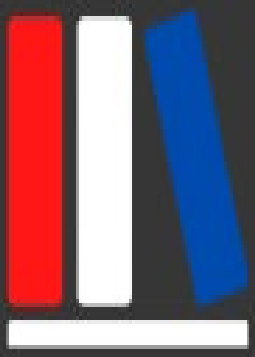

UNIONIST VOICE

POLICY STUDIES

Northern Ireland Protocol Report

7 JUNE 2021

Unionist Voice Policy Studies

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7 June 2021

Introduction

This report has been compiled by our policy studies group following extensive private consultation with a range of stakeholders including those from the legal, academic and media profession. There has been extensive private engagement with representatives of political Unionism and whilst this report does not purport to represent the views or policy position of any section of political Unionism, it is fair to say that many of our conclusions were shared by those senior elected representatives we engaged with individually on a private and confidential basis.

Northern Ireland's constitutional position faces its greatest threat since 1921. The whole premise of loyalism's support for the peace agreement, namely that the Union was safe, can no longer be said to be true. The clear findings set forth in this report, and the developing political reality, makes it obvious to any rational observer that the Union is in peril whilst the Protocol remains.

There are fundamental questions which Unionism collectively must confront; chief amongst which is that set out within paragraphs [22]-[33] of this report. The Belfast Agreement has been a millstone around the neck of the Unionist community, and the pathway leading to the imposition of the Protocol has demonstrated that far from offering protections for the substance of the Union, that rather it operates as a deceptive snare which enslaves Unionism within a 'process' that is designed to incrementally weaken the fundamental constitutional and culture ties which bind us to the rest of the United Kingdom.

This report- published in advance of the marching season- identifies the legal and political flaws at the heart of the Protocol and recommends a campaign of political action and peaceful grassroots civil disobedience.

It explores a range of legal problems with the Protocol, and draws heavily on the case advanced by John Larkin QC on behalf of the applicants Ben Habib, Baroness Kate Hoey, Jim Allister QC, Lord

Trimble and former DUP leader Arlene Foster in the recent Judicial Review application challenging the lawfulness of the Northern Ireland Protocol. At the time of writing the case is awaiting the judgment of Colton J. Whatever the outcome, the case will inevitably be appealed most probably to the Court of Appeal and thereafter to the United Kingdom Supreme Court, however it is possible that with the agreement of all parties and the leave of the Supreme Court that a 'leapfrog' appeal could speed up the process.

Politically this report comes within the context of increased Nationalist demands for the implementation of 'New Decade, New Approach' ('NDNA') which, in theory at least, is supposed to deliver an Irish Language Act under the guise of a wider cultural package. However, NDNA also commits to the maintenance of the United Kingdom internal market and legislation to ensure unfettered access. This commitment has not been delivered, so it seems absurd to suggest that Unionism should accede to the implementation of yet another Nationalist demand whilst the modest promise to protect the internal market of the United Kingdom, and thus the Act of Union, is shredded. There was universal agreement amongst those we engaged with that if NDNA must be implemented then it must be implemented in all its parts, or not at all. Notwithstanding that, a significant number of those we engaged with- and this writer- fundamentally oppose the implementation of Irish Language legislation per se.

Only a collective, determined, and relentless campaign to undermine, frustrate and ultimately demolish every aspect of the Northern Ireland Protocol will suffice. Amongst political Unionism there must be a unity of purpose. This must sit in tandem with a vibrant and empowered grassroots Unionist and Loyalist campaign that is both simultaneously organic yet sufficiently organised. The job of work extends beyond the Protocol and requires confrontation with the imbalance at the heart of the Belfast Agreement which turns a peace settlement into a requirement for Unionism to acquiesce in a Union-dismantling 'process'.

It is only with collective and parallel political and protest action that this injustice can be resisted, and a balance restored that is plainly necessary, according to most informed observers, to protect the peace in Northern Ireland.

Jamie Bryson

UVPS Chairman

Summary

[1] This report by Unionist Voice Policy Studies explores the legal and constitutional issues arising from the imposition of the Northern Ireland Protocol. It finds that the imposition of the Protocol is unlawful on a range of grounds. In order to remedy this historic injustice, the report calls for political and grassroots Unionism/Loyalism to work in tandem to create maximum political and societal instability via politically frustrating the continued operation of the institutions and a campaign of civil disobedience, especially throughout the upcoming marching season.

