Vetoing The Protocol

Supplementary Report

Foreword by Ben Habib

Introduction by Jamie Bryson

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This publication is in furtherance of the Unionist Voice Policy Studies objectives of:

(i) Promoting the constitutional position of Northern Ireland as an integral part of the United Kingdom in line with the Acts of Union 1800

(ii) Advocating for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy

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UNIONIST VOICE
POLICY STUDIES

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About Unionist Voice Policy Studies

Unionist Voice Policy Studies ('UVPS') is an organisation established to promote the:

(i) constitutional position of Northern Ireland as an integral part of the United Kingdom in line with the Acts of Union 1800

(ii) interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the Media, Law and Public Policy

In line with these objectives, UVPS brings together a network of groups and individuals from within the pro-Union community to engage in research, academia, media engagement, Law and Public Policy.

Our high level strategic advisory panel is responsible for identifying areas of importance, which are then tasked by our management committee to one of our three working groups (Law and Human Rights/Media/Public Policy) for focused actions.

This focused work includes both producing and commissioning reports, formulating written submissions to public consultations, and developing policy/legal papers focusing on areas of importance identified by our strategic advisory group.

Foreword

By Ben Habib

There is a sickness which pervades our liberal class. It is a disdain for the United Kingdom; for its history, its culture, its people and its unity. Somehow, these people, who themselves pervade our media, the civil service and governing institutions, have made it unfashionable generally to be proud of being British.

Patriotism has become a dirty word. Pride in our country is frowned upon. So deep is their disdain that they have no trouble in conceding rights, hard won and established over centuries, to foreign powers.

It is largely these people that wish to surrender our sovereignty to the European Union. They call it shared or pooled sovereignty. They lack confidence not just in the United Kingdom but in themselves. For if they had self-confidence, they would never give up something as precious as the right of self-determination within our sovereign unit: the union of Great Britain and Northern Ireland.

It is these same people that care not for Northern Ireland's position in the UK as an equal member alongside England, Scotland and Wales.

There may have been some justification for the Belfast Agreement. I myself could not see it at the time. The IRA were beaten and we volunteered up defeat out of the jaws of victory. But be that as it may, the Belfast Agreement was put in place and it has endured for nearly a generation.

The Protocol, which falsely claims to protect that Agreement, is yet another entirely unnecessary step towards Irish Nationalism and the destruction of the United Kingdom. The Protocol is perfectly designed to break the East/ West dimension of the Belfast Agreement. The border down the Irish Sea is the only example in history of a country voluntarily partitioning itself without a single shot being fired.

It is a tragedy for those of us that love our country; pro-unionists feel that love much more acutely than many in Great Britain. Certainly, their love is unrequited by

Westminster. It has been thus for at least the last 40 years. If this was not the case, Northern Ireland would economically be head and shoulders ahead of Ireland. It is not because successive governments have ignored it. There has been a dearth of investment in every form of infrastructure and tax rates have been way ahead of Ireland, deterring the private sector. With an open border to Ireland, Westminster's policies in Northern Ireland have robbed it of any chance of rapid advancement. Politicians and civil servants alike see Northern Ireland as a deficit economy/ as a drain on the Treasury but they only have themselves to blame.

And now, with the Protocol, Northern Ireland is being pushed into the arms of Ireland economically, judicially, and constitutionally. We are witnessing the reunification of Ireland without so much as an enquiry of its unionist constituency. Cross community consent, a cornerstone of the Belfast Agreement, has been set aside.

The Protocol is nothing short of constitutional vandalism.

Jamie is absolutely right that those in the civil service who would support such measures must be named and shamed. Westminster is not coming to the rescue. Pro-unionists and their representatives in Stormont and Westminster must take the lead. Time is short.

Politically, as far Her Majesty's Government is concerned, the battle for our union is almost lost. As I type, Liz Truss is meeting Maros Sefcovic. The mood music is not good. It seems our government is not prepared to invoke Article 16 to suspend the Protocol. Instead, it seems we are very close to a deal with the EU. That deal could only mean an ongoing role for the European Court of Justice and probably alignment with EU regulations and laws on foodstuffs, livestock, medicines and the like.

There is no will in HMG to put the customs border where it should go and where a border has existed for over a hundred years. This border is explicitly recognised in the Belfast Agreement but that seems lost on our government and the civil servants tasked with implementing Brexit. Yet again the self-loathing classes in our midst are prevailing.

There is a chance [if the courts act equitably, a good chance] that the judicial review of the Protocol launched by myself and others saves the day. But it is less than ideal to have to rely on the courts for something which is inherently political and should be resolved politically.

Without pro-unionists and their leaders making their voices heard and heard loudly, the United Kingdom will be shorn back to just Great Britain; the Saltire of St. Patrick will fall from the Union flag.

Ben Habib founded and is CEO of First Property Group plc, an award winning commercial property fund manager with operations in the United Kingdom and Central Europe.

Prior to establishing First Property, Ben was Managing Director of a private property development company, JKL Property Ltd, from 1994 – 2000. He started his career in corporate finance in 1987 at Shearson Lehman Brothers. He moved in 1989 to PWS Holdings plc, a FTSE 350 Lloyds reinsurance broker, to be its Finance Director.

In May 2019 Ben was elected to be a Member of the European Parliament (MEP) for the Brexit Party, representing London.

On 19 February 2021, Ben together with Jim Allister, leader of the Traditional Unionist Voice, and Baroness Hoey, applied for leave for a judicial review of the Northern Ireland Protocol, part of the Withdrawal Agreement. They were later joined in their litigation by Arlene Foster, First Minister of Northern Ireland, Lord Trimble, Nobel peace prize winning architect of the Belfast Agreement; and Steve Aiken, leader of the Ulster Unionist Party. The action contends that the Protocol breaches, amongst other things, Article 6 of the Act of Union 1800 and Article 10 of the Withdrawal Agreement Act 2018.

He was educated at Rugby School and Cambridge University.

Introduction

By Jamie Bryson

This supplementary report should be read in conjunction with the initial 'Vetoing The Protocol' report, which set out this group's successful legal action against the implementation of the Protocol, and a range of other interconnected issues.

The nationalist network, which exerts its influence via the media, law and academia, was unable to answer any of the substantive points contained within the report- which drew the support of DUP leader Jeffrey Donaldson, TUV leader Jim Allister, PUP leader Billy Hutchinson and a range of MPs, Peers and political commentators.

Instead, the influential nationalist network set about misrepresenting sections of the report which related to the necessity for unionism to counter the nationalist politicisation, and thus (at least superficial) dominance of a number of professional vocations.

