Faulkner (1971–72).

Ireland by a Governor, whose official residence was at Hillsborough Castle in County Down.¹⁹

The Special Powers Acts

1.15 The general policy of the government of Northern Ireland after 1921 was to keep in step with the policies and laws devised by the government and Parliament in London. On some issues Acts were passed by the Parliament of Northern Ireland a year or two after the equivalent Acts had been passed at Westminster. But the Parliament of Northern Ireland did deviate from Westminster in some respects.²⁰ Most importantly, it put in place draconian measures to enable the police to combat attempts to undermine the security of the State. The most notorious of these measures was the Civil Authorities (Special Powers) Act (NI) 1922. This was initially enacted for just one year, but at the end of that year, and in each of the next five years, it was re-enacted. In 1928 it was again re-enacted, this time for a further five years, and then it was made permanent. In 1944 it was amended by a further Act of the same name, so the Acts became known as the Civil Authorities (Special Powers) Acts (NI) 1922–44 or, more colloquially, as the Special Powers Acts. They remained in force until 1973 and were not mirrored by similar Acts passed at Westminster for Great Britain. Nor did Northern Ireland adopt the liberal reforms which occurred in Great Britain in the 1960s: when Westminster passed Acts de-criminalising abortion and homosexuality, the Parliament of Northern Ireland did not follow suit.²¹ Even divorce was not made generally available in Northern Ireland until 1939.²²

Direct Rule²³

1.16 Devolution of powers in Northern Ireland continued until March 1972, when, despite its best efforts to achieve positive change,²⁴ the Stormont Parliament had to be suspended by Westminster because of its inability to cope with serious

¹⁹ The successive Governors of Northern Ireland were the Duke of Abercorn (1922–45), Earl Granville (1945–52), Lord Wakehurst (1952–64), Lord Erskine (1964–68) and Lord Grey (1968–72).

²⁰ For an interesting survey see C Brett, 'The Lessons of Devolution in Northern Ireland' (1970) 41 *Political Quarterly* 261.

²¹ Abortion law in Northern Ireland is still largely governed by the Offences Against the Person Act 1861: see paras 9.137–9.139. The law on homosexuality was mostly brought into line with that in Great Britain by the Homosexual Offences (NI) Order 1982: see para 5.45.

²² By the Matrimonial Causes Act (NI) 1939.

²³ An almost day-by-day chronology of events in Northern Ireland since 1968 is available on www.cain.ulst.ac.uk.

²⁴ See *A Record of Constructive Change*, Cmd 558 (NI), 1971.

civil unrest that had developed in the province since 1968. The unrest was prompted by allegations that the Unionist government of Northern Ireland was presiding over a system which discriminated against Catholics in the way that electoral boundaries were drawn, in the way public housing and public sector jobs were distributed, and in the manner in which the police force—the Royal Ulster Constabulary—went about maintaining law and order. The unrest was made the subject of a tribunal of inquiry chaired by an English High Court judge, Mr Justice Scarman,²⁵ while a commission chaired by an English Law Lord, Lord Diplock, was tasked with bringing forward proposals for how the law could better deal with the problem of terrorism.²⁶ Internment (ie, detention without trial) had been introduced by the Northern Ireland government in August 1971²⁷ and allegations of security force brutality in that context led to a further inquiry.²⁸

1.17 ‘Direct rule’ is the name given to the form of government used for Northern Ireland after March 1972. Most matters which would have been legislated for by the Parliament of Northern Ireland were instead dealt with by the Privy Council in London, in the form of Orders in Council. The Privy Council is effectively a body comprising senior members of the UK government. Executive powers were exercised by a team of ministers headed by the Secretary of State for Northern Ireland, a member of the British Cabinet, rather than by a government formed from the MPs elected to the Stormont Parliament. The first such Secretary of State was William Whitelaw.²⁹ The detailed arrangements for direct rule were set out in the Northern Ireland (Temporary Provisions) Act 1972. They were renewed by the UK Parliament in one form or another on an almost annual basis until 1999.

The Troubles

1.18 The civil unrest which broke out in a serious way in Northern Ireland in 1968 was a further manifestation of the communal difficulties which had existed

²⁵ Later Lord Scarman. See *Violence and Civil Disturbances in Northern Ireland in 1969*, Cmd 566 (NI), 1972.

