

RE-CHARTING CONFLICT RESOLUTION DESIGNS THROUGH A STRUCTURE/AGENCY EXPLICATION OF WAR AND PEACE IN NORTHERN IRELAND

Dr Ofrit Liviatan*

I. INTRODUCTION

This article extrapolates from the Northern Ireland experience, commonly viewed as a historic example of transforming an intractable conflict,¹ to discern the role of legal designs in conflict resolution within deeply divided societies. The emergence of largely peaceful conditions in the Northern Ireland conflict has been studied within a multitude of social paradigms including political theory, conflict studies and psychological approaches to hostility reduction.² Yet the socio-legal prism of analysis has been comparatively under-employed,³ even though legal mechanisms

*Director, Freshman Seminar Program, Harvard College; Lecturer on Law and Politics, Department of Government, Harvard University. The author extends her deepest gratitude to Fionnuala Ní Aoláin, Lord Alderdice, John D Brewer, Richard Wilford, Robert Mauro, Eva Grosman, The Irish Institute, Boston College and the Centre for Democracy and Peacebuilding in Northern Ireland. All errors and omissions are the author's own.

¹ Stephen Farry, 'Consociationalism and the Creation of a Shared Future for Northern Ireland' in Rupert Taylor (ed), *Consociational Theory: McGarry and O'Leary and the Northern Ireland Conflict* (Routledge 2009) 165-79; John D Brewer, *Peace Processes: A Sociological Approach* (Polity Press 2010) 204.

² Examples of this scholarship include David Bloomfield, *Peacemaking Strategies in Northern Ireland* (Palgrave Macmillan 1997); Fionnuala Ní Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press 2000); John McGarry and Brendan O'Leary, *The Northern Ireland Conflict: Consociational Engagements* (Oxford University Press 2004).

³ Notable exceptions include Colm Campbell, Fionnuala Ní Aoláin and Colin Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Review* 317; Kieran McEvoy and John Morison, 'Beyond the "Constitutional Moment": Law, Transition, and Peacemaking in Northern Ireland' (2003) 26 (4) *Fordham Int'l L. Rev.* 961;

played a central role in ameliorating, and sometimes solidifying, the tensions between the region's Catholics/Nationalists and Protestants/Unionists.⁴ In rectifying this scholarly lacuna, this article presents an alternative explanation to existing structure-dominated readings on the persistence of conflict conditions in Northern Ireland years after the signing of peace accords. Current readings largely fall into two camps: (i) those arguing that the consociational (power-sharing) regime legally engineered to pacify the conflict was the only pragmatic path for peace in a polarized Northern Ireland, and (ii) those who argue that these legal structures deepened the conflict and exacerbated social inequality.⁵

Transcending this structure-centric standpoint, this article seeks to chart new territory by highlighting the boundaries of law as a conflict management device in deeply divided social contexts by examining the interplay between legal structure and agency. It demonstrates that innovative equality-based legal structures put in place in Northern Ireland since the 1970s were instrumental in progressively generating conditions to pacify the violent era known as 'the Troubles' (1968-98). At the same time, opting to shape the political arrangements governing post-Troubles Northern Ireland through equality-based devices also presented the rival communities with rational and instrumental opportunities to reproduce the conflict as opposed to resolving it. As a result, enduring polarization, political paralysis and the prospects of renewed violence imperils contemporary Northern Irish reality.

Kieran McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland' (2003) 27(4) *Journal of Law & Society* 542; Catherine Turner, 'Political Representations of Law in Northern Ireland' (2010) 3 *Public Law* 451.

⁴ Nationalists desire the reunification of Ireland, and are predominantly but not exclusively Catholics while Unionists want to maintain the link with the UK, and are predominantly but not exclusively Protestant. For the sake of brevity, the Catholics/Nationalists and Protestants/Unionists groupings will be used as shorthand for a recognisably more nuanced position.

⁵ The two approaches will be discussed and contrasted in Section IV.

Nonetheless, this article proposes a policy-relevant conclusion for conflict transformation through socio-legal ideas about structuration.⁶ Structuration theory, developed by Giddens, demonstrated how both structures and human agencies constrain and reshape each other in mutually constitutive relations. Employing this dialectic structure-action dynamics, this article proposes that motivated human agents with an appetite for change possess considerable opportunities to reconfigure and transform conditions of conflict. These opportunities exist even within segregation feeding legal structures characteristic of Northern Ireland, thanks to the agents' ongoing capacity to reformulate a reconciliatory space through their day-to-day activities.

The rest of this article proceeds in three sections. Section II surveys the contribution of legal mechanisms in generating peaceful conditions in Northern Ireland, illustrating an instrumental role for legal processes in tapering the marginalization of Catholics/Nationalists. However, as will be demonstrated in Section III, these legal processes also facilitated the reproduction of difference and the polarization of the rival communities, evident in electoral behaviour, growing residential separation and deep-seated sectarianism. Section III further explicates the reasons why existing structure-driven explanations are limited in discerning Northern Ireland's conflict reduction path. It demonstrates that an agent-based perspective reveals the incentives to enter into political power-sharing as a marriage of convenience, thus enabling the reworking of the conflict's components rather than their resolution. The article concludes with a forward looking proposal for reformulating conflict conditions, anchored in Giddens' structuration theory that identified a recursive structure-agency dynamics. Drawing on the

⁶ Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press 1984). Related ideas developed in Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977); Pierre Bourdieu and Loic Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press 1992); Charles Wright Mills, *The Sociological Imagination* (Oxford University Press 1959).

Northern Ireland experience, Section IV explores means for human agencies to utilize consociational structures as a resource enabling future reconciliation.

II. THE ROLE OF LEGAL MEASURES IN NORTHERN IRELAND'S PATH TO PEACE

Rather than attempting an exhaustive historical account of the Northern Ireland conflict, the thrust of this part is concerned with the effects of legal measures on its pacification. An array of legal processes – including statutory reforms, bilateral and multiparty agreements, institutional designs and official governmental declarations – implemented an equality based socio-economic and political agenda for the region. These proactive legal measures in relations to goods, services and the balancing of political power ushered in the gradual restructuring of Northern Ireland's inter-communal hierarchies, enabling a more peaceful path in the region's destiny.⁷

Northern Ireland was left largely to its own devices during its first five decades of existence.⁸ In this process, a double minority problem arose: (i) the indigenous Catholic/Nationalist community became a minority in the new polity aspiring by and large to unite with the emerging Irish Republic, which for its part focused inward on its own state-building; (ii) the Protestant/Unionist majority was extremely anxious about its survival in a Catholic-

⁷ Mari Fitzduff, *Beyond Violence: Conflict Resolution Process in Northern Ireland* (UN University Press 2002) 11; Gráinne Kelly, 'Progressing Good Relations and Reconciliation in Post-Agreement Northern Ireland' (2012) INCORE Research Report <http://www.incore.ulst.ac.uk/pdfs/projects/55_Reconciliation_Research_Report.pdf> accessed 17 August 2015.