There were a number of articles written which can only be described as vitriolic (see, for example, articles and media contributions by anti-unionist activist Susan McKay) and which made a number of disgraceful remarks about Baroness Hoey, and UVPS. These contributions, far from drawing any condemnation, were rather endorsed and credentialled by the same nationalist network who had whipped themselves into a frenzy over the content of the report (or, more accurately, their malicious representation of the report).

It has been further disappointing to see how sections of the BBC have displayed their inherent bias by their treatment of the report, and associated successful legal action against the implementation of the Protocol. To give some simple examples, BBC TalkBack hosted by William Crawley allowed the report to be maliciously described as "deeply sectarian", and proceeded to host a number of discussions of issues arising from the report without every affording UVPS the opportunity to contribute to such discussions.

It was also notable that the same BBC NI Newsroom that had extensively platformed the politically motivated legal action by Sinn Fein activist Sean Napier against DUP Ministers in relation to North-South bodies, failed to even mention the successful UVPS legal action against DAERA over Protocol implementation, or indeed the recent legal challenge to two nationalist Ministers over their targeting (unlawfully without Executive authority) of a unionist cultural bonfire in the Tigers Bay area of North Down. This disparity speaks for itself.

This report seeks to address a number of issues which have arisen after our initial publication. We felt it important to challenge both legally and factually inaccurate commentary, and provide a central source of rebuttal to a number of arguments being advanced by those hostile to unionism and in favour of the Protocol, largely due to its corrosive effect on Northern Ireland's place within the United Kingdom.

It was notable that following publication of the report, the central legal contention (that the implementation of the Protocol required Executive authority) could not be resisted in substance by any political representative or commentator. Rather the responses ranged from infantile *ad hominem* attacks, fatally flawed political contributions which failed to properly understand the effect of section 28A of the 1998 Act, or indeed the international obligations both within and flowing from the Protocol and most incredibly of all a dog whistle by Sinn Fein urging the civil service to stage a constitutional coup and to defy any direction by Minister Poots.

The constitutional confrontation - centred on the Protocol - sparked by the UVPS legal action is bringing matters to a head, not only in relation to the Protocol, but also more fundamentally in regards unionism's relationship with, and support (or, in fact lack thereof) for the Belfast Agreement.

It is time that all the constructive ambiguity, which has given cover to submissive unionism for their participation in the 'process' over the past two decades, is confronted. That constructive ambiguity, as the Protocol has shown, always was - and always will be - resolved in favour of nationalism. This introduction is not the venue for a (yet another) detailed exploration of the fatally corrosive nature of the 'process' for the Union, however it is welcome to note that the ideas and ideological positions which for much of the past two decades were dismissed as 'extremist' are now in fact mainstream within Unionism.

As with all political movements, it is crucially important to continually replenish and grow the base. Whilst not the subject of this report, we do touch upon the necessity to empower and platform more new voices from across the grassroots unionist and loyalist community. Over the past decade especially the voice of loyalism has largely been represented on the media and in the public arena by a handful of people. It is, important to broaden this scope and encourage new ***genuine*** voices to come forward, and for those of us lucky enough to have a public platform to do our best to open doors and create pathways for new voices. In turn, those new voices should then use their platform to bring forward yet more new voices. This is how networks of influence grow, and movements thrive.

It is welcome that the DUP have made firm commitments to use the Executive mechanisms to halt the implementation of the Protocol. This, of course, will only be a temporary solution. The Protocol needs to be removed permanently and in its entirety, with Northern Ireland restored as an integral part of the United Kingdom (in line with the Act of Union).

At the time of writing the last Executive meeting of January looms (27th). I understand, not least from the clear commitment of Minister Poots in response to UVPS legal action (affirmed by later public comments), that the paper relating to Protocol implementation will be submitted for consideration at this meeting. Whether it goes on the agenda, or not, is largely irrelevant. There will be a deprivation of Ministerial authority for the continued implementation of the Protocol either via the matter not going on the agenda (and thus, depriving the Minister of the positive affirmation required to continue implementing the Protocol) or via unionist Ministers using their veto to block any positive affirmation to grant authority for the continuation of Protocol implementation.

There had been some suggestion that nationalist Ministers, supported by the civil service infrastructure, would seek to take refuge in a previous Executive 'minute', which they suggest provided authorisation for Protocol implementation. This is not so. The minute has no operative provisions. It merely acknowledges DAERA's position.

However, this report has outlined a means of neutralising this issue and turning nationalism's argument inwards on itself via simply deploying the relevant Executive mechanisms.

Thereafter, the real battle looms. It is clear that the civil service structure underpinning the institutions is hostile to unionism, and moreover appear to operate as if it is they (unelected officials) rather than elected representatives who run Northern Ireland. This is also prevalent within the Departmental Solicitor's Office who (as was clear in the erroneous advice they offered to nationalist Ministers over the Tigers Bay bonfire) will more often than not shape their legal advice to fit with nationalism's political agenda, rather than undertaking an exercise in rigorously impartial legal analysis and intellectual honesty.

That, on the face of it, is an obstacle for unionism. However, that is only so if the subjective views of the DSO and civil service is given primacy by elected Ministers. It is important unionist Ministers assert their authority (it is they, not civil servants or the DSO who are in charge of the relevant Departments) and ensure that not only are they receiving the most robust and legally sound advice available, but moreover that civil servants understand what they constitutional role is, and more importantly, what it most definitely is not.

If unelected civil servants do entertain the idea of defying any direction of the Minister, then they are willingly taking on the role (without a democratic vote to their name) of a public representative, and they should therefore be known by- and accountable to- the public. That is why this report recommends that should unelected officials defy the Minister, that the Minister should make an Assembly statement naming each official in order that the public can hold them to account by any lawful means possible.

I would extend my thanks to our industrious working group and 'critical friends' who have contributed significantly to the production of this report in an extremely short period of time. It is nevertheless necessity to continue developing and inserting into the public domain intellectual capital to be drawn upon by all those who share our objective of ensuring Northern Ireland regains its position as a full and integral part of the United Kingdom.

Finally, it is a privilege to have the foreword to this supplementary report written by Ben Habib, former Member of the European Parliament, businessman and a lead applicant in the Protocol legal challenge *Allister et al*.

I note that this week a paper will go to the NI Executive on Protocol implementation. That confrontation has been forced by the actions of UVPS.

Jamie Bryson works in Public Relations and Law. He is author of Brexit Betrayed, which was listed by BookAuthority.org in the top 100 Brexit books, and the forthcoming Justice, Law and Human Rights handbook.

He has published a number of legal and policy papers on the Belfast Agreement, Brexit and the Northern Ireland Protocol, and provided oral evidence to the Northern Ireland Affairs Committee Devolution and Democracy inquiry at Westminster.

Jamie appears regularly in both print and broadcast mainstream media outlets as a commentator and was a regular contributor on Brexit Central. He is the founder and editor of UnionistVoice.com, a trustee of Unionist Voice Policy Studies and head of the group's Law and Human Rights working group.