²⁶ See *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland* (the Diplock Report), Cmnd 5185, 1972. See too T Hadden and P Hillyard, *Justice in Northern Ireland: A Study in Social Confidence* (London, Cobden Trust, 1973).

²⁷ As it had been on earlier occasions in both Northern Ireland and the Republic of Ireland.

²⁸ See *Report of the enquiry into allegations against the security forces of physical brutality in Northern Ireland arising out of events on the 9th August 1971* (the Compton Report), Cmnd 4823, 1971.

²⁹ The successive Secretaries of State for Northern Ireland have been William Whitelaw (1972–73), Francis Pym (1973–74), Merlyn Rees (1974–76), Roy Mason (1976–79), Humphrey Atkins (1979–81), James Prior (1981–84), Douglas Hurd (1984–85), Tom King (1985–89), Peter Brooke (1989–92), Sir Patrick Mayhew (1992–97), Mo Mowlam (1997–99), Peter Mandelson (1999–2001), John Reid (2001–02), Paul Murphy (2002–05), Peter Hain (2005–07), Shaun Woodward (2007–10), Owen Paterson (2010–12), Theresa Villiers (2012–16), James Brokenshire (2016–18) and Karen Bradley (2018–).

there ever since the partition of the island in 1921. Opinions differ over what event marked the beginning of the euphemistically named ‘troubles’. It could be the killing of three people on different days in June 1966 by the Ulster Volunteer Force, a loyalist group which adopted the same name as the citizens’ army which had helped push for the retention of Northern Ireland as part of the UK in 1921.³⁰ It could be the occupation of a vacant house in Caledon, County Tyrone, in June 1968 by people protesting about its allocation by the local council to a young childless Protestant woman rather than to an older Catholic family with children. Or it could be the breaking-up by the Royal Ulster Constabulary in October 1968 of a march organised in Derry by the Northern Ireland Civil Rights Association.³¹ There is no doubt, however, that once the violence started it very quickly escalated. In 1969, 14 people died, including the first RUC officer.

1.19 The British army was called in to assist the police in August 1969 and the death toll was contained to 25 in 1970. But in 1971 it shot up to 174, with no fewer than 48 soldiers being killed. The use of internment, begun in August 1971, continued until December 1975. It was used mainly against people suspected of violent republican sympathies, not violent loyalists. On 30 January 1972, on what became known as ‘Bloody Sunday’,³² British soldiers shot dead 14 unarmed civilians when trying to disperse a crowd participating in an illegal march in Derry. The total number of people killed during 1972 was 470. In the next four years the deaths averaged 254 per year, and the violence spread to the Republic of Ireland and England. In May 1974, 33 people were killed by car bombs in Dublin and Monaghan, in October 1974 five people died in an explosion in a pub in Guildford, and in November 1974 21 were killed in a pub explosion in Birmingham. The government in London took steps to try to counter the violence by persuading Parliament to enact the Northern Ireland (Emergency Provisions) Act 1973, which applied only in Northern Ireland, and the Prevention of Terrorism (Temporary Provisions) Act 1974, which applied throughout the UK. These gave the police and army wider powers of arrest, stop, search and seizure. The 1973 Act also created a special juryless court in which to try people accused of troubles-related offences, the so-called Diplock courts; there were fears that if jurors were used for such trials not all of them could be relied upon to be impartial, and they might be subject to intimidation if not outright attack by associates of some of the accused.

³⁰ For a death-by-death account of the victims of the troubles in Northern Ireland see D McKittrick, S Kelters, B Feeney, C Thornton and D McVea, *Lost Lives* (Edinburgh, Mainstream Publishing, rev edn, 2007). After these 1966 killings, which led to the UVF being outlawed, there were no further troubles-related deaths until July 1969.

³¹ This is the start date chosen by T Hennessey in his *The Evolution of the Troubles 1970–72* (Dublin, Irish Academic Press, 2007).

³² This was actually the second Bloody Sunday. The first had occurred in Dublin on 21 November 1920. ‘Bloody Friday’ designates 21 July 1972, when the IRA exploded 19 bombs in Belfast, killing 9 people.