⁸ The Government of Ireland Act 1920 and the Anglo-Irish Treaty divided the Irish island into the six northeast counties, Northern Ireland under British control with a devolved parliament in Belfast, and the remaining twenty-six counties with a parliament in Dublin in what ultimately became the Irish Republic. For a historical summary see Paul Arthur, *Special Relationship: Britain, Ireland and the Northern Ireland Problem* (Blackstaff Press 2000).

dominated island, and thus fervently sought to remain part of the United Kingdom.⁹

This reality facilitated a Protestant/Unionist hegemony, which was terminated only towards the end of the 1960s.¹⁰ A Catholic/Nationalist revolt centring on equality demands spiralled into massive and violent inter-communal outbreak, forcing a reluctant Britain to assume control of the region. By virtue of the Northern Ireland (Temporary Provisions) Act 1972, all statutory and executive powers exercised by the Northern Ireland government were transferred to the UK Government and Parliament.¹¹ The direction of British policy, dominated by aggressive security measures, has been a subject of much political and scholarly debate.¹² Yet, indisputably, an understanding emerged by the

⁹ Claire Palley, 'The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution' (1972) (1) *Anglo-American Law Review* 368, 372; Harold Jackson and Georgina Ashworth, *The Two Irelands: The Problem of Double Minority: A Dual Study of Inter-Group Tensions* (Minority Rights Group Report No 2 1979); Geoff Gilbert et al, 'The Northern Ireland Peace Agreement: Minority Rights and Self Determination' (1998) 47(4) *Int'l & Comp L Quarterly* 943, 944; Michael Cunningham, *British Government Policy In Northern Ireland 1969-2000* (Manchester University Press 2001) 3-4; Paul Bew et al, *Northern Ireland 1921-2001: Political Forces and Social Classes* (Manchester University Press 2002) 163-4; Jonathan Bardon, *A History of Ulster* (Blackstaff Press 2005) 467; Kenneth Bloomfield, *A Tragedy of Errors: The Government and Misgovernment of Northern Ireland* (Liverpool University Press 2007) 12; Paul Dixon, *Northern Ireland: The Politics of War And Peace* (2nd ed, Palgrave Macmillan 2008) 57-8; Shane O'Neill, 'The Politics of Ethno-National Conflict Transformation: A Recognition-Theoretical Reading of the Peace Process in Northern Ireland' in Shane O'Neill and Nicholas H Smith (eds), *Recognition Theory as Social Research* (Palgrave Macmillan 2012) 158.

¹⁰ Lorenzo Bosi, 'Explaining the Emergence Process of the Civil Rights Process in Northern Ireland (1945-1968): Insights from a Relational Social Movement Approach' (2008) 21(2/3) *Journal of Historical Sociology* 242.

¹¹ Derek Birrell, *Direct Rule and The Governance of Northern Ireland* (Manchester University Press 2009).

¹² Paul Dixon, 'British Policy towards Northern Ireland 1969-2000: Continuity, Tactical Adjustment and Consistent "Inconsistencies"' (2001) 3(3) *British J Politics & Int'l Relations* 340, 340-3; Cunningham (n 9) 153-5; Feargal

early 1970s that went beyond security means, recognizing that restoring order in Northern Ireland required the engineering of equality and inclusion.¹³ Hence, deliberate and proactive social, economic and political reforms to eradicate inequalities between Catholics/Nationalists and Protestants/Unionists became the shaping factor of the region's agenda in the years to come.¹⁴

Beginning in the early 1970s and spanning the course of Britain's direct rule of the region, anti-discrimination reforms were gradually enacted to safeguard equitable allocation of goods and services and balance political powers. An initial set of legislative reforms designed to address the demands of the 1960s Catholic/Nationalist revolt included: (i) changes to the housing system to ensure equitable allocation of public housing;¹⁵ (ii) reforms to the Royal Ulster Constabulary (RUC), Northern Ireland's police force recruited at the time predominantly from the Protestant community;¹⁶ (iii) centralization of local government authorities and the establishment of non-elected bodies (popularly known as 'quangos') to administer housing,

Cochrane, *Northern Ireland: The Reluctant Peace* (Yale University Press 2013) 65-6 .

¹³ Kenneth Bloomfield, *A Tragedy of Errors* (n 9) 25; Kevin Bean, *The New Politics of Sinn Fein* (Liverpool University Press 2007) 6; Dixon, *Northern Ireland* (n 9) 123-4; Niall Fitzduff and Sue Williams, 'How Did Northern Ireland Move Toward Peace?' (CDA Collaborative Learning Project 2007) <<http://www.cdacollaborative.org/media/53213/How-Did-Northern-Ireland-Move-Toward-Peace-.pdf>> accessed 27 July 2015; Colin Harvey,

'Contextualised Equality and the Politics of Legal Mobilisation: Affirmative Action in Northern Ireland' (2012) 21(1) *Social & Legal Studies* 23, 27.

¹⁴ David J Smith and Gerald Chambers, *Inequality in Northern Ireland* (Oxford University Press 1991) 3; John Morison and Stephen Livingstone, *Reshaping Public Power: Northern Ireland and the British Constitutional Crisis* (1995) 122; Harvey, 'Contextualised Equality' (n 13) 27-8; Cunningham (n 9) 5-8; Dixon, *Northern Ireland* (n 9) 94.

¹⁵ The Housing Executive Act (NI) 1971 removed housing allocation from local political control to the management of the Northern Ireland Housing Executive (NIHE).

¹⁶ The Police Act (NI) 1970 reorganized the structure for policing in Northern Ireland following the Hunt Committee's recommendations.

education, health and planning in an attempt to reduce sectarian practices at the local level;¹⁷ (iv) prohibitions on the incitement to racial hatred;¹⁸ (v) The creation of a Standing Advisory Commission on Human Rights (SACHR) with a statutory mandate to monitor the effectiveness of anti-discrimination legislation;¹⁹ (vi) the creation of a Community Relations Commission and its Ministry in an attempt to strengthen grass root cross-community activities;²⁰ and (vii) new methods to investigate citizens' grievances of maladministration by government departments and other public bodies.²¹

Nonetheless, these set of reforms proved increasingly inadequate to halt the conflict's radicalization owing to two main reasons. First, the emergence and rise of the Provisional Irish Republican Army (IRA) compounded by an overall sense of injustice toward security and interment measures; and secondly, a lack of clear British strategy and underfunding, all of which resulted in these initial reforms having little impact.²²

Alongside its emerging socio-economic agenda, Britain sought the renewal of self-government for Northern Ireland.²³ London's initial attempts to constitute power-sharing between

¹⁷ For example, the newly-centralized NIHE (n 15). See also Local Government (NI) Act 1972.

¹⁸ Prevention for Incitement to Hatred (NI) Act 1970.

¹⁹ Northern Ireland Constitution Act 1973, ss 17-9.

²⁰ Community Relations Act (NI) 1969; Ministry of Community Relations Act (NI) 1969.

²¹ Parliamentary Commissioner Act (NI) 1969; Commissioner for Complaints Act (NI) 1969; a Police Complaints Board was established by the Policy (NI) Order 1971.

²² Internment was introduced in August 1971 and used exclusively against republican-nationalists; see Kevin Boyle et al, *Law and State: The Case of Northern Ireland* (Robertson 1975) 17-22; Cunningham (n 9) 9.

²³ The 1972 consultation document *The Future of Northern Ireland*, produced by the Northern Ireland Office, included the objective of an inclusive future government (<<http://cain.ulst.ac.uk/hmsso/nio1972.htm>> accessed 27 July 2015). For a full discussion see Robin Wilson, 'Constitutional Innovation since 1972: Where Next?' in Paul Carmichael et al (eds), *Devolution and Constitutional Change in Northern Ireland* (2007) 16.

Catholics/Nationalists and Protestants/Unionists²⁴ – notably the 1974 Sunningdale Agreement and the 1976 Constitutional Convention – failed spectacularly.²⁵ These failures strengthened British assumptions that conditions need to be created for cross-community acceptance of power-sharing,²⁶ and the growing threat from the IRA solidified Anglo-Irish cooperation.²⁷ A year and a half of negotiations yielded the 1985 Anglo-Irish Agreement (AIA), which legally formalized British-Irish governmental cooperation on political and security matters as well as the mutual promotion of social, economic and cultural equality for Northern Ireland.²⁸

The AIA's lasting contribution in steering the conflict toward the peace process was threefold.²⁹ First, it institutionalized the Irish Republic's role as the *de facto* advocate of the Catholic/Nationalist community.³⁰ Secondly, its declaration that 'any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland' signalled to Catholics/Nationalists that Irish unity could be pursued by peaceful means, ultimately justifying the 1994 IRA ceasefire.³¹ Finally, the British conscious exclusion of

²⁴ Northern Ireland Act 1974, s 2(1).

²⁵ Robert Fisk, *The Point of No Return: The Strike Which Broke the British in Ulster* (Andre Deutsch 1975); Cunningham (n 9) 18.

²⁶ Brian Barry, 'The Consociational Model and Its Dangers' (1975) 3 *European Journal of Political Research* 393, 403-4.

²⁷ The Irish Dimension acknowledged by the 1972 consultation document *The Future of Northern Ireland* (n 23) was front and centre a decade later. See in particular Kenneth Bloomfield, *A Tragedy of Errors* (n 9) 58.

