# -Surrendering Sovereignty-

# The Constitutional Implications of the NI Protocol

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*Falsus in uno, falsus in omnibus*

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29 December 2020

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## Introduction

[1] This paper is written to provide a (brief) analysis of the constitutional implications of the Northern Ireland Protocol. The views of the grassroots unionist and loyalist community has been largely ignored within the sphere of civic society, academia, and the mainstream media in relation to the impact of the Protocol on the status of Northern Ireland as part of the United Kingdom.

[2] The arguments presented within this paper are not, and do not purport to be, reflective of every unionist and loyalist. Rather it seeks to present a legal, and to a lesser degree political, argument as to why the Protocol poses a threat to the sovereignty of the United Kingdom.

[3] The Belfast Agreement in 1998[1] was sold to the nationalist community as a 'process', and thus served to politicise and energise a whole new generation of activists. On the other hand, the 1998 Agreement was sold to the unionist/loyalist community as a final settlement, and as such had the opposite effect and de-politicised an entire generation. The NI Protocol is a clear and present danger to the union, and as such has the potential to energise and politicise unionist and loyalist communities in a collective effort to frustrate and ultimately thwart its permanent imposition.

[4] There is an almost complete absence of written academic or legal papers from within unionism generally, and loyalism specifically. This stands in stark contrast to the civic activism of the nationalist community, who have rallied the professional class to their cause and used those avenues to make their case through the civic, academic, media and political establishment. This paper seeks to insert an analysis from a loyalist perspective into that sphere, which will at least provide a written record of the arguments advanced against the Protocol.

[1] Belfast Agreement 1998- An agreement reached as a result of multi-party talks

## Summary

[5] On 29 December 2020 the European Research Group's ('ERG') legal advisory committee ('Star Chamber') published their opinion on the UK-EU Trade and Cooperation agreement[2]. The legal advisory committee is made up of Sir William Cash MP, Martin Howe QC, Barnabas Reynolds, Rt.Hon. David Jones MP, Christopher Howarth and Emily Law.

[6] It is important to note that the Star Chamber opinion was based solely on an analysis of the UK-EU Trade and Cooperation agreement. The opinion concluded, inter alia:

*"the Agreement preserves the UK's sovereignty as a matter of law and fully respects the norms of international sovereign to sovereign treaties."*

[7] Whether intentional or otherwise, the definitive conclusion as to the UK's sovereignty plainly engenders confusion in so far as many persons will struggle to differentiate between the specific agreement (UK-EU Trade and Cooperation agreement) referred to by the Star Chamber's conclusion, and the wider Withdrawal Agreement, inclusive of the Northern Ireland Protocol.

[8] Notwithstanding the potential for confusion, it is submitted that any assessment as to the preservation of sovereignty must assess the Brexit deal in all its component parts, which naturally includes the provisions of the NI Protocol. If sovereignty is diminished in one area, then this should poison the well in its entirety: *Falsus in uno, falsus in omnibus*[3].

[9] This analysis paper focuses solely on the narrow but crucial issue of the effect of the NI Protocol on the sovereignty of the United Kingdom. The Protocol will effectively annex Northern Ireland off from the rest of the United Kingdom, creating trade barriers between NI-

[2] The ERG's Legal Advisory Committee – Opinion of the UK-EU Trade and Cooperation Agreement 29 December 2020

[3] 'False in one thing, false in all' in Latin. In the present context, if it is accepted the NI Protocol undermines the sovereignty of the United Kingdom, then the entire deal must be viewed in that context.

GB and vice versa. Northern Ireland will be further subjected to laws made by the EU, with input from the Irish Government, despite having no democratic say in those laws.

**The Act of Union 1800**

[10] The Act of Union 1800 created the union of Great Britain and Ireland. When Northern Ireland was created in 1921, the Act of Union Articles continued to apply as before, with specific importance placed upon ensuring Northern Ireland and Great Britain remained as part of one internal market.