Executive Summary

This supplementary report should be read in conjunction with the initial 'Vetoing the Protocol' report published on 5 January 2022.

UVPS has considered, and formulated a response, to relevant arguments advanced in the public domain following publication of the initial report. In doing so, we have identified further steps which should be taken by unionist elected representatives in relation to frustrating and impeding the ongoing and any future implementation of the Northern Ireland Protocol.

The key recommendations arising from this supplementary report are as follows:

1. A unionist Minister, primarily the DAERA Minister, should (in addition to, or included in the referral on Protocol implementation due to go to the Executive no later than 27 January) refer to the Executive pursuant to section 20 (4) and 28A (5) of the Northern Ireland Act 1998 and associated paragraph 2.4 (v) of the Ministerial code, the interpretation (and thus effect) of the Executive 'minute' relied upon by nationalist Ministers to suggest that Ministerial authority to implement the Protocol has already been obtained. This referral should provide the Executive with a list of varying interpretations and require a positive affirmation as to the correct interpretation.

   In the absence of a positive affirmation (either due to deadlock in the Executive or a refusal to put the paper on the agenda) there is therefore no Ministerial authority to rely upon any interpretation of the minute, and accordingly it is entirely neutralised.

2. In circumstances whereby unelected civil servants defy a Ministerial direction to cease implementation of the Protocol, the relevant Minister should make a statement to the Assembly and identify by name and position each unelected civil servant who is acting in defiance of the Ministerial direction issued by an elected unionist representative.

3. Subsequent to (2), and on the footing that unionists are being forced to

implement the Protocol which subjugates the Acts of Union itself, the DUP should resign the First Minister and collapse the Northern Ireland Executive. Given that Ministers remain in post until an election, a mechanism should be devised to ensure that whilst the Executive is collapsed, that unionist Ministerial posts are not filled by nationalist representatives.

4. The Ulster Unionist Party position on the Northern Ireland Protocol is inconsistent and that unionist party should make their position clear, specifically in relation to whether they support Northern Ireland being the only part of the UK with 'dual membership' of the EU and UK internal markets, notwithstanding that proposition's inconsistency with the constitutional principles of the United Kingdom of Great Britain and Northern Ireland.

   There have been principled statements against the Protocol by the UUP, however there have been other suggestions such as (i) managing the Protocol via a new North-South body- which appears to suggest an implied acceptance of the Protocol in some form- alongside the express desire to enhance the role of the Irish Government *vis-à-vis* the internal workings of the UK Internal Market; (ii) the express endorsement of the view set out by independent Cllr Dr John Kyle. This view is essentially an endorsement of NI having dual membership of the UK Internal Market and EU Single Market. This position is of course utterly inconsistent with the UK Internal Market as a legal construct (found in Article VI of the Acts of Union 1800), and thus incompatible with the Union.

   In addition, UUP endorsed election candidates have expressed views (whilst in the UUP) such as in once instance a candidate stating that it would be welcome to see the Irish Parliament sit in Belfast, and in another instance another candidate stated Northern Ireland was *"steeped in bias and discrimination…particularly oppression towards catholic and other minorities*". The UUP should clarify whether they endorse such remarks.

5. UVPS is already undertaking an extensive piece of work on the changes which are required to the Northern Ireland Act 1998 and Belfast Agreement itself before unionism should re-enter Government following the election. For the avoidance of doubt, these required changes go far beyond solely the removal of the Protocol. The main unionist political parties should in parallel each produce a paper on their present position vis-à-vis the Belfast Agreement and Northern Ireland Act 1998, with specific and explicit positions on key issues, most notably

on section 1 (1) of the Northern Ireland Act 1998 and whether they are content that this safeguard offers sufficient protection to the substance of the Union.

6. UVPS recommends that protest groups and networks begin to plan for an escalated resumption of peaceful protest activity, should such become necessary due to a political failure to remove the Protocol.

7. In addition to recommendation [6], the co-ordination and relationships developed across grassroots unionist/loyalist activists during the anti-Protocol campaign should be built upon to develop a broad network of activists capable of articulating grassroots unionist/loyalist views and concerns in the public arena. This should include encouraging new faces *with a genuine commitment to the Union* to speak at protest events, or take opportunities to appear on the media. It is necessary to broaden the base and create a conveyor belt capable of empowering and platforming a continuous stream of new activists.

These recommendations are designed to provide a pathway to eradicating the scourge of the Northern Ireland Protocol, but in addition to enhance and empower unionism generally by ensuring that political unionism has clear and coherent messaging on the fundamental issues in relation to sustaining and strengthening the Union, and that this objective is supported by a cohesive structural network of activists.

The UVPS Legal Action against Protocol implementation

[1] The publication of the UVPS report, and the news that the Department for Agriculture, Environment and Rural Affairs ('DAERA') had conceded on the challenge brought against the failure to secure Executive approval for the ongoing, and any future, implementation of the Protocol prompted various responses.

[2] On 20 January 2022 in the judgment of Scoffield J in *Re Bryson's application* [2022] NIQB 4 the obligations arising from section 20 (4) and section 28A of the Northern Ireland Act 1998 and associated paragraph 2.4 were reaffirmed. These align with the submissions made on behalf of UVPS in arguing that the ongoing and any future implementation of the Protocol required Executive approval.

[3] In the first instance SDLP leader Colum Eastwood reacted angrily on the BBC's Stephen Nolan Show, but without being able to provide any substantive rebuttal to the core contention at the heart of the legal challenge. There was a brief mention of international obligations (later also adopted as a rebuttal by other parties), but even on this point the SDLP leader failed to understand the relevant impact of same.

[4] The Alliance Party's Sorcha Eastwood agreed that the matter required Executive approval pursuant to section 20 (4) and section 28A (5) of the Northern Ireland Act 1998 and paragraph 2.4 of the associated Ministerial Code. It is unclear whether the Alliance representative truly understood the implications of this concession, and it is almost certain Ms Eastwood failed to appreciate that a referral pursuant to section 28A (5) of the 1998 Act had the resulting effect of a deprivation of Ministerial Authority to act pursuant to section 28A (10) of the 1998 Act. Put simply; if (as Ms Eastwood explicitly conceded) the continuation and future implementation of the Protocol require Executive approval, then pursuant to section 28A (10) any continuation of the Protocol implementation (or any intensification of checks) would be unlawful in the absence of Executive approval (either retrospectively pursuant to paragraph 2.15 of the Ministerial Code or prospectively).

[5] Later the Alliance position altered somewhat whereby there was an effort to weld together the concession of Ms Eastwood along with Alliance's unwavering commitment to the implementation of the Protocol. The updated position basically resolved to this: the implementation of the Protocol does require Executive authority pursuant to section 28A (5) of the 1998 Act, but the Executive are required as a matter

of law to give such approval.