²⁸ Passed in the House of Commons 473 to 47. Anglo-Irish Agreement, HC Deb, 27 November 1985 vol 87, col 972. See also Harvey, *Contextualised Equality* (n 13) 31.

²⁹ Arthur Aughey and Cathy Gormley-Heenan (eds), *The Anglo-Irish Agreement: Rethinking its Legacy* (Manchester University Press 2011).

³⁰ Cunningham (n 9) 50; Kenneth Bloomfield, *A Tragedy of Errors* (n 9) 60.

³¹ Courtney Jung, Ellen Lust-Okar and Ian Shapiro, 'Problems and Prospects for Democratic Settlement: South Africa as a Model for the Middle East and Northern Ireland?' in Stathis N Kalyvas et al (eds), *Order, Conflict and*

Protestants/Unionists from the AIA process instigated a gradual realization among them of the perils in continuing to resist the British agenda of power-sharing for Northern Ireland.³²

By and large, for the remaining period of Britain's direct rule of the region its interventionist policies focused on the labour market. With the 1970s reforms yielding little progress, successive structural modifications were taken to address the blatant disparities between the two communities and establish new agencies that monitored progress.³³ Moreover, the Anglo-Irish cooperation emerging from the AIA's agreements further consolidated the fair employment regime by, for the first time, outlawing indirect discrimination and incorporating rigorous monitoring and affirmative action measures for the minority, albeit falling short of introducing quotas.³⁴ Subsequent enactments – such as the Fair Employment and Treatment (Northern Ireland) Order 1998 – consolidated the anti-discrimination apparatus and extended it to goods, services and facilities; with additional policies launched to target resources directly toward disadvantaged areas.³⁵ Finally, the Central

Violence (Cambridge University Press 2008) 156; Dixon, *Northern Ireland* (n 9) 209.

³² Adrian Guelke, 'The Potency of External Conflict Management' in Stefan Wolff and Christalla Yakinthou (eds), *Conflict Management In Divided Societies* (Routledge 2012) 254; James W McAuley, *Ulster's Last Stand? Reconstructing Unionism After The Peace Process* (2010) 48-50; Christopher Farrington, *Ulster Unionism and the Peace Process in Northern Ireland* (Basingstoke 2006) ch 2; Cunningham (n 9) 52.

³³ Legislation included Fair Employment (NI) Act 1976; Fair Employment (NI) Act 1989; Fair Employment and Treatment (NI) Order 1998; Fair Employment (Monitoring) Regulations (NI) 1999; Fair Employment and Treatment (Amendment) Regulations (NI) 2003.

³⁴ *ibid.* See also RD Osborne and Ian Shuttleworth, 'Fair Employment in Northern Ireland' in Bob Osborne and Ian Shuttleworth (eds), *Fair Employment in Northern Ireland: A Generation On* (Blackstaff Press 2004) 5-6; Christopher McCrudden et al, *Affirmative Action Without Quotas in Northern Ireland* (2009) 4 *Equal Rights Review* 7, 8.

³⁵ The economic development policies included, *inter alia*, Targeting Social Needs, Making Belfast Work and Londonderry Regeneration. See generally:

Community Relations Unit (CCRU), part of the Northern Ireland Office, began to publish annual Policy Appraisal and Fair Treatment (PAFT) guidelines intended to oversee that all government policies and the delivery of services in the region are subject to principles of equality.³⁶

By the end of the 1980s political dialogue was underway.³⁷ A joint British-Irish Downing Street Declaration in 1993 ‘directed primarily at the IRA’ highlighted the futility of continued violence as part of a broad Republican campaign for a united Ireland.³⁸ Britain reiterated that it has ‘no selfish strategic or economic interest in Northern Ireland,’ and both governments proclaimed their intentions to facilitate an agreement on the future of Northern Ireland ‘based on full respect for the rights and identities of both traditions in Ireland’ that will be ratified on both sides of the border.³⁹ Consequently, the two governments also jointly proclaimed their shared understanding for settling the armed conflict in Northern Ireland based on the now famous ‘Three Strands’ framework.⁴⁰ By 1994, paramilitary ceasefires

David Bloomfield, *Peacemaking Strategies* (n 2) 179; Colin Knox and Pádraic Quirk, *Peace Building in Northern Ireland, Israel And South Africa* (Palgrave Macmillan 2000) 53.

³⁶ First report produced in 1994: Central Community Relations Unit, ‘Policy Appraisal and Fair Treatment Annual Report 1994’ (1995) <cain.ulst.ac.uk/ccru/equality/docs/paft94.htm> accessed 27 July 2015.

³⁷ Initial ‘talks about talks’ evolved into negotiations between the two governments and the constitutional parties, ultimately followed by paramilitaries entering into the process (Arthur, *Special Relationship* (n 8) 235-47).

³⁸ *ibid* 243.

³⁹ Joint Declaration On Peace: The Downing Street Declaration, Wednesday 15 December 1993 <<http://cain.ulst.ac.uk/events/peace/docs/dsd151293.htm>> accessed 27 July 2015.

⁴⁰ The Framework Documents – A New Framework for Agreement, 22 February 1995 <<http://cain.ulst.ac.uk/events/peace/docs/fd22295.htm>> accessed 27 July 2015. ‘Three Strands’ Framework: (i) ‘Strand One’ will cover relations and structures within Northern Ireland; (ii) ‘Strand Two’ will cover relations and North/South structures between Northern Ireland and the Republic of Ireland; and (iii) ‘Strand Three’ will cover East/West structures and relations

were achieved and, with the Blair government elected in 1997, inter-party talks resumed with renewed vigour.⁴¹ As part of these developments, additional legislative schemes were utilized to address outstanding hurdles to the peace negotiations – for example, marches and parades. These are seen by Protestants/Unionists as a historical and fundamental right to assert their tradition, and are bitterly resented by Catholics/Nationalists living on the parades' principal routes. They have been a constant source of public disorder since the start of the conflict.⁴² Following an independent review, the Parades Commission was established in 1997 with statutory powers and duties to administer and monitor parades and promote dialogue between organizers and residents.⁴³

These efforts to produce power-sharing among Northern Ireland's political elites were supplemented with bottom-up policies in the form of financial resources for building cross-community relations at the local level. In addition to the CCRU, several other public bodies were established to initiate and administer programs for cross-community cooperation such as concerts, sporting events, plays, cross-community and single-community development projects, and prejudice-reduction programs.⁴⁴ However, these schemes and their funding have largely been defined by ad hoc thinking, and have lacked a

between the Republic of Ireland and the United Kingdom, and ensure that 'nothing is agreed until everything is agreed' (Cunningham (n 9) 78-9).

⁴¹ Brian Barton, 'The Historical Background to the Belfast Agreement' in Brian Barton and Patrick J Roche (eds), *The Northern Ireland Question: The Peace Process and the Belfast Agreement* (Palgrave Macmillan 2009) 35.

⁴² Tom Hadden and Anne Donnelly, 'The Legal Control of Marches in Northern Ireland: A Report to the Community Relations Council' (Queen's University Belfast 1997).

⁴³ Public Procession (NI) Act 1998, extended by the Public Procession (Amendment) (NI) Order 2005.

⁴⁴ Sean Byrne, 'Consociational and Civic Society Approaches to Peacebuilding in Northern Ireland' (2001) 38(3) *Journal of Peace Research* 327-8 & 333; Knox and Quirk (n 35) 73-4.

systematic policy on reconciliation.⁴⁵ As a result, their overall effect in transforming the conflict's dynamic proved negligible.⁴⁶ Similarly, despite substantial domestic and international investment in community based organizations, the effective contribution of civil society toward Northern Ireland's path to peace remains the subject of much debate.⁴⁷

As the 1990s drew to a close, the fruits of the anti-discriminatory legal frameworks were increasingly evident by greater – even if imperfect – equity in housing allocation; employment opportunities; electoral processes; public sector representation; and public services, all of which yielded the reposition of the Catholic/Nationalist community politically, socially and economically.⁴⁸ With the signing of the Belfast/Good Friday Peace Agreement (B/GFA) and its formalization in the Northern Ireland Act 1998, the idea of communal equality – not reconciliation – became the overarching principle to govern the

⁴⁵ Sandra Buchanan, 'Examining the Peacebuilding Policy Framework of the Irish and the British Governments' in Maria Power (ed), *Building Peace in Northern Ireland* (Liverpool University Press 2011) 172-90.