The Act of Union

[2] The foundational stone of the Union in constitutional law is the Act of Union 1800. In the High Court Judicial Review challenge (which at the time of writing is awaiting judgment), Colton J quite correctly expressed in clear terms that "the Act of Union remains law". This is an elementary proposition when viewed in the context of the Government arguing that parts of Article VI of the Act of Union had been impliedly repealed by the general provisions within section 7A of the European Union (Withdrawal Agreement) Act 2018. It is trite to point out therefore that even by the Government's own argument, the Act of Union remained law, otherwise why would they advance the proposition it has been subjected to implied repeal via the 2018 Act?

[3] Article VI of the Act of Union provides as follows:

> "*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 the same privileges, and be on the same footing as his Majesty's subjects in Great Britain.*"

[4] Article VI therefore acts as the guarantee of the constitutionally sacred nature of the United Kingdom internal market, and requires- as a matter of statute- that all constituent parts of the United Kingdom must be on the same footing in treaties made.

[5] This raises two constitutional law issues; the first is the use of the Crown prerogative in making a treaty- the Withdrawal Agreement- with the European Union which is in direct conflict with provisions of domestic law in the form of Article VI of the Act of Union; the second is the direct conflict between section 7A of the 2018 Act and Article VI of the Act of Union. We address both issues in turn.

The unlawful use of the Crown prerogative power in making the Withdrawal Agreement treaty

[6] Article 5 (1) of the Northern Ireland Protocol requires that "goods at risk" of travelling from GB to the European Union, via Northern Ireland, be subject to customs duties. It states:

> "*(1) No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. The customs duties in respect of a good being moved by direct transport to Northern Ireland other than from the Union or from another part of the United Kingdom shall be the duties applicable in the United Kingdom, notwithstanding paragraph 3, unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing. No duties shall be payable by, as relief shall be granted to, residents of the United Kingdom for personal property, as defined in point (c) of Article 2(1) of Council Regulation 1186/20091 , brought into Northern Ireland from another part of the United Kingdom.*"

[7] This is compounded by the fact that Article 5 (2) makes clear there is a default presumption that goods travelling from GB to Northern Ireland are at risk of entering the European Union. It states, inter-alia, as follows:

> *(2) For the purposes of the first and second subparagraph of paragraph 1, a good brought into Northern Ireland from outside the Union shall be considered to be at risk of subsequently being moved into the Union unless it is established that that good:*
>
> *(a) will not be subject to commercial processing in Northern Ireland; and (b) fulfils the criteria established by the Joint Committee in accordance with the fourth subparagraph of this paragraph***.** (emphasis added)

[8] In basic terms, as is clear from Article 5 (2), the default presumption is that goods are "at risk" until established otherwise. It is an extraordinary state of affairs that the burden to be discharged for being able to freely move goods within the United Kingdom rests with those within the United Kingdom.

[9] A default presumption that goods moving between GB and Northern Ireland are at risk (*see Article 5 (2))* means that all goods start from the default position of being subject to customs tariffs *(see Article 5 (1))* within the United Kingdom internal market. This is a clear and flagrant breach of Article IV of the Act of Union.

[10] It is also trite to point out that the Withdrawal Agreement makes Northern Ireland subject to EU laws, whilst the rest of the United Kingdom are on a different constitutional footing. This is a further flagrant breach of the second limb of Article IV of the Act of Union.

[11] It follows from all the foregoing that the Withdrawal Agreement is in direct conflict with domestic law. In the making of treaties the Government exercises the Royal Prerogative. However, it is established law that prerogative powers can not be used in a manner which conflicts with statute. This principle was expressly reaffirmed by the Supreme Court at p.55 in *R v (Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.*

[12] In the making of the treaty the Government has offended both limbs of Article VI. It has purported to make a treaty which creates a customs barrier between GB and Northern Ireland and thus directly conflicts with statute in the form of Article VI of the Act of Union. It further offends the restriction in Article VI of the Act of Union against differentiating between GB and Northern Ireland in the making of treaties, by placing Northern Ireland on a different footing in a whole manner of ways. The use of the prerogative power in this instance is unlawful as the Government had no power to make such a treaty in conflict with domestic law.

Section 7A of the 2018 Act cannot override the Act of Union

[13] The Withdrawal Agreement is enforced in domestic law via section 7A of the 2018 Act. The general provisions therein at Section 7A (3) purports to require every enactment (all domestic law) to be read and to have effect in a manner consistent with the 2018 Act. It is from this provision

springs the Government's argument that Parliament has by implication repealed those parts of Article VI of the Act of Union which are plainly inconsistent with the Protocol.