Victims of the Troubles³³

1.20 Despite concerted efforts to suppress the violence, it continued at a fairly high rate for many years. The Irish Republican Army (IRA) became ever more efficient and daring in its exploits and neither the British army nor the political system was able to effectively contain the resulting terror.³⁴ Between 1977 and the IRA ceasefire announced in 1994 an average of 83 people died each year. Several dozen more people were to die before the Belfast (Good Friday) Agreement was reached in 1998. Most estimates suggest that, throughout the troubles, 60 per cent of the deaths were attributable to republican paramilitaries, 30 per cent to loyalist paramilitaries and 10 per cent to actions of the security forces (not all of which were lawful). In addition, more than 45,000 people were injured during the troubles, some very seriously indeed. Between 1969 and 2009 there were more than 37,000 shooting incidents and almost 19,000 real or hoax explosive devices were planted (see para 7.42 and Table 7.2).³⁵

1.21 The impact of the troubles was very severe, not just as regards the achievement of political progress but also as regards the development of the legal institutions and the substantive law in Northern Ireland. With attention focused on combating terrorism, less regard was had for how improvements could be made to the 'ordinary' criminal and civil justice systems.³⁶ Modernisation of the legal system of Northern Ireland has really only taken place in earnest since the peace settlement of 1998.

Efforts to Restore Devolution

1.22 In September 1972 the seven political parties which had previously had representatives in the Parliament of Northern Ireland were invited by the UK government to take part in a conference in Darlington, England, but only three of them attended.³⁷ The following month the government published a consultative document stating the criteria which firm proposals for the future of Northern Ireland would have to meet.³⁸ On 8 March 1973, a referendum was held on whether the border between Northern Ireland and the Republic of Ireland should

³³ See too para 7.92 below.

³⁴ See, generally, R English, *Armed Struggle: The History of the IRA* (London, Macmillan, 2003).

³⁵ Detailed statistics are available on the website of the Police Service of Northern Ireland: www.psn.police.uk.

³⁶ For an assessment see B Dickson, 'Northern Ireland's Legal System—An Evaluation' (1992) 43 *NILQ* 315.

³⁷ The Ulster Unionist Party, the Alliance Party and the Northern Ireland Labour Party.

³⁸ *The Future of Northern Ireland: A Paper for Discussion*.

be retained;³⁹ out of an electorate of just over one million, some 600,000 voted (many nationalists did not vote) and, of these, 591,820 voted to stay within the UK. Later that same month the government published a White Paper containing further proposals for the way forward.⁴⁰ These suggested that there should be a new legislature in Northern Ireland elected by proportional representation, with the executive and other legislative committees containing representatives from both communities. The proposals were then given legislative form through the Northern Ireland Assembly Act 1973 and the Northern Ireland Constitution Act 1973. Two-thirds of the 78 people who were then elected to the Assembly, which met for the first time in July 1973, were in favour of the government's proposals.

1.23 After further talks, and a conference in Sunningdale in Berkshire in December 1973, agreement was reached on creating a Northern Ireland Executive and Assembly, and also on setting up a Council of Ireland comprising seven members of the Executive and seven ministers from the Irish government, a consultative Assembly and a secretariat. The Northern Ireland Executive was sworn in on 1 January 1974, with the Chief Executive (effectively the Prime Minister) being Brian Faulkner, leader of the Official Unionist Party. Powers to make laws (called 'Measures') were vested in the unicameral elected Assembly.

The 1974 Assembly

1.24 However, due to further civil unrest linked to a strike called by the Protestant-dominated Ulster Workers' Council, this experiment in devolution collapsed in May 1974, when the Assembly was suspended and responsibility for governing Northern Ireland was again returned to the Secretary of State.⁴¹ More proposals were put forward in a government White Paper issued in July 1974⁴² and these were given effect in law by the Northern Ireland Act 1974. They provided for a constitutional Convention to be elected, again with 78 members, with the job of considering over a six-month period 'what provision for the government of Northern Ireland is likely to command the most widespread acceptance among the community there'. Elections were held for the Convention in May 1975 and it began work almost immediately, under the chairmanship of the then Lord Chief Justice of Northern Ireland, Sir Robert Lowry. It reported, as planned, in November 1975,⁴³ but as its proposals were based very largely on unionist ideas

³⁹ Under the Northern Ireland (Border Poll) Act 1972.