⁴⁶ Nicholas Acheson et al, 'Understanding the Role of Non-Aligned Civil Society in Peacebuilding in Northern Ireland: Towards a Fresh Approach' in Power (n 45) 26; Elham Atashi, 'Peace Dividends: The Role of External Aid in Peacebuilding' in Power (n 45) 211.

⁴⁷ A diminished role is highlighted in Nick Acheson, 'A Case of Avoiding 'Political Mumbo Jumbo': Lessons for the Role of Voluntary Associations in Community Relations Policies' (2011) 39(2) *Policy and Politics* 203, 203-20; compare to Paul Arthur, 'The Role of Civil Society in the Northern Ireland Conflict' (2012) 18(2/3) *Palestine-Israel Journal Of Politics, Economics, and Culture* 96, 96-101.

⁴⁸ For a survey of satisfaction with housing allocation see Martin Melaugh, 'Housing' in Peter Stringer and Gillian Robinson (eds), *Social Attitudes in Northern Ireland: Second Report* (Blackstaff Press 1992) <<http://cain.ulst.ac.uk/othelem/research/nisas/rep2c8.htm#housing>> accessed 27 July 2015. See also Cunningham (n 9) 110; Adrian Guelke, 'Lessons of Northern Ireland and the Relevance of the Regional Context' (LSE Ideas Reports – Special Report SR-008 2011) 8; Harvey, *Contextualised Equality* (n 13) 40.

future of Northern Ireland.⁴⁹ An Equality Commission was established to take over the functions of the separate bodies that oversaw fair employment and anti-discrimination on grounds of race, sex and disability. This meant a single body now fulfilled all statutory duties relating to equality.⁵⁰ Additionally, a positive duty to mainstream equality was introduced.⁵¹

Addressing the conflicting national claims, the constitutional status of Northern Ireland has been regulated under the principle of consent.⁵² Furthermore, the birth right of all people of Northern Ireland to identify as Irish, or British, or both was formally recognized.⁵³ Legislation introduced also established new institutions of government for Northern Ireland.⁵⁴ Keeping with the 'Three Strands' model, they included: (i) devolved power-sharing institutions designed in accordance with parity of esteem between the two communities; (ii) a North-South Ministerial Council to administer the relationship within the island of Ireland; and (iii) a British-Irish Inter-Governmental Conference to promote the UK-Ireland cooperation.

⁴⁹ Northern Ireland Act 1998, pt VII. See also Patricia Lundy and Mark McGovern, 'Telling Stories, Facing Truths: Memory, Justice and Post-Conflict Transition' in Colin Coulter and Michael Murray (eds), *Northern Ireland After The Troubles? A Society in Transition* (Manchester University Press 2008) 30; Harvey *Contextualised Equality* (n 13) 28.

⁵⁰ Northern Ireland Act 1998, ss 73-5 .

⁵¹ The dimensions of this positive duty are explained in Maggie Beirne, 'General Equality Issues' in Brice Dickson and Martin O'Brien (eds), *Civil Liberties In Northern Ireland: The CAJ Handbook* (4th edn, Committee on the Administration of Justice 2003) 225-6.

⁵² Art 1(i) of the B/GFA proclaimed that 'it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given ...'

⁵³ *ibid* Art 1(vi).

⁵⁴ Northern Ireland Act 1998, pts II-V.

Nonetheless, the top-down focus of these consociational arrangements fortified in subsequent agreements⁵⁵ paid lip service to the idea of communal reconciliation, and offered little incentive to deal with sectarian divisions.⁵⁶ Legislation was further utilized to address outstanding challenges in post B/GFA's Northern Ireland, for example the need for the production of a police force acceptable to all communities. Following the recommendation of an Independent Commission on Policing (the Patten Commission), the Police (Northern Ireland) Act 2000 reconstituted the polarizing 'RUC' as the 'Police Service of Northern Ireland' (PSNI). A recruitment scheme was also introduced requiring 50% of trainee officers be drawn from the Catholic community in a bid to overcome the historically disproportionate number of Protestants in the force.⁵⁷ The scheme was discontinued in 2011 after a government report found that greater inter-community balance had been achieved.⁵⁸

Following a turbulent political beginning, a devolved Assembly exercising executive and legislative powers has been operating continuously since 2007.⁵⁹ The dismantling of socio-economic hierarchies between Catholics and Protestants proved considerably successful, even if they were not entirely eradicated.

⁵⁵ St. Andrews Agreement, 2006 implemented by the Northern Ireland (St. Andrews Agreement) Act 2006 and the Hillsborough Castle Agreement of 2010.

⁵⁶ Maria Power, Introduction: Peacebuilding in Northern Ireland in Power (n 45) 1; Timothy J White, 'The Role of Civil Society in Promoting Peace in Northern Ireland' in Power (n 45) 37.

⁵⁷ The Police (NI) Act 2003; The Police (NI) Act 2000 Renewal of Temporary Provisions Order 2004.

⁵⁸ Northern Ireland Office, 'Police (Northern Ireland) Act 2000 Review of Temporary Recruitment Provisions: Summary of Responses to Public Consultations' (22 March 2011)

<<https://www.gov.uk/government/consultations/police-northern-ireland-act-2000-review-of-temporary-recruitment-provisions>> accessed 27 July 2015.

⁵⁹ Colin Knox, *Devolution and the Governance of Northern Ireland* (Manchester University Press 2010) 8-12; Paul Dixon and Eamonn O'Kane, *Northern Ireland Since 1969* (Routledge 2011) 94-109.

For example, according to a 2012 government report, Catholics have consistently experienced increase rates of working age economic activity, with the gap between the two communities falling from 11% to 5% over a ten-year period.⁶⁰ Improvement is also apparent in education levels, housing occupancy and access to employment and public services.⁶¹ Most notably, sustained political violence has significantly receded, now depicted as criminal activity.⁶²

Nonetheless, ample indicators suggest that Northern Ireland is a far cry from a reconciliation process.⁶³ Deep divisions are embedded in all of the following: (i) segregated residential areas;⁶⁴ (ii) separated education systems and cultural activities;⁶⁵ (iii) proliferation of physical barriers between rival communities;⁶⁶ (iv) sectarian attacks on property and the traditional symbols of each community;⁶⁷ (v) low levels of intermarriage and little change in patterns of inter-community

⁶⁰ Office of the First Minister and Deputy First Minister (OFMdfm), *2012 Labour Force Survey* (January 2014) <<http://www.ofmdfmi.gov.uk/labour-force-religion-report-2012.pdf>> accessed 27 July 2015.

⁶¹ Harvey *Contextualised Equality* (n 13) 40.

⁶² Power (n 45) 6. For example, on the Unionist side, they are seen as 'betray[ing] the "real" meaning of loyalism.'

⁶³ Jeffrey A Sluka, 'In the Shadow of the Gun: 'Not-War-Not-Peace' and the Future of Conflict in Northern Ireland' (2009) 29(3) *Critique Of Anthropology* 255.

⁶⁴ Colin Knox, 'Peace Building in Northern Ireland: A Role for Civil Society' (2010) 10(1) *Social Policy & Society* 13, 14-5.

⁶⁵ 92.6% of the primary and post primary students are educated in separate schools (Ministerial Advisory Group, 'Advancing Shared Education' (March 2013)

<<http://www.qub.ac.uk/schools/SchoolofEducation/MinisterialAdvisoryGroup/Filestore/Fileupload.382123.en.pdf>> accessed 27 July 2015).

⁶⁶ Altogether 108 interface structures, walls, fences and gates divide communities, of which nine were built between 1998-2008 (Peter Shirlow, 'Belfast: A Segregated City' in Coulter and Murray (n 49) 75).