[14] Notwithstanding the extraordinary nature politically of the Conservative and Unionist Government purporting to repeal the Act of Union, the very foundational stone of the Union, there are significant legal impediments to section 7A overriding the Act of Union.

[15] It is a basic legal principle that constitutional statutes are not subject to implied repeal, and the courts proceed on the presumption that Parliament does not intend by implication to repeal constitutional statues. It follows that it is established law that if Parliament wishes to repeal or amend constitutional statutes, it must do so expressly and accept the political consequences. In short; it must squarely confront what it is doing.

[16] A similar conflict between the European Communities Act 1972 and the Bill of Rights 1689 came before the Supreme Court in *R (Buckinghamshire County Council) v Secretary of State for Transport and linked appeals [2014] UKSC 3.* As referred to by John Larkin QC on behalf of the applicants in the Northern Ireland Judicial Review challenge to the Protocol, Lady Hale- writing extra judicially- summarised the relevant finding in the following way[1]:

> *"In other words, there could be no implied repeal of such a fundamental principle (section 9 of the Bill of Rights 1689) merely by virtue of supremacy given to EU law by the 1972 Act"*

[17] The same issue now arises; namely whether the general provisions of the 2018 Act can be taken by implication to trump the fundamental constitutional principles enshrined within Article VI of the Act of Union.

[18] This report concurs with the submissions advanced by John Larkin QC in the Northern Ireland High Court Protocol challenge, in which it was asserted that plainly section 7A of the 2018 Act must give way to the Act of Union. Notwithstanding that fundamental principle, this argument was further developed by Mr Larkin in so far as it was argued that the proper harmonisation of section 7A of the 2018 Act with Article IV of the Act of Union was to acknowledge that given the Government had no power in the exercise of the prerogative to make the parts of the treaty which

[1] UK Constitution on the March? https://www.supremecourt.uk/docs/speech-140712.pdf

conflicted with the Act of Union, that section 7A should simply be read as conferring domestic enforceability only on the parts of the Withdrawal Agreement that the Government could lawfully make.

[19] In basic terms; if the Government had no power to make the impugned parts of the Withdrawal Agreement treaty, then section 7A of the 2018 Act cannot confer domestic enforceability on provisions which were made in the first instance without any lawful power.

[20] Article IV of the Act of Union, as a constitutional statute, is not subject to implied repeal. The general provisions of section 7A of the 2018 must give way to the Act of Union, which remains law.

The Northern Ireland Act 1998

[21] The Northern Ireland Act 1998 has the status of a constitutional statute (see House of Lords in *Robinson*). It therefore attracts the same protection from implied repeal as the Act of Union.

Section 1 (1) of the Northern Ireland Act 1998

[22] A fundamental question arises within the imposition of the Protocol vis-à-vis section 1 (1) of the 1998 Act. It can be summarised as this; does the protection within section 1 (1) of the Northern Ireland Act in relation to the constitutional status of Northern Ireland within the United Kingdom apply to the substance of the Union, or merely the symbolism?

[23] Developing this question, it essentially requires us to confront the constructive ambiguity within the Belfast Agreement (sometimes referred to rather absurdly as the 'spirit' of the Agreement) and its real trajectory.

[24] Protecting the substance of Northern Ireland's place within the United Kingdom means that all of the core foundational principles of the Union are protected within the sphere of the 'constitutional status' of Northern Ireland. In short, it means that Northern Ireland can't be incrementally stripped of all the component parts that make up the Union, until such times as Northern Ireland is part of the United Kingdom in name only.

[25] If, however, the protections merely extend to the symbolism of the Union then there is nothing to prevent all the core foundational planks which constitutes Northern Ireland's place in

the United Kingdom being incrementally removed, until the only thing remaining is the formal technical transfer of sovereignty. As succinctly put by John Larkin QC in the High Court; the severing of the last tie.

[26] If we follow Lord Sumption's advice to distil law to its simplest form, the issue can be illuminated with the following analogy: If Northern Ireland is a house; can it be stripped of all its interior, refurbished and the internal walls knocked down to in practical terms enjoin it as one with the neighbouring property, without impediment? The house would of course symbolically on the outside appear as two distinct properties, but the practical reality would be quite different. The substance of the house would be fundamentally altered, with the only tasks remaining for the complete harmonisation being the symbolic transfer of the deeds and the knocking down of the little wooden fence dividing the properties from the outside.

[27] This question raises a fundamental issue for Unionists. If section 1 (1) of the 1998 Act merely protects against the severing of the last tie (the symbolic protection theory) then it is obvious to point out that the 'process' (which is the term used for the outworking of the Belfast Agreement) is empowered, and arguably designed, to incrementally dismantle the substance of the Union.