[6] That position is entirely circular and effectively amounts to an arbitrary fetter on the provisions of section 28A of the 1998 Act. It is, to put it in its simplest form, a suggestion that there is some form of implied fettering of section 28A either by international obligations or the direct effect provisions in section 7A of the European Union (Withdrawal) Act 2018. That has no basis in law and it in fact goes beyond even the novel suggestion of an implied repeal of a constitutional statute (contrary to the principles set out by Laws LJ in *Thoburn*) and amounts to reading in varying and subjective fetters on the provisions of the Northern Ireland Act 1998 to disapply its force or effect.

[7] The proposition would operate to deprive section 28A of all meaning, and effectively render as pointless any Executive referral, because the ultimate decision of the Executive would be pre-determined. That would bind the Executive in an impermissible way.

[8] The Alliance leader Naomi Long MLA and Sinn Fein, perhaps following legal advice as to the cardinal error in the suggestion that section 28A of the 1998 Act was fettered by the obligation to implement the Protocol, then pivoted to the position of claiming that the Executive had already approved the implementation of the Protocol by designating DAERA as the Department with responsibility. This is not in fact the case, and the relevant minute is understood to be so broad and ambiguous, it can not in any shape or form be taken as Executive authority to do anything.

[9] The extent or effect of the relevant minute may itself of course be significant and controversial. And it seems that it is. Therefore, if a Minister determines that the suggestion the relevant minute requires implementation of the Protocol is significant and controversial, then the Minister before acting any further on that minute would be required to refer the matter to the Executive pursuant to section 20 (4) and 28A (5) of the 1998 Act, and associated 2.4 of the Ministerial Code. Put simply; if Minister [A] forms the view that the minute does not amount to Executive authority, then Minister [A] would be required to refer that question to the Executive before taking any further action. Minister [A] upon referring the matter would be deprived of Ministerial authority to act upon the minute until the question was resolved and a positive affirmation as to its extent provided by the Executive.

[10] It is obvious to point out that if Minister [A], and a number of other Ministers,

do not read the Minute as providing the relevant authorisation, then the minute can not amount to a previous decision, because the question as to what the minute amounts to can only be resolved by the Executive committee itself.

[11] In short, upon referral to it, the Executive has to provide a positive affirmation to the effect that the minute is Executive authority for Protocol implementation. In the absence of that significant and controversial matter (what the minute means) being resolved with a positive affirmation in favour of nationalism's interpretation, then there is no Ministerial authority to act upon it and thus it is entirely neutralised.

[12] It is important to note this approach would not be to refer an Executive decision back to the Executive, but rather to refer to the Executive a dispute over the interpretation a Minister is to apply to a broad and ambiguous minute. **UVPS recommends that any question as to the effect of the Executive 'minute' relied upon by nationalist representatives be referred to the Executive as a significant and controversial matter pursuant to section 20 (4) and 28A (5) of the 1998 Act and associated paragraph 2.4 (v) of the Ministerial Code.**

[13] If in the alternative we were to take the suggestion that the relevant Minister had been authorised to implement the Protocol (which is in no way accepted) by the broad and general words in the Executive minute, then that in the overarching dispute does not assist nationalism. This is so because if Minister Poots is authorised as the Ministerial Department to deal with Protocol implementation, then this equips him with Ministerial authority and the discretion to manage that implementation. In short, he could exercise that discretion to whittle the checks away to nothing, or direct resources to only for example checking that which is *clearly* destined for the Republic of Ireland and removing all checks on the flow of goods internally within the United Kingdom, in line with the stated position of the Government's command paper.

[14] It is trite to point out that the DUP, much to the justified objection of many within the unionist community, only re-entered Government on the basis of New Decade New Approach ('NDNA'). This, as canvassed in detail in the underlying report preceding this supplementary paper, included a clear commitment to legislating to ensure unfettered access to the UK Internal Market. A commitment to legislating to protect unfettered access to the UK Internal Market, by implication clearly requires the interconnected protection of the UK Internal Market itself. The UK Internal Market is, as a matter of law, Article VI of the Acts of Union 1800. It is an elementary point that one does not protect the UK Internal Market, by repealing it as a constitutional

construct.

[15] An additional, although unparticularised, defence to the arguments raised in the first UVPS report was to simply revert to repeating ad nauseum that the Executive could not do anything other than implement the Protocol, because international obligations required it. That may be superficially an attractive point, but it is in fact devoid of substance.

[16] In the first instance, it fails to grapple with the core point which confounds its superficial attractiveness; can *general* international or domestic law obligations, operate to nullify the effect of section 28A of the Northern Ireland Act 1998 (a constitutional statute)?

[17] The answer to that question, when viewed in light of all the relevant legal authority, is no. If Parliament wished to nullify section 28A of the 1998 Act, then it could do so. But it would have to do so expressly and face the political consequences. If any further authority is needed for this proposition, then it is found in the Government's treatment of section 42 of the 1998 Act. To disapply that provision, the Secretary of State via regulations made under section 8C the 2018 Act inserted into the 1998 Act section 56A and Schedule 6A, which at paragraph 18 (5) expressly disapplied section 42.[1]

[18] If Parliament wished to equally disapply or interfere with the operation of section 28A, then it would be required to follow a similar course as that deployed in relation to section 42 of the 1998 Act. That, of course, is caveated by the position set out in the footnote *infra,* namely that it is not conceded that the Government were in fact lawfully empowered to disapply section 42 of the 1998 Act in the manner they have purported to do so.

[19] It is clear that Parliament has not decided to interfere with the operation of section 28A of the 1998 Act, therefore those obligations can not be subjugated by other, even competing obligations, but must co-exist with them. This statement of the law was most recently addressed by Colton J in *Re NIHRC's Application* [2021] NIQB 91 at paragraph 68:

[1] The making of the regulations is presently under legal challenge in the Northern Ireland Court of Appeal in *Allister et al*. It is not accepted that the Secretary of State was lawfully empowered to make these regulations given the requirement in section 10A (1) of the 2018 Act to act compatibly with the Northern Ireland and more fundamentally as to whether a constitutional statute could be interfered with via secondary legislation.

> *"[68] It recognises that this will inevitably take some time. It will further be constrained by the fact that ultimately the Executive Committee will have to agree to the commissioning proposals when complete. This is because the introduction of any new service would require Executive approval, in accordance with sections 20 and 28A of the Northern Ireland Act 1998 and the Ministerial Code contained in the Act. I should add that none of the parties in this application disputed this contention. For the purposes of these proceedings the court has proceeded on the basis that this is an accurate statement of the law." (*underlining added*)*

[20] Put simply, the existence of other obligations does not have the effect of nullifying the obligations within the 1998 Act.