⁶⁷ Robbie McVeigh and Bill Rolston, 'From Good Friday to Good Relations: Sectarianism, Racism and the Northern Ireland State' (2007) 48(4) *Race and Class* 1, 9.

socialization;⁶⁸ and (vi) violent parading and ‘sectarian manipulation of the allocation of public resources’.⁶⁹ A recent observation concluded:

The sad reality is that the conflict mindsets ... are alive and well in Northern Ireland ... The perhaps frightening truth is that nineteen years after the initial ceasefires, fifteen years after the B/GFA, and six years after the full implementation of devolved government, sectarian attitudes seem stubbornly undiminished in Northern Ireland. While devolution has delivered stability, it has so far failed to develop policies capable of promoting reconciliation within the wider community. Unless this is addressed ... a dark shadow will remain over the future of Northern Ireland.⁷⁰

The next section will attempt to explicate the function of legal instruments in facilitating these systemic divisions.

III. LAW’S BOUNDARIES IN CONFLICT MANAGEMENT: THE INTERPLAY OF STRUCTURE AND AGENCY

Constitutional engineering has increasingly become the preferred formula for ameliorating socio-cultural tensions in deeply divided societies.⁷¹ Even as debates centred on its preferred configuration, namely whether to promote consociational institutions⁷² or

⁶⁸ Katrina Lloyd and Gillian Robinson, ‘Intimate Mixing – Bridging the Gap? Catholic-Protestant Relationships in Northern Ireland’ (2011) 34(12) *Ethnic and Racial Studies* 2134, 2135-6.

⁶⁹ Cochrane, *The Reluctant Peace* (n 12) 286.

⁷⁰ *ibid* 253-4.

⁷¹ Sujit Choudry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008); Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press 2012) 4.

⁷² Yash Ghai (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press 2000); Caroline Hartzell and Matthew Hoddie, ‘Institutionalizing Peace: Power Sharing and Post-Civil War Conflict Management’ (2003) 47(2) *American Journal of Political Science* 318,

centripetal electoral systems,⁷³ a wide consensus emerged that ‘the most effective way to guarantee peace is fostering inclusionary power structures’.⁷⁴ Reflecting this trend, the B/GFA and its subsequent consolidations⁷⁵ generated the legislation of power-sharing designs between the rivalling communities compounded by structural links to both Britain and Ireland along with ‘constructive ambiguity’ over the constitutional future of Northern Ireland.⁷⁶ At first glance, the post B/GFA reality is seemingly a success story as violence has substantially subsided and the rhetoric of a shared future has featured prominently in official discourse. A governmental strategy to address communal divisions has been in the making for a decade even though one is yet to materialize into substantive action for reasons that will be clarified by this section.⁷⁷

The popular rise of the two diametrically opposed hard line parties – the Unionist Democratic Unionist Party (DUP) and the Republican Sinn Féin – has been described as an ‘unanticipated electoral dynamic’.⁷⁸ Furthermore, it was perceived to be ‘brazen as much as it was astonishing’ that these hard line parties so

332; Arend Lijphart, ‘Constitutional Design for Divided Societies’ (2004) 15 *Journal of Democracy* 96.

⁷³ Donald L Horowitz, *Ethnic Groups In Conflict* (University of California Press 1985); Donald L Horowitz, *A Democratic South Africa: Constitutional Engineering in Divided Societies* (University of California Press 1991); Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering For Conflict Management* (Cambridge University Press 2001).

⁷⁴ Andreas Wimmer, *Waves Of War* (Cambridge University Press 2013) 32.

⁷⁵ Northern Ireland Act 1998; Northern Ireland (St Andrews Agreement) Act 2006; Justice and Security Act 2007; Northern Ireland Act 2009; Northern Ireland (Miscellaneous Provisions) Act 2013.

⁷⁶ David Mitchell, ‘Cooking the Fudge: Constructive Ambiguity and the Implementation of the Northern Ireland Agreement 1998-2007’ (2009) 24(3) *Irish Political Studies* 321, 333.

⁷⁷ First consultation paper on the matter is from 2003. See OFMdFM, *A Shared Future: A Consultation Paper on Improving Relations in Northern Ireland* (January 2003) <<http://cain.ulst.ac.uk/issues/community/cru03.htm>> accessed 27 July 2015.

⁷⁸ Barton and Roche (n 41) 5.

quickly endorsed the power-sharing arrangements, and have been sharing power in the Executive since 2007.⁷⁹ Consequently, academic assessments tend to frame the developments in Northern Ireland as a process of incremental progress toward peace and the diminished prospects of return to widespread violence.⁸⁰ Policy proposals focused on ways to strengthen the fragility of existing political structures, for example:

If power-sharing is essayed as the keystone in a process of reconciliation, then it should stimulate and incentivize interethnic coalition-building in an integrative manner, rather than entrenching division behind ethnic vetoes.⁸¹

Others suggested a consociational structure ‘must also include grass root efforts at building civil society’ and that these were ‘the only means by which the legacy of animosity between the groups can be overcome’.⁸²

This prevailing reading of the developments in Northern Ireland tends to overemphasize the effects of power-sharing arrangements as a conflict-management vehicle, as well as underestimate the motivations by the rival communities to adopt these legal arrangements in their particular designated form. A micro-level perspective evokes a much less rosy interpretation of Northern Ireland’s path to violence reduction. Rational choice sets forth a reasoned exposition for the rival communities’ motivation in adopting consociational legal structures and their chosen

⁷⁹ Dennis Kennedy, The Case against the Belfast Agreement in Barton and Roche (n 41) 246; Dixon, *Northern Ireland* (n 9) 334.

⁸⁰ Lee A Smithey, *Unionists, Loyalists, and Conflict Transformation in Northern Ireland* (Oxford University Press 2011) 9-10.

⁸¹ Robin Wilson, *The Northern Ireland Experience Of Conflict And Agreement: A Model For Export?* (Manchester University Press 2010) 10 & 180.

⁸² Timothy J White, ‘Consolidating Peace and Democracy in Northern Ireland: The Role of Civil Society’ (2011) 4(3) *Dynamics of Asymmetric Conflict* 259, 260.

institutional devices as part of these structures.⁸³ In essence, entrenching power-sharing and equality arrangements presented a pragmatic opportunity for the rival communities to maximize their interests and goals without having to sustain the lethal consequences of the conflict. The leadership of the two communities did little to compromise their political ideology. Rather, through these chosen legal instruments, they self-inflicted what Elster described as ‘beneficial constraints,’ structured as a pre-committed negation of the need to reconcile or promote a shared future for Northern Ireland.⁸⁴

For Catholics/Nationalists, entering into power-sharing arrangements provided a credible and unarmed alternative toward Irish unification.⁸⁵ The armed struggle was a continual point of contention within the nationalist camp.⁸⁶ With formal proclamations of British neutrality toward the future of Northern Ireland repeatedly included in documents, such as the AIA and the 1993 Downing Street Declaration,⁸⁷ the legitimization of IRA violence as advancing the cause of Irish unification was rapidly losing ground.⁸⁸ Moreover, The anti-discrimination machinery legislated progressively over the duration of Britain’s direct rule

⁸³ On rational choice see William H Riker, ‘Political Science and Rational Choice’ in James E Alt and Kenneth A Shepsle, *Perspectives on Political Economy* (Cambridge University Press 1990) 163; James S Coleman, *Foundations of Social Theory* (Harvard University Press 1990) 32. See also Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field* (1987) 38 *Hastings Law Journal* 805, 814; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004) 11.

⁸⁴ Jon Elster, *Ulysses Unbound* (Cambridge University Press 2000). See also Cillian McGrattan, ‘Northern Nationalism and the Belfast Agreement’ in Barton and Roche (n 41) 149, who suggests the ‘elite consociational pact presently benefits both Sinn Fein and the Democratic Unionist Party (DUP).’

⁸⁵ McGrattan (n 85) 148; McVeigh and Rolston (n 68) 7-8; Dixon, *Northern Ireland* (n 9) 212.

⁸⁶ Dixon, *Northern Ireland* (n 9) 335.

⁸⁷ (n 39).