[11] The Act of Union remains in force and is a key constitutional component of the United Kingdom. Article IV declares:

***"Subjects of Great Britain and Ireland to be on same footing from 1 Jan. 1801.***

*That it be the sixth article of union, that his Majesty's subjects of Great Britain and Ireland shall, from and after the first day of January, one thousand eight hundred and one, be entitled to the same privileges, and be on the same footing as to encouragements and bounties on the like articles, being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the united kingdom and its dependencies; and that in all treaties made by his Majesty, his heirs, and successors, with any foreign power, his Majesty's subjects of Ireland shall have same the privileges, and be on the same footing as his Majesty's subjects of Great Britain."*

***"No duty or bounty on exportation of produce of one country to the other.***

*"That from the first day of January, one thousand eight hundred and one, all prohibitions and bounties on the export of articles the growth, produce, or manufacture of either country to the other, shall cease and determine; and that the said articles shall thenceforth be exported from one country to the other, without duty or bounty on such export.*

***"All articles the produce of either country shall be imported free from duty.***

*"That all articles the growth, produce, or manufacture of either country, (not herein-after enumerated as subject to specific duties) shall from thenceforth be imported into each country from the other free*

*from duty, other than such countervailing duties as shall hereafter be imposed by the parliament of the united kingdom in the manner herein-after provided; "*

[12] It is clear that the NI Protocol, by virtue of creating trade barriers between Northern Ireland and the rest of the United Kingdom, and vice versa, offends the Act of Union in so far as subjects of Great Britain and Northern Ireland are not left on the same footing.

[13] In assessing whether the Brexit arrangements, taken in all their parts, preserves the sovereignty of the whole United Kingdom, it is logical to assess whether any, or all, of the arrangements offend the basic constitutional provisions set out within the Act of Union.

[14] The barriers to trade and differential treatment of the citizens of Northern Ireland vis-à-vis citizens in GB fundamentally offends the Act of Union, and as such this alone undermines the constitutional foundations of the United Kingdom.

**The Belfast Agreement and Northern Ireland Act 1998**

[15] Those dedicated to overturning the democratic will of 17.4 million British citizens who voted to leave the European Union have worked alongside the Irish Government and Irish Nationalist political parties in Northern Ireland, to weaponise the Belfast Agreement. This has been part of a cynical effort to manipulate the agreement in order that it be used as a vehicle to advance a purely nationalist objective.

[16] The weaponisation of the agreement has worked from the fundamental premise that there must be no barriers between Northern Ireland and the Irish Republic because a border- or even a solitary CCTV camera to monitor trade- would be a breach of the Belfast Agreement.

[17] This is, of course, arrant nonsense. Indeed, the fundamental bedrock of the Belfast Agreement is the principle of consent, ensuring that Northern Ireland remains part of the United Kingdom for so long as a majority of citizens wish it to be so. Therefore, the Belfast Agreement copper-fastens the reality that Northern Ireland the Irish Republic are separated by a border between two sovereign jurisdictions.

[18] Whilst beyond the scope of this piece, it is important to highlight that the whole premise of the weaponisation of the Belfast Agreement was that should nationalist interpretations of the agreement (which have no basis whatsoever in law) not prevail, then peace would be at risk. In short; if there were to be any recognition of the reality that there is a sovereign border between Northern Ireland the Irish Republic, then republican terrorism may return. This illuminates the reality that peace in Northern Ireland is dependent upon concessions to Irish nationalism, no matter how outlandish their perpetual demands. By capitulating to the implied threat of violence, a dangerous precedent has been set which sends a concerning message that political leverage can be gained by threatening peace.

[19] The nationalist interpretation of the Belfast Agreement, and its apparent requirement for an open border and membership of the EU, was litigated in the High Court and Court of Appeal in Northern Ireland, and finally referred to the Supreme Court as a devolution issue. This was ultimately resolved as part of the cases which culminated in the Supreme Court judgment commonly referred to as '*Miller 1*'.

[20] At paragraph 135 of *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 the majority said:

*"135. In our view, this important provision, which arose out of the Belfast Agreement, gave the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland. It neither regulated any other change in the constitutional status of Northern Ireland nor required the consent of a majority of the people of Northern Ireland to the withdrawal of the United Kingdom from the European Union. Contrary to the submission of Mr Lavery QC for Mr McCord this section cannot support any legitimate expectation to that effect."*

[21] As is clear from *Miller 1*, the Belfast Agreement has nothing to say about the European Union, nor is there any requirement that Northern Ireland would remain part of the EU, or that its citizens should retain benefits of EU membership.

[22] A full Brexit, inclusive- if necessary- of infrastructure between Northern Ireland and the Irish Republic would not, in any shape or form, have offended the provisions of the Belfast Agreement. Accordingly, it is imperative to ask; precisely what part of the Belfast Agreement

was being protected in ensuring there was no infrastructure between the sovereign territory of the United Kingdom and the Irish Republic?