[21] In addition, the international obligations in fact point the opposite direction than suggested by those who claim they provide authority for the proposition that section 28A of the 1998 Act is subservient to such obligations.

[22] The Protocol itself contains a commitment to protect the Belfast Agreement, its implementation agreements, and arrangements "*in all its parts*". This is transposed into domestic law via section 10 (1) (a) of the 2018 Act which requires that a Minister of the Crown or devolved authority must "*act in a way that is compatible with the terms of the Northern Ireland Act 1998".*

[23] Rather than the international obligations, which flow into domestic law via the 2018 Act, imposing an implied fetter upon or subjugating section 28A of the 1998 Act, they in fact- due to section 10 (1) (a) of the 2018 Act- reassert the primacy of the 1998 Act.

[24] Therefore, the international and domestic law obligation on Minister Poots, and the devolved authority corporately, is in fact to act in accordance with the provisions of section 20 (4) and 28A of the 1998 Act, and the associated paragraph 2.4 of the Ministerial Code.

[25] The position adopted by Sinn Fein has been to assert that they will not permit the relevant Executive referral by Minister Poots onto the Executive agenda. This appears to completely misunderstand the working of section 28A of the 1998 Act. A

failure to permit the paper onto the agenda would ensure that there could be no positive affirmation of Ministerial authority to continue Protocol implementation, therefore such an approach would in fact operate to affirm the deprivation of Ministerial authority and render the continuation of checks unlawful.

[26] The key forthcoming dispute which has been perceptively analysed by a number of journalists is the suggestion- prompted by Sinn Fein's dog whistle to nationalists in the civil service to stage a constitutional coup- that the Northern Ireland Civil Service ('NICS') would defy any direction of the Minister to direct the cessation of Protocol implementation.

[27] This extraordinary situation would create an unprecedented constitutional coup by unelected officials, who would defy a clear instruction by an elected Government Minister, and effectively seize control of the operation of Government in this particular policy area for themselves.

[28] In the first instance, this flies in the face of the very clear judgment in *Buick*, not to mention the crystal clear statement of legal principle set out by the now Lady Chief Justice Keegan at first instance in *Buick*

> *"[42] In my view the provisions of the 1999 Order are clear. The language is expressed in mandatory terms by inclusion of the word shall. The other words are also clear. However, the issue is really whether they should be qualified to take into account current circumstances. The Respondent is effectively asking the Court to read Article 4(1) of the 1999 Order to mean that direction and control only applies when a Minister is in place and at all times is also subject to that qualification. I am not attracted to this argument for the following reasons. Firstly, it offends the ordinary and natural meaning of the provision. Secondly, it is not in keeping with the legislative context namely the 1998 Act which forms the basis for government in Northern Ireland and which provides for ministerial oversight. Thirdly, I do not consider that Parliament can have intended that such decision making would continue in Northern Ireland in the absence of Ministers without the protection of democratic accountability. Fourthly, in terms of effect, the rubric*

> *suggested by the Department would mean that civil servants in Northern Ireland could effectively take major policy decisions such as this one for an indefinite period. This is not a purdah situation where there is a short gap. Rather there is a protracted vacuum in existence pending the restoration of executive and legislative institutions or direct rule."*

[29] This position was endorsed by Treacy LJ in the Court of Appeal in *Buick*[2] at paragraph 64:

> *"[64] I consider that it is clear from the terms of the Agreement set out above that the Department's argument that executive authority may be exercised by Departments in the absence of a Minister is inconsistent with the express terms of the Agreement. The default position contended for by the Department is profoundly undemocratic. If correct Departments in NI would be empowered, in breach of fundamental constitutional principle, to act without being accountable to Ministers. This would be a striking consequence for an Agreement which was intended to usher in a new era of accountable governance and power sharing.*
>
> *[65] The Department's argument is also inconsistent with the Civil Service view of the constitutional arrangements by which it is governed, contained in NI in its Code of Ethics. At paragraph 1 the Code states that the "Civil Service supports Ministers in developing and implementing their policies, and in delivering public services. Civil servants are accountable to Ministers". This is in keeping with the traditional UK constitutional model as set out in the Civil Service Code [see also Halsbury page 36]"*

[30] It will be noted that the two most senior judicial figures presently in Northern Ireland is Lady Chief Justice Keegan, and Lord Justice Treacy.

[31] The proposition that the civil servants can defy the Minister rests

[2] *Buick's Application (ARC21)* [2018] NIQB 43

fundamentally, it seems, on the general principle that a civil servant is not required to follow an order to act unlawfully. In general terms, that is uncontroversial in so far as it goes. If, for example, a Minister directed a civil servant to fraudulently draw up false expenses, or directed an official to go and punch another official in the face, then of course the official would not be obliged to follow such a direction.

[32] However, context is everything. In present purposes we have, at the most, a contested area of public law with conflicting views as to legality. It is certainly not comparable to a clear and deliberate order to act unlawfully. Therefore, in order to prevail, the proposition encouraging defiance of the Minister would have to resolve itself to this: it is for an official to subjectively determine any dispute over the legality of a Ministerial direction, and if there is any doubt, the doubt must be resolved in favour of the official's subjective legal opinion.

[33] That would be to effectively treat officials as Ministers, and more than that, to reserve to officials a quasi-judicial role of determining the legality of directions which are designed to have the effect of binding officials. In circumstances whereby the dispute, such as the present one in relation to Protocol implementation, is between officials and the Minister, the officials would in effect be the more powerful and could sit as judge of their own case, in so far as determining in their own favour a contested question of law.

[34] It is not hard to see how that proposition amounts to a fundamental overriding of the constitutional governance arrangements in the United Kingdom. It would further create the situation whereby official's subjective assessment of questions of public law would be the ultimate authority, until such times as the question is resolved by a competent judicial body. That would lead to a fundamental realignment of the constitutional principles of governance in the United Kingdom, and would reverse the principle of civil servants being accountable to Ministers, and rather make elected Ministers accountable to unelected civil servants.

[35] The superficially attractive riposte to the dismantling of the above proposition would be to say that in circumstances whereby there is a divergence of views as to the legality of a Ministerial direction, that the question of whether the decision has presumptive validity or not, should be resolved by recourse to legal advice.

[36] The first problem with that is that it simply repeats the problem canvassed *supra* in relation to power, on determining presumptive validity of contested questions of

public law, ultimately residing with unelected civil servants. If the question is to be resolved in the first instance by recourse to legal advice, then it simply means that power resides with equally unelected legal advisors.

[37] There is nevertheless a more fundamental problem with the proposition that the question in regards presumptive validity of a contested Ministerial direction be resolved by legal advice.