⁸⁸ Fitzduff (n 7) 115.

induced social mobility among Catholics/Nationalists and gradually opened for them greater access to public goods and positions of power.⁸⁹ These arrangements also bestowed Catholics/Nationalists with legal safeguards for the continuation of equitable resource allocations and the guarantee against the return of Protestant/Unionist supremacy.⁹⁰ Lastly, specific prized developments for the Catholic/Nationalist community were facilitated through the B/GFA, including: (i) the north-south bodies of ‘Strand Two’ that could be envisaged as an ‘embryonic’ all-Ireland government legitimizing the unification goal; and (ii) the early prisoner release scheme.⁹¹ Remarking on Republicanism’s peace process strategy, Aughey concluded that ‘the legitimacy of abandoning the “war” is based on the expectation that delivering peace will achieve republican objectives. The end is defined by the logic of the means’.⁹²

For Protestants/Unionists, power-sharing commanded the best – even if difficult to stomach – political vehicle to self-preserve their link to the United Kingdom.⁹³ Repeatedly unsuccessful in obliterating the British power-sharing agenda for Northern Ireland, they gradually and unenthusiastically arrived to the realistic understanding that they must secure ‘the best terms for their own political destiny’ under the new Anglo-Irish

⁸⁹ Peter Shirlow, *The End of Ulster Loyalism?* (Manchester University Press 2012) 85; Peter Shirlow and Brendan Murtagh, *Belfast: Segregation, Violence And City* (Pluto Press 2006) 104.

⁹⁰ Bean (n 13) 6-7.

⁹¹ Dixon, *Northern Ireland* (n 9) 268-9.

⁹² Arthur Aughey, ‘The Art and Effect of Political Lying in Northern Ireland’ (2002) 17(2) *Irish Political Studies* 17-8.

⁹³ Farrington, *Ulster Unionism* (n 32) 4-5; Arthur Aughey, ‘Wild catastrophism to mild moderation in Northern Ireland’ in Mark Perryman (ed), *Breaking Up Britain: Four Nations After A Union* (Lawrence & Wishart Ltd 2009) 79-80; Donald H Horowitz, ‘Explaining the Northern Ireland Agreement: The Source of an Unlikely Constitutional Consensus’ (2012) 32(2) *British Journal of Political Science* 193, 206-7; Dixon, *Northern Ireland* (n 9) 15.

alignment.⁹⁴ Moreover, in light of their continuous demographic decline in the region, power-sharing arrangements institutionalized Protestant/Unionist representation in governing Northern Ireland notwithstanding their numeric capacity.⁹⁵ Finally, the B/GFA also regulated the Irish government's involvement ensuring that it will not have a role in the internal affairs of Northern Ireland, which has been an ongoing source of anxiety within the Protestant/Unionist community.⁹⁶

Substantively, the consociational arrangements as implemented by the Northern Ireland Act 1998 constituted safeguards to ensure parity of esteem between the two communities, which effectively reinforces communal distinctions and 'rewards resource competition' in the governance of Northern Ireland.⁹⁷ These included requirements such as (i) community designation as 'nationalist,' 'unionist' or 'other' to ensure constant cross-community balance in the Assembly's operation; (ii) involuntary inter-communal coalition in the Executive; (iii) special voting arrangements and communal veto rights; (iv) proportional allocation of executive ministries based on the d'Hont algorithm and guarantees for cross community representation in public bodies; and (v) cultural autonomy in education and language.⁹⁸ Furthermore, the Fair Employment and Treatment (Northern Ireland) Order 1998 consolidated and replaced earlier equality in employment legislation, in addition to extending equal treatment to other spheres of goods and services. Hence, considering the

⁹⁴ McAuley (n 32) 48. See also Arthur Aughey, 'The 1998 Agreement: Three Unionist Anxieties' in Michael Cox et al (eds), *A Farewell to Arms?* (Manchester University Press 2006) 92.

⁹⁵ Horowitz (n 93) 218.

⁹⁶ Raised as one of the reasons why the B/GFA succeeded and Sunningdale failed in the Unionist newspaper, the *Belfast News Letter* ('Unionists Did Not Repeat Mistake of Sunningdale' (9 December 2013) <www.newletter.co.uk/news/regional/unionists-did-not-repeat-mistake-of-sunningdale-1-5737002> accessed 27 July 2015).

⁹⁷ Shirlow and Murtagh (89) 3.

⁹⁸ *ibid.*

direct profit by these arrangements to the core interests and long-term political goals of the more extreme factions of each community (ie Sinn Féin and the DUP) – notwithstanding the rhetoric of reluctance around them – the strong incentives to swiftly adopt them become fully apparent.⁹⁹

Finally, identifying the power-sharing arrangements as the pragmatic adaptation of the conflict by the rival communities also clarifies why policy-making concerning contentious cross-communal issues has remained defined by political paralysis and stagnation.¹⁰⁰ Examples of Northern Ireland's zero-sum politics are in abundance, known all too well to its observers. They include: (i) the failed attempt by Sinn Féin to abandon academic selection process within the education system known as 11+ exam, strongly cherished by Protestants/Unionists;¹⁰¹ (ii) the inability to develop a bill of rights for Northern Ireland despite being on the political agenda since the signing of the B/GFA, due predominantly to disagreement between Catholics/Nationalists and Protestants/Unionists over which rights demand protection;¹⁰² (iii) a failed attempt to regenerate a site for social housing in the sectarian area of North Belfast, known as Girdwood;¹⁰³ and (iv) the majestic collapse of a highly anticipated plan to build a peace centre in the former Maze/Long Kesh Prison, which housed the 1981 hunger strikers.¹⁰⁴

⁹⁹ Paul Bew, 'The Triumph of the Belfast Agreement' in Barton and Roche (n 41) 242.

¹⁰⁰ Cochrane, *The Reluctant Peace* (n 12) 248; Feargal Cochrane, 'From Transition to Transformation in Ethnonational Conflict: Some Lessons from Northern Ireland' (2012) 11(2) *Ethnopolitics* 182, 196; Harvey (n 13) 36; Wilson, 'A Model for Export?' (n 81) 183.

¹⁰¹ Cochrane, *The Reluctant Peace* (n 12) 229; Knox, *Devolution and the Governance of Northern Ireland* (n 59) 39-40.

¹⁰² Robin Whitaker, 'Debating Rights in the New Northern Ireland' (2010) 25(1) *Irish Political Studies* 23, 23-45.

¹⁰³ Cochrane, *The Reluctant Peace* (n 12) 284-7.

¹⁰⁴ 'Northern Ireland Coalition is Divided Over Maze Prison Peace Centre' *The Guardian* (15 August 2013) <<http://www.theguardian.com/uk->

Still, the most telling example has been the ongoing process – thus far with scarce evidence on implementation – to devise a substantive and comprehensive governmental strategy at tackling the persistent segregation of Northern Ireland. In 2007, a direct rule’s commissioned study quantified the financial costs of segregation in Northern Ireland as an additional 1.5 billion pound per annum spent on public services in the region.¹⁰⁵ This sum included security and policing measures; inflated social housing resulting from societal divide; duplicated systems of schooling, healthcare, public transport, voluntary sectors and other services provided separately for the two communities; and lost economic opportunities in the form of investment, tourism, etc. In 2013, the power-sharing Executive published the much anticipated *Together: Building a United Community*,¹⁰⁶ the third incarnation of the governmental agenda for cross-community relations after its failure to deliver on the previously published agendas – the 2005 *A Shared Future*¹⁰⁷ and the 2010 *Cohesion, Sharing and Integration*.¹⁰⁸ Even as the new program proclaimed a commitment to ‘a new, united, reconciled and shared society’,¹⁰⁹ through the establishment of the new Equality and Good Relations Commission and cross-community initiatives around education, housing, sports, youth volunteering and interface

[news/2013/aug/15/northern-reland-coalition-maze-divided-prison](#)> accessed 17 July 2015.

¹⁰⁵ Deloitte, *Research into the Financial Cost of the Northern Ireland Divide* (April 2007) <<http://cain.ulst.ac.uk/issues/segregat/docs/deloitte0407.pdf>> accessed 27 July 2015.

¹⁰⁶ OFMdfm, *Together: Building a United Community* (May 2013) <<http://www.ofmdfmi.gov.uk/together-building-a-united-community>> accessed 27 July 2015.