⁴⁰ *Northern Ireland Constitutional Proposals* (Cmnd 5259).

⁴¹ See D Anderson, *14 May Days* (Dublin, Gill and Macmillan, 1994). Only 4 Measures were made in the less than 5 months of the Assembly's existence.

⁴² *The Northern Ireland Constitution* (Cmnd 5675).

⁴³ *Report of the Northern Ireland Constitutional Convention*, HC 1 (1975–76).

the British government rejected them⁴⁴ and the Convention was formally dissolved in March 1976.

1.25 In 1982 another 78-member Northern Ireland Assembly, again with only one chamber and sitting at Stormont, was elected under the Northern Ireland Act 1982.⁴⁵ In the same year the number of MPs that could be elected to Westminster from Northern Ireland was increased from 12 to 17, partly to compensate for the lack of a fully operational devolved Parliament in Belfast. The new Assembly did not have any law-making powers (only scrutiny, consultative and deliberative powers) but the UK government hoped that in due course some such powers could be transferred to it under the principle of ‘rolling’ devolution. Once again the experiment proved unsuccessful and the Assembly was dissolved in 1986.⁴⁶

1.26 The signing of the Anglo-Irish Agreement at Hillsborough Castle, County Down, in November 1985⁴⁷ led to the establishment of the Anglo-Irish Inter-Governmental Conference, which convened periodically to allow representatives from the government of the Irish Republic to put forward their views on the governance of Northern Ireland. It also created an Anglo-Irish Parliamentary Council, which allowed 25 members from each of the British and Irish Parliaments to meet from time to time to discuss matters of mutual interest. The 1985 Agreement, however, was a treaty between two sovereign States and did not have the force of internal domestic law in either country. It was bitterly opposed by unionists.

The Belfast (Good Friday) Agreement 1998

1.27 Following various additional inter-governmental initiatives, including a Downing Street Declaration in 1993, a Framework Document in 1995⁴⁸ and the publication of ground rules for substantive all-party negotiations in 1996,⁴⁹

⁴⁴ It made one last effort to allow the Convention to reach agreement, but this too failed: see *The Northern Ireland Constitutional Convention: Text of a letter from the Secretary of State for Northern Ireland to the Chairman of the Convention* (Cmnd 6387; 1976).

⁴⁵ This followed three government discussion papers: *The Government of Northern Ireland: A Working Paper for a Conference* (Cmnd 7763; 1979), *The Government of Northern Ireland: Proposals for Further Discussion* (Cmnd 7950; 1980) and *Northern Ireland: A Framework for Devolution* (Cmnd 8541; 1982).

⁴⁶ C O’Leary, S Elliott and R Wilford, *The Northern Ireland Assembly 1982–1986: A Constitutional Experiment* (London, St Martin’s Press, 1988).

⁴⁷ See A Kenny, *The Road to Hillsborough: The Shaping of the Anglo-Irish Agreement* (University of Michigan, Pergamon Press, 1986); T Hadden and K Boyle, *The Anglo-Irish Agreement: Commentary, Text and Official Review* (London, Sweet & Maxwell, 1989).

⁴⁸ Cm 2964.

⁴⁹ Cm 3232. See also E Mallie and D McKittrick, *The Fight for Peace: The Secret Story of the Irish Peace Process* (London, Heinemann, 1996).

most of the political parties within Northern Ireland and the British and Irish governments eventually reached a new agreement on the way forward in Northern Ireland on Good Friday (10 April) 1998.⁵⁰ A path facilitating the agreement had been cleared by ceasefires that had been declared by both loyalist paramilitaries in October 1994 and republican paramilitaries in July 1997 (an earlier IRA ceasefire in August 1994 was breached in February 1996). The underlying principle of the settlement was power-sharing, in what political scientists call a 'consociational' framework, one which required a coalition of parties to form the government of Northern Ireland and provided for no official opposition.