[38] Legal advice is subjective; you could pose the question to three senior counsel, and receive three conflicting answers. The contested nature of complex areas of law is contested for a reason; because there are a divergence of credible opinions on the right answer. If this was not so, and questions of law were so clear cut, then there would be no need for courts- or legal argument- because the answer would be obvious. There would be no such thing as questions of law of general public importance or an arguable case threshold, indeed all questions of law could be determined by a judge by simply looking at the question, because the answer is so straightforward. That, of course, is an absurd proposition. The law, especially public law, is a contested space. Even within the judiciary, different answers to the same question will be provided by different judges- that is why we have appeal courts.

[39] And so, the question arises, if the question of whether a Ministerial direction has presumptive validity is to be resolved by legal advice, who gets to choose the legal advisor? The Minister, or the officials?

[40] In the present case part of the legal question involves detailed consideration of the provisions of section 20 (4) and 28A of the 1998 Act. The Departmental Solicitors Office have recently misadvised nationalist Ministers (or, if one was a cynic, provided the advice the Ministers wanted to hear) in relation to the workings of the relevant provisions, particularly the test within paragraph 2.4 of the Ministerial Code (see *Re Bryson's application* [2022] NIQB 4)

[41] If therefore in the present case in relation to Protocol implementation, nationalist Ministers, or civil servants, come to the table armed with legal advice from Departmental Solicitors Office, is it not reasonable for Minister Poots to seek alternative legal advice? It would seem as a matter of legal principle, and common sense (not to mention the Minister is in charge of the Department), obvious that the Minister can take such a course and obtain competent legal advice.

[42] In circumstances where there is conflicting legal advice, the question therefore resolves to this: in circumstances whereby there is conflicting legal advice as to the legality of a Ministerial direction, is (i) the question as to presumptive validity resolved in favour of the Minister and thus officials are bound to follow it unless and until it is quashed by a competent court or; (ii) the question is resolved in favour of unelected civil servants and as such the direction is deprived of presumptive validity and the unelected officials are then at liberty to defy the Minister?

[43] It seems that in circumstances set out immediately *supra* there can only be one answer which is consistent with the constitutional principles of the United Kingdom. And that is that the officials yield to the Minister. That is so as a matter of fundamental constitutional principle, but also flowing from the clear provisions of Article 4 (1) of the Departments (Northern Ireland) Order 1999 which makes clear that the functions of the Department "*shall at all times be exercised subject to the direction and control of the Minister".* The inclusion of the word *shall* indicates the mandatory nature of this provision; it is not optional.

[44] In circumstances whereby officials do defy the Minister, then fundamentally it should be obvious to unionism that the governance arrangements in the 1998 Act offer nothing to the unionist community, and in fact those democratically elected by the unionist electorate can have their democratic power to govern arbitrarily stripped away by nationalist representatives, or more concerningly, unelected civil servants acting as agents of nationalist political representatives. It would seem there is ultimately no other end-point at that stage than unionism withdrawing from the institutions in their entirety, and refusing to re-enter until such times as there is a fundamental rebalancing of the 1998 Act and Belfast Agreement itself.

[45] However, in advance of resignation, the Minister should also direct disciplinary action against any civil servant who wilfully defies a Ministerial direction. In addition, the electorate are entitled to know the identity of unelected officials defying elected representatives and subverting democracy. Accordingly, if such a situation arises in the coming days and weeks, **UVPS recommends that the Minister should make a statement to the Assembly and name the officials who are acting in defiance of a Ministerial direction, and who are thus taking on the role of Protocol implementers in defiance of democratically elected unionist representatives.**

[46] In any event, the objection to the legality of any potential Ministerial direction rests solely on the claim that such a direction would conflict international obligations.

As has been set out, that objection is not in substance sustainable, and in fact the obligations (both international and domestic) point the other direction. However, if for arguments sake we give credence to the objection rooted in international obligations, then Parliament has clearly provided a remedy for that. If the sovereign Government form the view that actions of a Minister of the NI Executive, or the devolved authority more generally, has acted incompatibly with the United Kingdom's international obligations, then the Secretary of State is empowered to remedy that via a direction pursuant to section 26 of the 1998 Act.

[47] Put simply; Parliament has legislated for precisely the kind of dispute as presently arises (whether an act of a devolved Minister is compatible with international obligations) and has reserved to the Secretary of State the power to determine the matter, and remedy it. Parliament (obviously) did not hand the power to unelected civil servants.

[48] A constitutional coup by unelected civil servants (as urged by nationalists) would defy fundamental constitutional principles, but would also subvert the clear Governance arrangements contained within the 1998 Act. It is somewhat ironic that the self-appointed guardians of the Belfast Agreement are so quick to forsake its terms whenever they operate in a manner contrary to nationalism's political objectives.

Cross Community Consent (section 42 of the 1998 Act)

[49] A number of amendments have been brought by Baroness Hoey, Lord Dodds and Lord Trimble during the passage of the recent Executive (Elections, Functions and Petitions of Concern) Bill. Whilst these were not ultimately voted on in the House of Lords, they served as a platform for a significant debate on the propriety of disapplying cross community consent to neutralise the potential for unionism to deploy the relevant mechanisms in opposition to the Protocol.

[50] In advance of the most recent debate on this issue on 19 January 2022, Baroness Hoey, Lord Dodds and Lord Trimble issued a joint public letter to Peers explaining the significance of their amendments. We feel it worthwhile to republish it in full:

> *Dear Colleague,*
>
> *We write to bring to your attention the amendment/s being laid in our name tomorrow (19 January 2022) which seek to restore the carefully constructed balance to the heart of the Belfast Agreement.*
>
> *Last year the Government inserted via Schedule 6A paragraph 18 (5) into the Northern Ireland Act 1998 a provision to expressly disapplying the requirement for cross community consent when it comes to the key vote on the Northern Ireland Protocol.*
>
> *This demolishes a core plank of the Belfast Agreement, and thus causes unionists to wonder what purpose a cross community protection for key decisions (Strand One (5) (d) of the Belfast Agreement) serves, if it is in fact only applicable to nationalists.*
>
> *In addition, it equally conflicts even with the Protocol itself, which contains an express requirement to protect the Belfast Agreement "in all its parts". This is replicated in domestic law in Section 10A (1) of the European Union (Withdrawal Act) 2018 whereby there is a requirement to act compatibly with the terms of the Northern Ireland Act 1998.*

The Government's approach to acting compatibly with the 1998 Act, and protecting the Belfast Agreement in all its parts, was to unilaterally- without the consent of a single unionist elected representative at any political level- disapply one of the Agreement and 1998 Act's key provisions.