¹⁰⁷ OFMdfm, *A Shared Future* (March 2005) <<http://www.ofmdfmi.gov.uk/policy-strategic-framework-good-relations.pdf>> accessed 27 July 2015.

¹⁰⁸ OFMdfm, *Cohesion, Sharing and Integration* (July 2010) <http://www.ofmdfmi.gov.uk/reformatted_final_print_version_csi_-_26.07.10.pdf> accessed 27 July 2015.

¹⁰⁹ *Together* (n 106) 12.

barriers, it was met with ample criticism as lacking details on implementation mechanisms and funding, and as thus being sanctioned for failures at its outset. Yet, this development should hardly be surprising considering that the social contract upon which Northern Ireland ratified to bring itself out of its state of nature negated the obligation to strive for reconciliation as much as it neglected to provide catalysts toward such a goal.

In view of the above, the contours of existing theoretical debates that thus far have centred on the power-sharing structures underplay the recursive interaction between structural design and the strategic conduct of agents in Northern Ireland. The current pondering on the value of consociationalism as a 'source of causation'¹¹⁰ – namely whether power-sharing arrangements are essentially the only viable vehicle for peace and stability in divided territories or, alternatively, as constraining conflict transformation through the reproduction of the conflict's injustices¹¹¹ – overlooks the instrumental aspects and purposive choices of the human agents in entering into these peace agreements. Excessively functionalists, consociationalists tended to overestimate the power and centrality of structures in enabling conflict transformation and promoting reconciliation.¹¹² Their critics were correct to categorize power-sharing arrangements as conflict preserving, highlighting the role of consociational arrangements as: (i) reinforcing ethno-national divisions and effectively freezing avenues for transformative forms of politics;¹¹³ and (ii) undermining other forms of social equality, such as gender or civic equality.¹¹⁴

¹¹⁰ A structure description borrowed from Giddens (n 6) 174.

¹¹¹ A comprehensive summary and discussion of this debate can be found in Taylor, *Consociational Theory* (n 1).

¹¹² Self-described 'outspoken proponents' of this view are Christopher McCrudden, John McGarry, Brendan O'Leary and Alex Schwartz, 'Why Northern Ireland's Institutions Need Stability' (2014) Government and Opposition CJO 1, 25.

¹¹³ Rupert Taylor, 'The Belfast Agreement and the Limits of Consociationalism' in Christopher Farrington (ed), *Global Change, Civil Society and The Northern*

Yet, these critics, too, err in exaggerating the power of structures and fail to take into account the active role of individual agents in creating and reproducing these structures. As noted by Giddens, ‘structures exist only in ... the knowledgeable activities of situation human subjects, which reproduce them as structural properties of social systems’.¹¹⁵ Hence, the legal instruments employed as part of the Northern Ireland peace process offered an opportunity for the rivalling communities to secure beneficial vehicles to proceed – and at a much lesser lethal cost – with the conflict conditions as much as it provided for a structural negation of reconciliation. ‘Constraint’ Giddens further observed, ‘operate[s] through the active involvement of the agents concerned, not as some force of which they are passive recipients’.¹¹⁶ Therefore, the common depiction of the power-sharing arrangements as a difficult and historic compromise actively driven by external involvement and the result of a complex cocktail of carrots and sticks seems to be overreaching.

IV. INFERRING A PATH FORWARD

Are legal designs a constructive device to transform conflict conditions in deeply divided societies? The Northern Ireland reality validates the substantive impact of legal mechanisms in constraining overt discrimination, targeting socio-economic differentials and reorienting the conflict toward a less lethal

Ireland Peace Process (Palgrave Macmillan 2008) 183-198; Acheson et al (n 46) 28; Andrew Finlay, *Governing Ethnic Conflict: Consociation, Identity and The Price Of Peace* (Routledge 2011) 211.

¹¹⁴ Cynthia Cockburn, ‘The Gendered Dynamics of Conflict and Political Violence’ in Caroline O Moser and Fiona C Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict And Political Violence* (Zed Books 2001) 13-29; Rachel Rebouche and Kate Fearon, ‘Overlapping Identities: Power Sharing and Women’s Rights’ in Ian O’Flynn and David Russell (eds), *Power Sharing: New Challenges For Divided Societies* (Pluto Press 2005) 155-171.

¹¹⁵ Giddens (n 6) 173-5 & 304.

¹¹⁶ *ibid* 289.

terrain.¹¹⁷ A realist perspective on conflict-management will expectedly identify these as criteria of success. However, the longevity and durability of such an outcome is challenged by the reality in such divided societies characterized by profound mistrust and imminent prospects of re-escalation. The empirical reality of post B/GFA's Northern Ireland points to the resilience, if not intensification, of the traditional identities and militant desires.¹¹⁸ Even as the majority population has been declaring in public surveys the wish to live in mixed religion neighbourhood (71%); work in a diverse workplace environment (80%); and send their children to mixed schools (62%), these public proclamations have yet to translate into political choices. Thus far, Northern Irish voters have opted to strengthen communal parties over those advancing cross-community political traditions.¹¹⁹

The majority in Northern Ireland also displayed ongoing preference for the power-sharing institutions as opposed to majority-based democratic politics even as the formers proved quite dysfunctional in delivering joint policies. Finally, ethnic competition and confrontation in Northern Ireland seems salient, if not rising, evident recently in disputes over flying the Union Jack flag at Belfast City Hall, which caused severe disruptions in the everyday life of Northern Ireland. The situation deteriorated to such a low point that external mediators were re-employed to pacify tensions, but the Haass-O'Sullivan talks ended without an agreement.¹²⁰

¹¹⁷ Kelly (n 7).

¹¹⁸ The 2012 Northern Ireland Life and Time Survey (NILT) revealed a marked intensification in British (from 60% to 68%) and Irish (from 26% to 32%) identities and a fall in people identifying as 'Northern Irish' (from 29% to 22%) (ARK, NILT (June 2013)

<http://www.ark.ac.uk/nilt/2012/Community_Relations/index.html> accessed 27 July 2015). According to Cochrane, 'Ethnopolitics' (n 100) 189, 'the desire of some groups to continue militant campaigns of violence has grown.'

¹¹⁹ For example, the Alliance Party, established in 1970 with cross-community agenda, has remained a minor political force.

¹²⁰ Henry McDonald, 'Northern Ireland executive publishes draft proposals from failed Haass talks', *The Guardian* (31 December 2013)

In socio-legal literature the exploration of the relationship between law and social change frequently focused on the attempt by disadvantaged groups seeking social justice to transform existing power arrangements.¹²¹ However, the context of post-violent Northern Ireland where the fortification of equality yielded an equal-yet-separated reality calls for greater connectivity in the investigations of the macro-level and micro-level social dynamics.¹²² Peacebuilding practitioners have long argued for an integrative approach in generating sustainable reconciliation for protracted conflict.¹²³ Yet, perhaps the most noteworthy theoretical contribution in this regard has been Giddens' theory of structuration, which attempted to rethink the relations between social structures and human action and interweave them.¹²⁴ Giddens famously argued that a social structure 'has no existence independent of the knowledge that agents have about what they do in their day-to-day activity'.¹²⁵ Structures provide the rules and resources for human agents who in turn reproduce but can also reformulate these structures

<<http://www.theguardian.com/uk-news/2013/dec/31/northern-ireland-draft-proposals-published>> accessed 27 July 2015.

¹²¹ Michael McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994); Helena Silverstein, *Unleashing Rights: Law, Meaning and the Animal Rights Movement* (University Michigan Press 1996); Austin Sarat and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press 2006); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008).

¹²² On this divide, see Monika Krause, 'Recombining Micro/Macro: The Grammar of Theoretical Innovation' (2013) 16(2) *European Journal of Social Theory* 139.

¹²³ John Paul Lederach, *Building Peace: Sustainable Development In Divided Societies* (United States Institutes of Peace 1997). In the Northern Ireland context, see David Bloomfield (n 2). For a sociological perspective, see Brewer (n 1) 203.

¹²⁴ Additional theoretical schemes to bridge the micro-macro gap include Pierre Bourdieu, *The Logic of Practice* (Polity Press 1990); Coleman, (n 83); Mills (n 6).