1.28 The Belfast (Good Friday) Agreement⁵¹ was put to the electorates in referenda in both Northern Ireland and the Republic of Ireland on the same day in May 1998 and was approved by substantial majorities in both jurisdictions—71 per cent in Northern Ireland and 95 per cent in the Republic of Ireland. Dissident republicans, however, were still active: in August 1998 they planted a car bomb in Omagh, County Tyrone, which killed 29 people as well as unborn twins.

1.29 In June 1998 an election was held in Northern Ireland to choose six representatives from each of the 18 Westminster constituencies to sit as Members of a new Northern Ireland Assembly (the number of constituencies had been raised from 17 to 18 in 1995). The powers of this Assembly, and other aspects of the Belfast (Good Friday) Agreement, were then enshrined in law by a Westminster Act, the Northern Ireland Act 1998. By section 1 of that Act Northern Ireland is to remain a part of the UK unless and until a majority of the electorate in Northern Ireland vote to join a united Ireland.⁵² The Assembly's powers were to become live whenever the Secretary of State determined that an Executive Committee (ie, a Cabinet) could be formed, and seats on this Executive Committee were to be allocated in accordance with the 'd'Hondt' system, thereby giving proportional ministerial representation to the four largest parties in the Assembly.⁵³ The First Minister designate was to be David Trimble MP, the leader of the Ulster Unionist

⁵⁰ Cm 3883. Available online on the UK government's website. The Democratic Unionist Party was the only major party not in favour of the Agreement. For the story of the genesis of the Agreement, see M Mansergh, 'The Background to the Irish Peace Process' in M Cox, A Guelke and F Stephen (eds), *A Farewell to Arms? From 'long war' to long peace in Northern Ireland*, 2nd edn (Manchester, Manchester UP, 2005), ch 1.

⁵¹ See generally A Morgan, *The Belfast Agreement: A practical legal analysis* (Belfast Press, 2000) and T Hennessey, *The Northern Ireland Peace Process: Ending the Troubles?* (Dublin, Gill and Macmillan, 2000).

⁵² See generally B O'Leary, 'The Nature of the Agreement' (1999) 22 *Fordham International LJ* 1628; C Harvey, 'The New Beginning: Reconstructing Constitutional Law and Democracy in Northern Ireland' in C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford, Hart Publishing, 2001); G Anthony, 'Public Law Litigation and the Belfast Agreement' (2002) *EPL* 401; C Campbell, F Ni Aoláin and C Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *MLR* 317.

⁵³ Northern Ireland Act 1998, s 18. More details are provided in para 2.35.

Party, and the Deputy First Minister designate was to be Seamus Mallon MP, the deputy leader of the Social Democratic and Labour Party (SDLP).⁵⁴

Implementing the Good Friday Agreement⁵⁵

1.30 Considerable difficulties were encountered in securing agreement for the formation of the full Executive Committee. The largest unionist party, the Ulster Unionist Party, would not agree to share power with the second largest nationalist party, Sinn Féin, unless there were greater guarantees concerning the decommissioning of weapons held by the IRA. Eventually, in November 1999, a deal was hammered out and on 2 December 1999 powers were finally devolved to the new administration in Belfast. This was a few months after slightly different forms of devolution had already commenced in Scotland and Wales,⁵⁶ for it was a policy of the UK government at the time to support devolution throughout the UK.

1.31 On 11 February 2000 the Secretary of State for Northern Ireland suspended the Assembly⁵⁷ because the Ulster Unionist Party was on the verge of withdrawing from it due to the fact that no republican weaponry had yet been decommissioned. After a few more weeks of negotiations a deal was again struck and the Assembly was reinstated on 30 May 2000.⁵⁸ When there was further stalling on decommissioning, however, David Trimble resigned as First Minister on 30 June 2001 and the Assembly was dissolved for single days in both August and September 2001 to allow further six-week periods to elapse so that new elections for a First and Deputy First Minister could take place. Meanwhile the British and Irish governments agreed at Weston Park in Shropshire on how best to proceed on a range of issues if the Assembly were restored.⁵⁹ An act of decommissioning by republicans took place on 23 October 2001⁶⁰ and David Trimble and Mark Durkan (the new leader of the SDLP) were finally elected on 6 November 2001⁶¹

⁵⁴ For their part in producing the Agreement, David Trimble and John Hume, the leader of the SDLP, were jointly awarded the Nobel Peace Prize in 1998.