*Shredding the Belfast Agreement principle of cross-community consent*

[23] The Belfast Agreement is given effect in domestic law by the Northern Ireland Act 1998 ('the 1998 Act'). It underpins the British-Irish international treaty, annex 1 of which is the Belfast Agreement. The agreement therefore imposes international obligations on the United Kingdom Government in respect of Northern Ireland.

[24] The Belfast Agreement enshrines the principle of cross-community consent in relation to "key decisions" taken by the Northern Ireland Assembly. Strand 1 (5) (d) of the Belfast Agreement imposes safeguards for 'key decisions':

*5*

*(d) arrangements to ensure key decisions are made on a cross community basis;*

*(i) either parallel consent, i.e a majority of those numbers present and voting, including a majority of the unionist and nationalist designations present and voting;*

*(ii) or a weighted majority (60%) of members present and voting, including at least 40% of each the unionist and nationalist designations present and voting;*

[25] In the Northern Ireland Act 1998, Section 26 provides that the Secretary of State may order or direct that any action which conflicts with international obligations is not taken, and may revoke any legislation which he considers breaches international obligations.

[26] The NI Protocol requires the consent, after 4 years, of the Northern Ireland Assembly. However, in a clear departure from Strand 1 (5) (d) of the Belfast Agreement, it is provided that this decision is taken by a simple majority, rather than on a cross-community basis.

[27] This creates the anomaly whereby by virtue of the consent mechanism for the NI Protocol departing from the international obligation set out at Strand 1 (5) (d), the Government is itself

conflicting its international obligations under the Belfast Agreement. It is difficult to see how this reconciles with Section 26 of the 1998 Act.

[28] There has been no outcry about this shredding of a key safeguard within the Belfast Agreement. This illuminates that the weaponisation of the agreement- *inclusive of the implied threat to 'peace'*- by Irish nationalism (including the Irish Government) was more about leveraging political concessions, rather than any genuine interest in protecting the Belfast Agreement. That is why safeguards are discarded in pursuit of protecting the nationalist demand that their contrived interpretation of the agreement prevails, notwithstanding the legal reality that such an interpretation has no basis in the text of the British-Irish treaty, Belfast Agreement or the 1998 Act.

**Internal Market Bill**

[29] In the New Decade, New Approach ('NDNA') deal[4] the Government committed to legislating to ensure Northern Ireland business had unfettered access to the UK internal market. At paragraph 10 of Annex A: UK Government commitments to Northern Ireland it stated:

*"10. The Government welcomes the consensus reached by all the parties recently on the protections they wish to see for trade between Northern Ireland and Great Britain under the Protocol. The Government is absolutely committed to ensuring that Northern Ireland remains an integral part of the UK internal market, in line with the clear guarantee in the Protocol that Northern Ireland remains in the customs territory of the United Kingdom. To address the issues raised by the parties,* ***we will legislate to guarantee unfettered access for Northern Ireland's businesses to the whole of the UK internal market****, and ensure that this legislation is in force for 1 January 2021. The government will engage in detail with a restored Executive on measures to protect and strengthen the UK internal market."* (emphasis added)

[4]'New Decade, New Approach deal [2020]

[30] The Internal Market Bill[5] initially included Clauses 42 and 43 which would have empowered Ministers to make regulations in relation to exit declarations for goods travelling from Northern Ireland to Great Britain. Clause 45 contained a notwithstanding Section 7A of the EU (Withdrawal) Act 2018 provision, granting Ministers the power to disapply the direct effect requirement of the 2018 Act.

[31] This Bill, had the Clauses remained intact, would have allowed the Government to live up to the legitimate expectation created by their unambiguous commitment at paragraph 10 of Annex 1 of NDNA, alongside the Prime Minister's numerous promises that there would be no extra paperwork or checks required for goods moving between NI and GB, and vice versa.