[28] That forces a confrontation between the competing meanings attached to the Belfast Agreement by Unionists and Nationalists. If the Belfast Agreement was the start of a 'process', then plainly such a process is perpetually progressing towards a pre-determined end point; it, by its very definition, a process has a beginning and an end. If, however, the Belfast Agreement was a settlement, then the substance of the Union cannot be incrementally altered as part of a progression towards the last lowering of the Union flag.

[29] In the Nationalist view of the agreement, it is a process which is designed to incrementally progress towards a United Ireland. This of course necessitates that along each step of the way the substance of the Union is weakened and Northern Ireland's ties to GB are loosened. In this view, the protections within section 1 (1) of the 1998 Act merely exists in relation to the formal handover of sovereignty. This is the 'symbolic' theory of section 1 and it is trite to point out that if it permits the handover of lawmaking powers to Dublin without offending the 'status' of Northern Ireland, then nothing would prevent the similar handing of powers to Dublin without consent required in section 1 (1) of the 1998 Act.

[30] In the Unionist view of the agreement, it is a settlement and section 1 (1) of the 1998 Act protects the substance and founding principles of the Union. It is only following a referendum in which the majority of those in Northern Ireland (and in parallel the Republic of Ireland) vote for a United Ireland that any of the foundational planks or internal UK ties can be weakened or removed. This is the 'substance' theory of section 1.

[31] It would appear to any rational observer that the last twenty-three years politically plainly lends itself to support for the symbolic theory. Two propositions arise if it transpires- as it appears- that the symbolic theory is that which prevails. Either Unionism continues to willingly participate in the incremental destruction of the Union, or else decides that the Belfast Agreement was little more than (again as succinctly put by John Larkin QC) a "deceptive snare" and takes robust political action to remedy this injustice and deceit perpetrated upon our community.

[32] The Protocol undeniably alters the substance of Northern Ireland's constitutional position within the United Kingdom. Even taking the Government's own case at its height, this is the constitutional effect. The Act of Union *is* the Union in law. If the Act of Union has been (as the Government suggests) subject to implied repeal, then the substance of the Union has been altered. If this is permissible within section 1 (1) of the 1998 Act, then the 'symbolic' theory prevails and as such demonstrates that- as a matter of law- the Belfast Agreement (which is given effect by the NI Act) in fact offers no genuine protection to the Union.

[33] It is worthwhile to dismiss the Nationalist argument very succinctly- advanced most recently by Claire Hanna MP without challenge at the NI Affairs Committee- that if consent is required for implementing the Protocol, then the same must be true for Brexit itself. This argument fundamentally misunderstands section 1 (1) of the 1998 Act. It- and the Belfast Agreement- deals with Northern Ireland's constitutional position within the United Kingdom; it does not lend itself to matters of the collective United Kingdom position in the European Union. Brexit does not (or should not have) altered Northern Ireland's status within the United Kingdom, therefore section 1 (1) of the 1998 Act is irrelevant. However, in imposing the Protocol this does alter Northern Ireland's constitutional position vis-à-vis the United Kingdom, and therefore does attract the provisions of section 1 (1) of the 1998 Act.

Section 42 of the Northern Ireland Act

[34] On 9 December 2020 the Secretary of State via secondary legislation purported to amend the 1998 Act and insert a new Schedule 6A and section 56A. The purpose of these regulations was to disapply cross community consent when the key decision of a vote on the Protocol comes before the Assembly.

[35] Section 42 of the 1998 Act gives effect to one of the key pillars of the Belfast Agreement set out at Strand One (5) (d)- the principle of cross community consent. Neither Strand One (5) (d) or section 42 of the 1998 Act constrains the principle of cross community consent exclusively to devolved matters.

[36] Strand One (5) (d) of the Belfast Agreement states:

> *"5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:*
>
> *(d) arrangements to ensure key decisions are taken on a cross community basis"*

[37] Section 42 (1) of the 1998 Act (which gives effect to Strand One (5) (d) in domestic law) provides as follows:

> *(1) If 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support.*

[38] As is plain from the wording of Strand One (5) (d), the Belfast Agreement envisages that the cross-community consent mechanisms are to apply to "key decisions". It is unsurprising therefore that section 42 of the 1998 Act is in broad terms and plainly relates to "a matter coming before the Assembly". There is no obligation for the matter to be devolved in order for the section 42 provision to be applicable.