⁵⁵ For a plethora of facts, figures and analysis detailing the extent to which Northern Ireland has moved towards 'peace' since the Belfast (Good Friday) Agreement of 1998, see *The Northern Ireland Peace Monitoring Report*, No 1 (2012), No 2 (2013), No 3 (2014), all by Paul Nolan, and No 4 (2016), by Robin Wilson. They are available on the website of the Community Relations Council, which commissioned them.

⁵⁶ Under, respectively, the Scotland Act 1998 and the Government of Wales Act 1998.

⁵⁷ By the Northern Ireland Act 2000 (Commencement) Order 2000 (SI 396).

⁵⁸ By the Northern Ireland Act 2000 (Restoration of Devolved Government) Order 2000 (SI 1445).

⁵⁹ Available at www.cain.ulst.ac.uk.

⁶⁰ Two further such acts took place on 8 April 2002 and 21 October 2003, but on none of these occasions were details made public of exactly what arms were destroyed.

⁶¹ Their election was challenged by Peter Robinson MP as being unauthorised under the Northern Ireland Act 1998 (see para 2.5). He eventually lost in the House of Lords (by 3 to 2): [2002] NI 390.

but on 14 October 2002 the Secretary of State again suspended the Assembly⁶² because of allegations of 'spying' by republicans.

1.32 The 2002 suspension was to continue for well over four years, despite a Declaration by the British and Irish governments in April 2003⁶³ and new elections to the Assembly in November 2003. An agreement between the two parties which performed best in those elections, the Democratic Unionist Party (DUP) and Sinn Féin,⁶⁴ was almost reached in December 2004 (after preliminary talks at Leeds Castle in Kent in September 2004), but negotiations broke down at the last minute, supposedly over the unwillingness of Sinn Féin to allow the decommissioning of weapons to be photographed. The British and Irish governments published their own proposals for the basis for an agreement but it soon became clear⁶⁵ that there was no prospect of a further settlement being reached until well after the UK general election due in May 2005. In that election the DUP and Sinn Féin increased their mandates even further.⁶⁶

The St Andrews, Hillsborough Castle, Stormont House and Fresh Start Agreements

1.33 In September 2005 the Independent International Commission on Decommissioning (IICD) reported that the IRA had decommissioned all its weapons, and this paved the way for further talks between political parties. In October 2006 an agreement was reached at St Andrews, in Scotland.⁶⁷ This committed Sinn Féin to fully support the Police Service of Northern Ireland and the DUP to share executive power with republicans and nationalists. Responsibility for policing and criminal justice was to be devolved within two years of the restoration of the Executive. Fresh elections to the Northern Ireland Assembly took place in March 2007⁶⁸

See M Lynch, '*Robinson v Secretary of State for Northern Ireland: Interpreting Constitutional Legislation*' [2003] *PL* 640.

⁶² By the Northern Ireland Act 2000 (Suspension of Devolved Government) Order 2002 (SI 2574). During suspension, for a period of 6 months, para 1 of the Schedule to the Northern Ireland Act 2000 allowed legislation to be made by Order in Council for any matter for which the Assembly might have legislated; the 6-month period could also be extended.

⁶³ Available at www.cain.ulst.ac.uk.

⁶⁴ The DUP won 30 seats in the Assembly, the Ulster Unionist Party 27, Sinn Féin 24, the SDLP 18, the Alliance Party 6 and three smaller parties 1 each.

⁶⁵ Especially after a massive bank robbery in Belfast on 20 December 2004, attributed to the IRA, and the murder of Robert McCartney in Belfast on 30 January 2005, again allegedly committed by members of the IRA.

⁶⁶ In those elections the DUP won 9 of the 18 seats at Westminster, Sinn Féin 5, the SDLP 3 and the UUP 1. In 2001 the seats won, respectively, had been 6, 4, 3 and 5. Sinn Féin MPs do not actually take their seats at Westminster, nor (because of their refusal to declare allegiance to the State) do they qualify for certain grants available to political parties: see *In re Sinn Féin's Application* [2004] NICA 4.

⁶⁷ The full text of the St Andrews Agreement is available on the NIO's website: www.nio.gov.uk.