[32] The relevant Clauses were eventually removed from the Bill, but not before a significant debate as to whether they breached international law and were unconstitutional. The issue is now moot, nevertheless for completeness it can be briefly addressed. This paper adopts the argument succinctly presented by John Larkin QC and John Finnis QC in which both eminent legal professionals argued that the clauses were not unconstitutional[6]. Writing for The Spectator they said:

*"What is beyond doubt is that it is entirely inconsistent with our constitution to argue as if statutes giving effect to international treaties were unrepealable or unamendable. The Human Rights Act 1998 itself contemplates and provides for non-compliance by the UK with its obligations under an important treaty, the European Convention on Human Rights. The courts of more than one major member-state in the EU insist that their national constitutional law authorises and requires violation of the EU treaties under conditions defined by national law."*

[33] Even ardent Remain campaigner Jo Maughan QC articulated the view that Parliament must be free to breach international law[7]. He tweeted:

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[5] https://services.parliament.uk/Bills/2019-21/unitedkingdominternalmarket.html

[6] 'Introducing the Internal Market Bill isn't unconstitutional' – John Finnis QC and John Larkin QC https://www.spectator.co.uk/article/whatever-its-political-wisdom-introducing-the-internal-markets-bill-is-not-unconstitutional

[7] Tweet from @Jolyonmaugham on 9 Sept 2020 at 08:50am

*"If Parliamentary sovereignty - a notion at the heart of most lawyers' idea of our rag-tag constitution - means anything it must mean Parliament can enact (thus Ministers can advise on and recommend) … legislation that breaches international law."*

[34] Martin Howe QC strongly argued in favour of the Internal Market Bill prevailing over the Protocol[8]. He also argued that the NI Protocol , if it were to take effect, posed a threat to the constitution of the United Kingdom:

*"As we have seen, the freedom to trade between different parts of the United Kingdom, and in particular to trade without customs duties or 'prohibition' (i.e. regulatory barriers), is one of the foundations of the UK's constitution.*

*"Were these threats to materialise, that would be flat contrary to the Act of Union between Great Britain and Ireland and would alter the constitutional status of Northern Ireland within the UK. As such, it would amount to a major breach of the core principle of the Belfast (Good Friday) Agreement that NI's constitutional status cannot be changed without the consent of the people of Northern Ireland."*

[35] Mr Howe is the Chairman of Lawyers for Britain and ironically a member of the ERG Star Chamber which authored the legal opinion declaring the UK-GB Trade and Cooperation deal preserved the sovereignty of the United Kingdom. As part of this Trade Deal, the UK removed Clauses 42 and 43 from the Internal Market Bill.

[36] I adopt Mr Howe's argument that Clauses 42 and 43 of the Internal Market Bill was necessary to thwart the threats arising from the NI Protocol. I also adopt the succinct analysis, which I quote at paragraph 34 above, of the inter-connected constitutional threat to Northern Ireland arising from the imposition of the Protocol.

[37] However, I respectfully struggle to reconcile Mr Howe's argument as adopted at paragraph 34 above, with the assertion by the ERG Star Chamber (of which he is a key member) that the

[8] 'Why UK Law must prevail over the EU Withdrawal Agreement' By Martin Howe QC
https://www.politeia.co.uk/internal-market-bill-by-martin-howe-qc/

Agreement "*preserves the UK's sovereignty as a matter of law and fully respects the norms of international sovereign-to-sovereign treaties*".

[38] In Mr Howe's defence, it may be said that the conclusion of the Star Chamber legal opinion related only to the UK-EU Trade and Cooperation Agreement. However, that agreement necessitated that the Government withdraw Clauses 42 and 43 of the Internal Market Bill, which Mr Howe himself only three months ago argued were essential to thwart the Protocol and its threat to the constitutional position of Northern Ireland.

**Defending the Union- Defeating the NI Protocol**

[39] There are two readily identifiable routes out of the Protocol, each addressed briefly in turn. These are (1) via a majority vote (*notwithstanding that such a key decision being taken via a majority vote mechanism is a flagrant breach of Strand 1 (5) (d) of the Belfast Agreement*) in the Northern Ireland Assembly when the consent question is posed in 2024; or (2) via the unilateral exit mechanism set out in Article 16 of the NI Protocol.

*A unionist majority rejecting the Protocol in 2024*

[40] This, on its face, is the simplest way of rejecting the Protocol. It is nevertheless likely to be the most challenging path given the position of Alliance who, despite positioning themselves as being 'on the fence' in the relation to the constitutional question, have consistently sided with nationalism- especially in relation to Brexit.

[41] In 2019 the Progressive Unionist Party called for a Unionist Convention[9]. It seems that such a forum is an essential mechanism for the development of a collective unionist and loyalist campaign to see of the threat to the union posed by the Protocol. The unionist and loyalist community is a broad church, with many differing views on social and broader political issues, however the one unifying component is the union. It would be a derogation of duty to defend the union if such a collective body did not come together with the sole purpose of developing a legal, political, community and civic strategy. Such a strategic movement is

[9] https://www.irishtimes.com/news/politics/unionist-forum-urgently-needed-in-response-to-calls-for-irish-unity-1.4048921

necessary to resist efforts to annex Northern Ireland off into what effectively amounts to an economic United Ireland.