[39] Therefore, the provisions of the Protocol which removes the principle of cross community consent faces the same obstacles as the breach of the Act of Union and the breach of section 1 (1) of the 1998 Act. Firstly, the Government had no power using the Crown prerogative to make the

Withdrawal Agreement in so far as it conflicts with section 42 of a constitutional statute, and secondly; the Secretary of State had no power to amend the NI Act by secondary legislation given the absence of an express power to do so within the 2018 Act, but moreover the 2018 Act plainly prohibits such an exercise of the power which conflicts with the terms of the 1998 Act.

[40] The 2018 Act in of itself actually provides for the opposite of the express power the Secretary of State would have required to amend the NI Act. At section 10 (1) of the 2018 Act it states:

> *"In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must (a) act in a way that is compatible with the terms of the Northern Ireland Act 1998."*

[41] It is a most elementary observation that given the powers to be exercised must be deployed in a manner compatible with the 1998 Act, that unilaterally deploying such powers to disapply a key provision of the 1998 Act does not satisfy the obligation. It does the opposite.

[42] It is an extraordinary state of affairs that those who have treated the Belfast Agreement as *in of itself* sacred and untouchable without cross community consent, would happily unilaterally amend the 1998 Act in order to disapply the cross-community consent provision for key decisions in order to neutralise Unionism's ability to veto a fundamental breach of the apparent protections within section 1 (1) of the 1998 Act.

The Remedy- Political and Societal Instability

[43] Article 16 (1) of the Protocol helpfully sets out the criteria for unilateral action to disapply elements of the Protocol. It states:

> *Article 16*
>
> *1. If the application of this Protocol 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. Such safeguard measures shall be restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Protocol.*

[44] It is a basic proposition that given the access conditions to Article 16 are "*serious economic, societal and environmental difficulties*", then such circumstances are identical to those which would render the Protocol unworkable. If such circumstances suffice to permit unilateral action, then plainly it would be wholly illogical if such sustained circumstances would not justify the complete removal of the Protocol. As such, to properly resist the Protocol there must be political and protest action which creates maximum political and societal instability.

Political and Societal Instability

[45] The whole basis of the Belfast Agreement, and the institutions, is that they must operate on the basis of cross-community consent. That is what underpins the persistent narrative that in order for the institutions to work, they must be compliant with the Belfast Agreement which provides the cross-community consent which is the key plank of the agreement. However, the Belfast Agreement has been shredded, and cross-community consent for a key constitutional decision disapplied, so therefore why should Unionism continue to provide consent for the operation of the institutions in such circumstances?

[46] It is wholly illogical to expect Unionism to operate and progress within the confines of institutions which rest on the fundamental premise that Nationalism's rights and protections must be treated as a holy writ, but those of Unionism can be dispensed with if they are an impediment to advancing Nationalism's demands (such as the imposition of the Protocol). That is a wholly unworkable, unjust and morally repugnant system of Government.

[47] Alongside the shredding of the Belfast Agreement in a manner compliant with Nationalist political objectives, there is the fundamental imbalance between North-South relationships and East-West relationships. Whilst East-West is trashed, Unionists are expected to continue with North-South harmonisation. This is absurd and offensive. It is incumbent upon political Unionism to retaliate with political action and inflict upon North-South relationships the same damage as that which has been inflicted on East-West.

[48] If the Protocol becomes synonymous with pollical and societal stability, then self evidently this will permit it to embed, making it almost impossible to remove. Political Unionism therefore must make a choice as to whether to work towards political and societal stability and thus assist in

the implementation of the Irish Sea border, or whether to create maximum political instability- no matter the cost- in order to achieve the removal of the Protocol. That is the stark choice.

[49] In a similar vein, grassroots Unionism and Loyalism in parallel to political instability created by political Unionism, can create maximum societal instability through a campaign of peaceful civil disobedience. Working in tandem, a powerful instability can be created which will bring home to the Government, the Irish Government, and the European Union that the Protocol is unsustainable.

Conclusion

[50] The only solution to the unsustainable nature of the Protocol lies only in its complete removal. As set out in this report, the very existence of the Protocol- which binds Northern Ireland to being subject to EU laws and the jurisdiction of a foreign court- is constitutionally incompatible. No amount of "amendments" or "significant changes" can remedy the fundamentally flawed nature of the grotesque injustice which has been imposed upon the people of Northern Ireland in the form of the Northern Ireland Protocol.

[51] There must be determined, collective and relentless political and protest action to create the circumstances whereby it comes to be acknowledged that the Protocol is incompatible with political and societal stability within Northern Ireland.

Unionist Voice Policy Studies