⁶⁸ The DUP won 36 seats, Sinn Féin 28, the UUP 18, the SDLP 16, Alliance 7, and others 3.

and the Executive was restored on 7 May 2007, the day when Rev Ian Paisley of the DUP was filmed sitting at a table side by side with Gerry Adams of Sinn Féin. But it was not until 5 February 2010 that final agreement on the devolution of policing and criminal justice was reached after lengthy discussions at Hillsborough Castle.⁶⁹ Devolution of those issues took effect on 12 April 2010, with the election of David Ford, the leader of the Alliance Party, as the Minister of Justice in Northern Ireland.⁷⁰ From then on the Northern Ireland Assembly and Executive had just as much power to govern Northern Ireland as the old Parliament and government of Northern Ireland had between 1921 and 1972.

1.34 In the 2010 general election and the 2011 Assembly election support for the DUP and Sinn Féin held up reasonably well.⁷¹ In 2011 Peter Robinson of the DUP was elected by the Assembly as First Minister and Martin McGuinness of Sinn Féin as Deputy First Minister. During the life of this Assembly one of the sticking points was to what extent it should implement in Northern Ireland the austerity measures which were being demanded by the UK government for the nation as a whole. In addition there was disagreement over how the Assembly should deal with the past in Northern Ireland: should there, for example, continue to be investigations and prosecutions in relation to killings committed during the troubles? These and other matters were mostly resolved through what became known as the Stormont House Agreement in December 2014.⁷² This allowed for a budget to be set for 2015–16, a reduction in the size of the civil service (by providing for a redundancy scheme), welfare reform conditional upon ‘flexibilities’ and ‘top-ups’,⁷³ a change to the rate of corporation tax in Northern Ireland,⁷⁴ the creation of a Commission on Flags, Identity, Culture and Tradition, and a package of measures for dealing with the past.⁷⁵ Unfortunately implementation of this agreement did not go smoothly and there had to be further negotiations which led to a ‘Fresh Start Agreement’ in November 2015.⁷⁶ This included a set of commitments to combat

⁶⁹ The full text of the Hillsborough Castle Agreement is available on the website of the NIO: www.nio.gov.uk.

⁷⁰ His election occurred as a result of a cross-community vote in the Northern Ireland Assembly, not by applying the d’Hondt process (see para 1.29).

⁷¹ In 2010 the DUP won 8 of the 18 Westminster seats, Sinn Féin 5, the SDLP 3, Alliance 1, and an independent 1. The UUP won no seats. In 2011 the DUP won 38 Assembly seats, Sinn Féin 29, the UUP 16, the SDLP 14, the Alliance Party 8 and others 3.

⁷² The full text of the Stormont House Agreement is available on the UK government’s website: www.gov.uk. Talks facilitated in 2013 by Dr Richard Haass and Prof Meghan O’Sullivan, two US experts, failed to conclude successfully. The Northern Ireland (Miscellaneous Provisions) Act 2014 also reformed electoral law by, for example, abolishing ‘double-jobbing’, the practice whereby by a person could be both an MLA and an MP.

⁷³ This was facilitated by the Northern Ireland (Welfare Reform) Act 2015, an Act of the Westminster Parliament.

⁷⁴ See the Corporation Tax (NI) Act 2015.

⁷⁵ The last mentioned provisions referred to the proposed creation of an Historical Investigations Unit (outside of the Police Service of Northern Ireland), an Independent Commission on Information Retrieval, an Oral History Archive and an Implementation and Reconciliation Group.

⁷⁶ This too is available on the UK government’s website: www.gov.uk.

ongoing paramilitary activity in Northern Ireland, including the establishment of an Independent Reporting Commission to promote progress towards ending such activity.⁷⁷ But the Fresh Start Agreement failed to resolve the lack of consensus as to how exactly to implement the provisions in the Stormont House Agreement on dealing with the past. In the 2015 general election Sinn Féin and the Alliance Party lost one seat each, while the UUP gained two.⁷⁸