When faced with this issue, the Government's response is to say the Protocol consent vote is not devolved. We make three observations on this: (i) Strand One (5) (d) of the Belfast Agreement and section 42 (1) directs itself to "key decisions" of the Assembly and "a matter to be voted on by the Assembly" respectively. There is no constraint on the provision only being applicable to devolved matters; (ii) If the provision had in any event no force or effect, then why was it disapplied?; and (iii) In any event, the Protocol consent matter is devolved. The 1998 Act lists matters which are excepted or reserved, and any which are not listed are therefore devolved. In Schedule 2 (3) of the 1998 Act, international relations is listed as an excepted matter, however (3) (c) expressly makes clear this does not include "observing and implementing international obligations". In undertaking the vote derived from Article 18 of Protocol, the Assembly is implementing and observing an international obligation. It is therefore devolved.

We would ask you to support this amendment in order that the careful balance at the heart of the Belfast Agreement is protected. Without that balance, there can be no basis for unionists to support an Agreement whereby the key provisions are weaponised against that community, or as in this case, crucial protections disapplied to neutralise unionists.

Yours faithfully

Baroness Hoey – Lord Dodds- Lord Trimble

[51] The above letter concisely and cogently sets out the incoherence within the

Government's position on cross community consent on the Protocol vote.

[52] As identified in the above letter, the main riposte of the Government has been to take refuge in the assertion that the Protocol vote derived from Article 18 of same is not devolved. Whatever about the merits (or, as is in fact the case, lack thereof) of that legal argument, it is fundamentally dishonest. It is patently obvious that the Government have sought to deceive unionists, and with a sleight of hand remove one of the key provisions in the Agreement they have committed to defending "*in all its parts".* Naturally, the cross-community consent provision is sacred for so long as it works to the advantage of nationalists, but at the very moment unionists would reach for cross community protections, it all of a sudden is easily disposable.

[53] The inherent deceit in the Government's position is succinctly illuminated by the first proposition set out in the joint letter by Baroness Hoey, Lord Dodds and Lord Trimble. If the suggestion that cross community consent protections should have applied is devoid of any merit, then why did Parliament expressly disapply it, if it would never have been applicable in any event? There has been no credible answer to that elementary point.

[54] In addition, the clear text of Strand One (5) (d) and section 42 (1) do not constrain the relevant provision to being merely matters within the legislative competence of the Assembly (being devolved), but rather applies to "*key decisions*" of the Assembly and "*a matter to be voted on by the Assembly*". If, for example, the Assembly voted on a motion brought that related to a matter outside its legislative competence, section 42 could be (and has been) deployed.

[55] It is further plain that in fact the Crown had no treaty making power to agree Article 18 of the Protocol, given that the prerogative power must be exercised in a manner consistent with statute. Given Article 18 (2) of the Protocol is inconsistent with the clear provisions of section 42 of the 1998 Act, the making of the treaty was an unlawful exercise of the prerogative. For the clear authoritative statement of the principle that the prerogative cannot be deployed in a manner inconsistent with statue, see paragraph 55 of *Miller 1* in the United Kingdom Supreme Court.

[56] In any event, the complete answer to the Government's response taking refuge in claiming the matter is not devolved, is found in Schedule 2 paragraph 3 (1) (c) of the 1998 Act.

[57] The 1998 Act does not list devolved matters, rather it sets out excepted/reserved matters, and everything else is devolved. In Schedule 2 paragraph 3 (1) (c) it is clear that the implementation of international obligations is a devolved matter. In voting pursuant to Article 18 of the Protocol, the Assembly is implementing an international obligation, therefore discharging a devolved function.

[58] The dishonesty of the Government in general on this issue was tackled head on by Lord Hannan in the House of Lords on 19 January 2022. He said:

> *My Lords, I have not heard anyone really deny the central point made by the noble Baroness, Lady Hoey. I have heard some brilliant and enlightening speeches but even that gorgeous threnody of the noble Lord, Lord Bew, for past agreements, his great melody against it, did not defy the central point that cross-community consent was supposed to be the basis for every major decision. The pact that we made with the communities of Northern Ireland was that important constitutional issues of this kind would not be decided by simple majoritarianism but would require the consent of both communities. As the noble Lord, Lord Dodds, says, that was the basis on which the whole previous dispensation was overturned, so we cannot in conscience arbitrarily withhold that principle on this one issue. I will therefore support the noble Baroness's amendment.*

[59] This short, but perceptive, intervention by Lord Hannan illuminated the lack of substantive response to the core point articulated by Baroness Hoey, which echoed the position on section 42 of the 1998 Act set out in the initial UVPS report.

[60] Lord Hannan was followed by Lord Empey (former leader of the UUP) who said the following:

> *"I point out to my noble friend Lord Hannan on cross-community consent: if you take that through to all decisions, Northern Ireland, as a unit, would not have left the European Union because there would not have been cross-community consent. We have to be very careful where we draw the lines here."*

[61] It is concerning that Lord Empey, a former UUP leader, so fundamentally misunderstands both the principle of consent, and the cross community consent provisions within section 42 of the 1998 Act.

[62] Dealing firstly with the principle of consent (enshrined- in theory at least- in section 1 (1) of the 1998 Act). The principle of consent relates to Northern Ireland's position internally vis-à-vis the United Kingdom. It is about whether Northern Ireland wishes to remain in the United Kingdom, or not. It says absolutely nothing, and nor was it intended to, about the United Kingdom's external relationships. Put simply, it is a provision directed to the internal relationships within the United Kingdom, rather than the external relationships of the United Kingdom itself.

[63] There is no comparison for consent for leaving the EU (which was a matter directed towards the United Kingdom's external relationships), with consent for the Protocol. The former has no bearing whatsoever on the principle of consent, because it relates to the United Kingdom's external relationships. The latter absolutely squarely falls within the Belfast Agreement's principle of consent (at least as was understood by unionists) because it bears directly on Northern Ireland's position internally within the United Kingdom. This is so because the Protocol fundamentally alters the very foundation of the United Kingdom itself in the form of the Acts of Union.

[64] Lord Empey's point is even more fundamentally wrong when it comes to comparing leaving the EU, with the Protocol consent vote and the associated disapplication of section 42 of the 1998 Act. The consent mechanisms in the Belfast Agreement and 1998 Act (Strand One (5) (d) and section 42 of the 1998 Act respectively) are directed at key decisions in the Executive or Assembly, and specifically in relation to section 42 of the 1998 Act, any matter to be voted on by the Assembly.

[65] It is patently obvious that whilst the Protocol *is* a matter to be voted on by the Assembly, and in addition its implementation requires cross community Executive approval, the Brexit referendum was a matter to be voted on by the electorate of the United Kingdom. It is confusing why Lord Empey, as a unionist who purports to oppose the Protocol, would seek to make this point even if it had merit (which it plainly does not; it is beyond any doubt entirely wrong).