*Unilateral Exit mechanism via Article 16 of the Northern Protocol*

[42] Article 16 provides a mechanism for the Protocol to be unilaterally disapplied by either the Government or EU, if its imposition *"leads to serious economic, societal or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the United Kingdom may unilaterally take appropriate safeguard measures"*

[43] It appears that Article 16 sets out an exit mechanism if precisely the kind of 'difficulties' that nationalists warned may arise should there be any North-South border, were to transpire with the imposition of the Protocol, and its attendant border in the Irish Sea. The reality that implied nationalist threats to peace were rewarded with political concessions, creates a danger that some may look at that outcome and conclude that if such destabilising antagonism was sufficient to prevent a North-South border, then why would the same approach not succeed in preventing an Irish Sea border, or of triggering Article 16. This is a situation which is unhelpful to the political stability of Northern Ireland. It is wholly understandable that a bubbling resentment boils within the unionist and loyalist psyche, flowing from the imposition of an Irish Sea border to appease the implied threats to peace, which emanated from nationalism and the Irish Government.

[44] It is crucial that Article 16 is attacked from a purely legal and political standpoint. Whilst mainstream unionist political parties, primarily the DUP, were content to share platforms with the grassroots unionist and loyalist community in the campaign against the 'Betrayal Act', this was primarily because the threat of loyalist protest allowed those politicians to cloud the reality; it is they who possess the most potent levers to pull in frustrating the Protocol. The real betrayal is their lack of courage to implement such a strategy.

[45] The DUP and UUP are part of the Executive. Ironically, the DUP have responsibility for the Department charged with implementing the Sea Border. The first 'protest' against the Protocol should be a deliberate DUP campaign to frustrate and impede the implementation of checks

and infrastructure. They must use every lever available to them within the structures of the Northern Ireland Assembly and their Ministerial offices.

[46] The real route to triggering Article 16 is not via protests or civil disobedience, but rather by making the system of Government unworkable from within. The power to do that rests with the DUP and to a lesser extent the UUP. I suspect the DUP well know that they now face a choice between disrupting the workings of Government in an effort to resist the Protocol[10], or alternatively of meekly implementing the Protocol. Their recent musings about "opportunities" in the Protocol leads to the inevitable conclusion that the DUP fully intend to eschew any real effort to resist the Irish Sea Border in favour of becoming its chief implementers.

**Conclusion**

[47] The NI Protocol is a clear and present danger to the constitutional integrity of the United Kingdom. The legal opinion of the ERG Star Chamber appears on a prima facie basis to be one of political convenience, rather than remaining faithful to the robust legal arguments advanced in the months previously, which correctly identified the unconstitutional nature of the NI Protocol.

[48] The integrity of the UK internal market is a foundation of the Act of Union. It follows that the preservation of that foundation is a core component of preserving the sovereignty of the United Kingdom. It is undisputable that the NI Protocol creates a trade border between NI and GB; evidenced by the fact that the Government itself initially sought to insert Clauses 42 and 43 into the Internal Market Bill in order to alleviate such fettered access to the UK internal market.

[49] The Protocol, whilst temporary in its nature, will by its very nature embed a trajectory of Northern Ireland being orientated towards Dublin, and away from GB. The ultimate logical outcome- *if allowed to grow unimpeded*- is an economic United Ireland, which is a pre-cursor to the political unification of Northern Ireland with the Irish Republic. The Irish Government are

[10] Paul Girvan MP stated in a public meeting in Antrim in 2019 that the DUP would collapse the Belfast Agreement if the Protocol was imposed

already- as evidenced by Erasmus funding- operating as if Northern Ireland is an extension of their sovereign territory.

[50] The NI Protocol is the new version of Articles 2 and 3; only on this occasion it is more potent given the compliance of the UK Government with the all-Ireland harmonisation set in motion by the Protocol.

[51] The grassroots unionist and loyalist community must never become tolerant of the Protocol, rather the core collective political objective must be to thwart its full imposition. To become compliant or accepting of the all-Ireland harmonisation which is a logical outworking of the Protocol is to become part of a process moving incrementally towards the destruction of the union.

Jamie Bryson

*29 December 2020*