¹²⁵ Giddens (n 6) 26.

through their actions. Even as Giddens' theory was criticized as leaving much to be desired,¹²⁶ the sterility embodied in the structure-centred debates warrants an attempt to draw on his powerful ideas and revisit their potential contribution in post-violence divided realities.

Equality and cross-community safeguards remains the predominant dimension of existing structures in Northern Ireland, and the political prospects of immediate structural reforms seems a distant possibility. Hence, conflict transformation for the foreseeable future ought to be envisioned within existing structures. The need for reconciliation was given a brief acknowledgment as part of the B/GFA introductory section. The subsequent structural manifestation of this pledge came in the form of a single implementing legislative provision, namely section 75(2) of the Northern Ireland Act 1998. This sub-section proclaims that:

A public authority shall in carrying out its functions relating to Northern Ireland will have regard to the desirability of promoting good relations between persons of different religious beliefs, political opinion or racial group.

Evident by its chosen legal articulation, this duty was intentionally subsidiary to the pursuit of equality enshrined by the preceding subsection 75(1).¹²⁷ Whereas public authorities are required to have '*due regard to the need*' to promote equality of opportunity,¹²⁸ the good relations duty requires public authorities to only have '*regard to the desirability*' of promoting such

¹²⁶ David Held and John B Thompson (eds), *Social Theory and Modern Societies: Anthony Giddens and His Critics* (Cambridge University Press 1989).

¹²⁷ Roz Goldie and Joanne Murphy, 'Embedding the Peace Process: The Role of Leadership, Change and Government in Implementing Key Reforms in Policing and Local Government in Northern Ireland' (2010) 15(2) *International Journal for Peace Studies* 32, 36-7.

¹²⁸ Northern Ireland Act 1998, s 75(1) (emphasis added).

relations.¹²⁹ Moreover, the prevailing interpretation of these duties conforms to guidelines published by the Equality Commission responsible for monitoring these two statutory duties. According to the guidelines, public authorities are required to periodically submit Equality Impact Assessments (EQIAs) to the Equality Commission specifying the fulfilment of the good relations duty by way of: (i) exercising *equality* in hiring a cross-community workforce, and (ii) abiding by *equality* schemes in developing and conducting their policies.¹³⁰ Not only is the implementation of the good relations enumerated in equality measures, but discourse in Northern Ireland has been known to suggest that abiding by the good relations duty may result in undermining the statutory duty of promoting equality¹³¹ and is likely to be non-justiciable save in exceptional cases.¹³²

Nonetheless, section 75(2) offers an ideal example to operationalize Giddens' structuration idea. The plain language of

¹²⁹ *ibid* s 75(2) (emphasis added).

¹³⁰ For guidelines see Equality Commission, *Section 75 of the Northern Ireland Act 1998: Guide to the Statutory Duties* (April 2010)

<<http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/S75GuideforPublicAuthoritiesApril2010.pdf>>

accessed 27 July 2015); Equality Commission, *Section 75 of the Northern Ireland Act 1998: Practical Guidance on Equality Impact Assessment* (February 2005)

<<http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/PracticalGuidanceonEQIA2005.pdf>> accessed 27

July 2015. Its reductionist implementation is discussed in Shirlow and Murtagh (n 89) 131-2.

¹³¹ CAJ, *Unequal Relations? Policy, the Section 75 Duties and Equality Commission Advice: Has 'Good Relations' Been Allowed to Undermine Equality?* (May 2013)

<http://www.caj.org.uk/files/2013/06/11/No.64_Unequal_Relations_%E2%80%93_Policy,_the_Section_75_duties_and_Equality_Commission_advice_etc._May_2013_.pdf> accessed 27 July 2015.

¹³² In both *Re Neill's Application* [2006] NICA 5 and *Re JR's 1 Application* [2011] NIQB 5, the courts suggested the Equality Commission, rather than judicial review, was the correct avenue for recourse where there was an alleged breach of Northern Ireland Act 1998, s 75(1). See also Anthony Gordon, *Judicial Review in Northern Ireland* (2nd edn, Hart Publishing 2014) 163-4.

section 75(2) bestows human agencies in all levels of Northern Ireland's public sector with the capacity to utilize this positive duty and reshape the polarized and segregated character of life in Northern Ireland. While the political parties remain consumed with tribal politics, the administrative level and the bureaucracy of Northern Ireland are still free – and statutorily required – to utilize this duty to build good relations across communal lines. For example, governmental agencies could address the existing rigidly sectarian landscape of the region by maximizing the construction of shared living areas. Individuals in the Education Department can initiate a constructive transformation of the education agenda toward an integrated one. Even though such a policy focus has been discussed publicly as early as 1966,¹³³ its de facto advancement has been negligible and its principal success resulted from private initiatives responsible for the establishment of a small network of integrated schools.¹³⁴

The horizon of opportunities for developing cross-community partnership in Northern Ireland under section 75(2) remains immense. Cultural agencies can develop shared ritual expressions to replace existing sectarian ones; and collaborative efforts by governmental agencies can focus on minimizing duplication of services and cultivating initiatives and incentives that place reconciliation at the heart of public policy. The absence of such a reconciliatory focus seems to involve a lack of imagination and initiative, rather than opportunities.¹³⁵ Such an observation is experimentally supported by social capital scholarship, which identified the range of public goods produced by social networks

¹³³ John Whyte, *Interpreting Northern Ireland* (Oxford University Press 1990) 210.

¹³⁴ Fionnuala O'Connor, *A Shared Childhood* (Blackstaff Press 2002); Jonathan Bardon, *The Struggle for Shared Schools in Northern Ireland* (Ulster Historical Foundation 2009).

¹³⁵ Coulter and Murray (n 49) 23.

but also highlighted the negative impact of in-group bonding ties in reinforcing polarized fabrics.¹³⁶

V. CONCLUSION

A single case study is perhaps too narrow in cumulating universal conclusions on the role of legal designs in conflict resolution. Yet, the above analysis does bring into sharp focus three main lessons on law's function in societies long divided by conflict. First, the article exposes the shortcoming of the current scholarly debates on conflict management that are dominated by structural readings. Instead, this article elucidates the motivations to enter into consociational frameworks through an agent-based perspective as a self-inflicted and pre-committed negation of the need to reconcile.

Secondly, the article highlights that the central challenge rest not in the inherently limiting capacities of structures to generate reconciliation. Rather, structures put in place in deeply divided societies were being operated within a limited institutional and imaginative universe. Finally, the article proposes the prospects of transforming sectarianized social realities drawing on Giddens' conceptualization of the duality of structure. Whereas legal structures remain intact, the dynamics of human societies and their thinking patterns are in constant state of evolution, and so are the prevailing interpretations of their legal arrangements.¹³⁷ As noted by Garth and Sarat, 'for law to be central to ... social change ... someone, or some groups, need to spread "the word" of the law' namely, 'a human agency at work' is essential to

¹³⁶ This paradoxical power of social capital is explored across Michaelene Cox (ed), *Social Capital and Peace-Building* (Routledge 2009). For Northern Ireland specifically see Robert Belloni, 'Shades of Orange and Green: Civil Society and the Peace Process in Northern Ireland' in Cox (n 136) 5-21; Arthur, *Special Relationship* (n 8) 98.

¹³⁷ On sociological theory of social change see Jay Weinstein, *Social Change* (3rd edn, Rowman & Littlefield 2010).

utilize the readily available structural components, exemplified through Northern Ireland's section 75(2).¹³⁸

And so, the Northern Ireland experience brings into sharp focus law's function in divided societies as embodying limitations but also a promise: conflict transformation and sustainable reconciliation require more than a structural solution in the form of broad consociationalism. An agency at work with an appetite for change is vital to materialize and operate a space for reconciliation. Reassuringly, constraining structures do not seem to negate opportunities for creative human agents to advance positive change. To paraphrase Marcel Proust, in deeply divided societies, the voyage for discovering a reconciled landscape lies not only in the pursuit of power-sharing structures, but also in having new eyes.

¹³⁸ Bryant G Garth and Austin Sarat (eds), *How Does Law Matter?* (Northwestern University Press 1998) 8-9.