The Current Impasse

1.35 In January 2016 Arlene Foster succeeded Peter Robinson as leader of the DUP and as First Minister in the Executive, and in the elections to the Assembly in May the DUP maintained its strong position.⁷⁹ For the first time an official ‘Opposition’ to the mandatory coalition Executive was then formed.⁸⁰ Unfortunately, later that year Mrs Foster became embroiled in a botched Renewable Heat Incentive (RHI) scheme, which enabled some applicants to claim excessive subsidies merely by burning large quantities of wooden pellets. She refused to stand down as First Minister but in January 2017 Martin McGuinness resigned as Deputy First Minister⁸¹ and Sinn Féin refused to nominate a successor, meaning that the Assembly had to be dissolved and fresh elections held. In line with the Stormont House Agreement, the number of contested seats had by then been reduced from 108 to 90 (ie, five rather than six seats for each of the 18 parliamentary electoral areas).⁸² In the March 2017 elections the DUP and the UUP suffered significant losses.⁸³ For the first time ever, avowed unionist parties did not win a majority of the available seats in the local Parliament.

1.36 The changing election results reflect in part the changing demography of Northern Ireland. According to the 2011 census, the population at that time numbered 1.81 million, a rise of more than 7 per cent since 2001. Of this total, 48 per cent belonged to or were brought up as non-Catholic Christians (down from 53 per cent in 2001), while 45 per cent were either Catholics or brought up as Catholics (up from 44 per cent in 2001). Just 1.8 per cent of the usually resident population belonged to minority ethnic groups (up from 0.8 per cent in 2001). As regards ‘national identity’, 40 per cent designated themselves as British only, 25 per cent as Irish only, and 21 per cent as Northern Irish only.⁸⁴

⁷⁷ Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016, ss 1–5.

⁷⁸ The DUP won 8 seats, Sinn Féin 4, the SDLP 3, the UUP 2, and an independent 1.

⁷⁹ The DUP won 38 seats, Sinn Féin 28, the UUP 16, the SDLP 12, the Alliance Party 8 and others 6.

⁸⁰ Under the Assembly and Executive Reform (Assembly Opposition) Act (NI) 2016.

⁸¹ He passed away 10 weeks later.

⁸² Assembly Members (Reduction of Numbers) Act (NI) 2016.

⁸³ The DUP won 28 seats, Sinn Féin 27, the SDLP 12, the UUP 10, the Alliance Party 8 and others 5.

⁸⁴ For more details on the census results, see the website of the Northern Ireland Statistics and Research Agency.

1.37 Since the Assembly elections in March 2017 there have been regular negotiations between the political parties in Northern Ireland, particularly between the DUP and Sinn Féin, in an attempt to get the Executive and Assembly up and running again, but by the time of writing (April 2018) a resolution of the impasse was still elusive. Oddly, the blockage seems to centre on what degree of protection should be provided for the Irish language in Northern Ireland, a topic which had not featured prominently in previous negotiations on the governance of Northern Ireland. The fact that Northern Ireland remains the only jurisdiction in these islands not to permit same-sex marriages is a further bone of contention. Overarching all other differences is the fact that the majority of people in Northern Ireland who voted in the June 2016 UK referendum on membership of the European Union opted to remain in the EU (56 per cent). Most unionist politicians, on the other hand, are in favour of leaving the EU and, after performing well in the 2017 general election,⁸⁵ the DUP entered into a ‘confidence and supply agreement’ with the Conservative Party whereby DUP MPs undertook to help maintain the Conservative Party’s majority in important votes in the House of Commons.⁸⁶ In exchange the UK government promised an extra £1 billion of public sector funding for Northern Ireland. There has not yet been a return to direct rule in Northern Ireland, as legislation has been passed at Westminster enabling extensions to the period of time for making ministerial appointments following elections to the Northern Ireland Assembly and providing for regional rate payments in Northern Ireland during 2017–18.⁸⁷ A further Act was passed confirming the budget for Northern Ireland up to the end of March 2018.⁸⁸ But such sticking-plaster solutions cannot remain in place for much longer.

⁸⁵ Of Northern Ireland’s 18 seats at Westminster, the DUP won 10, Sinn Féin won 7 and an independent unionist won 1.

⁸⁶ The confidence and supply agreement, together with the financial support document, are available on the UK government’s website: www.gov.uk.

⁸⁷ Northern Ireland (Ministerial Appointments and Regional Rates) Act 2017.

⁸⁸ Northern Ireland Budget Act 2017.