[66] In his contribution to the debate, Lord Bew said *inter alia*:

"The noble Baroness, Lady Hoey, mentioned the Act of Union

> *1800. Article 6 of the Act of Union—I have no idea why the Government's lawyers said it was subjugated by recent developments—is subjugated by the Government of Ireland Act 1920, which says that trade is the responsibility of this Parliament, as far as Northern Ireland is concerned. That is essentially what the 1998 Act and subsequent legislation, which took over the Government of Ireland Act, say. There is nothing obscure, oblique or implied—it is absolutely explicit in the Government of Ireland Act. That is a very weak argument."*

[67] Respectfully, Lord Bew is entirely wrong in this portion of his contribution. The Government of Ireland Act 1920 had no such effect. There was no explicit or implied repeal of Article VI of the Acts of Union 1800. The Government of Ireland Act 1920 making clear trade was the responsibility of Parliament has no bearing whatsoever on Article VI of the Acts of Union 1800. Rather, in exercising the responsibility for trade, Parliament must act in accordance with the Acts of Union, unless and until Parliament itself *expressly* repeals the Acts of Union (or portions thereof). In short, Parliament has bound itself, until such times as it chooses to expressly unbind itself. It has not done so in relation to the Acts of Union 1800.

[68] The devolution settlement contained in the Government of Ireland Act 1920 might be considered from a purely political vantage point either a good or bad idea but plainly as set out in general terms *supra*, it did not infringe the Acts of Union 1800 either impliedly or at all. First, there is nothing inconsistent with the Acts of Union in creating subordinate legislatures so long as the supremacy of the Parliament created by the Acts of Union is unaffected. Constitutionally, the power of Parliament is unaffected by the 1920 Act. Second, there is no infringement of Article VI of the Acts of Union in making provision for trade, including by reserving aspects of trade to Parliament. Article VI does not prohibit measures dealing with trade; what it does do is prohibit measures that put Ireland and Great Britain on an unequal footing as respects trade. The 1920 Act does not do that.

[69] Notwithstanding the error in the portion of Lord Bew's contribution addressed *supra,* the overall speech to the House was impressive and with typical clarity managed to illuminate the core imbalance which has prevailed in relation to the interpretation of the Belfast Agreement. Lord Bew said:

> *"I have great respect for the gritty texture of the speech of the noble Baroness, Lady Hoey—initially, what is important to understand is why we have got to this point. She is absolutely right; there is a major problem with the one-sided, nationalist appropriation of the Belfast agreement and the willingness, on the whole—if you read Michel Barnier's memoir on the EU, for example—to accept that version. Getting it back to a balance—and in this respect I absolutely agree with the noble Baroness—is the clue to stability in Northern Ireland. That balance has departed.*
>
> *The reality is that in 2017 the May Government lost an election they were not expecting to lose, and the UK negotiating position on these points collapsed in the autumn. Anybody who looks at it closely can see that Irish officials in recent times have published how amazed they were; one Irish official at the centre of these negotiations writes about how easily they were accepted as the only guardian of the Belfast agreement. That being the case, noble Lords will not be surprised that the version of the agreement that starts to play into the 2018 protocol in particular is one-sided. On 6 November, the noble Lord, Lord Murphy of Torfaen, said in this House that he considered that the negotiators of the 2018 withdrawal agreement for the May Government had failed to take into proper account the complexity and commitments of the Good Friday agreement across the board. To that extent, the underlying emotion impelling the noble Baroness, Lady Hoey, today is entirely correct."*

[70] The above portion of Lord Bew's speech is a powerful contribution, and one which sets out clearly how the Belfast Agreement has become effectively a nationalist document.

[71] The restoration of cross community consent- and mechanisms to prevent any future disapplication- must be a fundamental red line for unionism.

Unionist messaging on the Protocol and Belfast Agreement

[72] There must be a clear position set out on the Protocol by all unionist parties. At its core the fundamental issue of the Protocol is that it works from the premise that Northern Ireland can be at the same time both a member of the United Kingdom Internal Market, and the EU Single Market.

[73] The Acts of Union 1800 (and specifically in relation to the UK Internal Market, Article VI of same) is the Union as a legal construct. It prohibits any one part of the UK being on either a more advantageous, or disadvantageous, footing than the rest of the UK. Therefore, in order for Northern Ireland to have a different relationship with the EU single market than Great Britain, this requires a fundamental altering of the constitutional position of Northern Ireland within the Union. That issue cannot be avoided or fudged; and so, all unionist parties should be clear on it, and face the consequences of their political position.

[74] If any unionist party support the 'best of both worlds' theory of Northern Ireland having privileged access to the EU and UK Internal Market, then it must be accepted that this position requires a fundamental change in Northern Ireland's constitutional position, because it requires the subjugation or repeal of the Acts of Union itself.

[75] Conversely, if the position is (as we recommend it should be) that Northern Ireland's relationship with the EU must yield to the Acts of Union, and thus any arrangement must be consistent with that foundational constitutional statute, then it should be made clear that Northern Ireland is not, and cannot be treated as if it is, part of the EU Single Market.

[76] There have in addition been a number of contradictory policy positions set out by the UUP, not least in relation to what appears to be support for the 'best of both worlds' theory (NI having dual membership of EU Single Market and UK internal market, inconsistently with the Acts of Union) and a proposal for a new North-South body which would presumably give the Irish Government a say in the internal trading arrangements of the United Kingdom. That is a concerning position and we recommend that the UUP clearly sets out their position, lest it be misunderstood.

[77] In addition, the UUP have a number of candidates who have made remarks which would appear entirely hostile to unionism. This includes, for example, a suggestion by one election candidate that the Irish Parliament should sit in Belfast,

and comments by another election candidate who stated Northern Ireland was "*steeped in bias and discrimination…particularly oppression towards catholic and other minorities*". The UUP should make clear whether they endorse or repudiate these positions set out by their candidates.

[78] Several recent polls have outlined the increasing unionist opposition to the Belfast Agreement, and a desire to see the institutions collapsed in opposition to the Protocol. Unionism collectively is becoming increasingly aware as to the deceptive and, in regards the Union, corrosive nature of the Belfast Agreement.

[79] This is not confined to 'hardline' sections of unionism or loyalism, but rather is a widespread view in Northern Ireland. In the most recent Lucid Talk poll, almost two thirds of unionists (63%) supported collapsing the institutions. Regarding timing 45% believe this should happen immediately. In the breakdown of those surveyed 81% of DUP voters want unionism to withdraw from the institutions, compared with 98% of TUV voters who want this outcome.

[80] This is in addition to the finding that 67% of unionists generally rate the Executive as bad/awful, demonstrating that anti-agreement unionism is now the dominant ideological position within the unionist family. This is a remarkable sea change over the past decade, and is evidence of the one-sided trajectory of the 'peace process' becoming ever more apparent.

[81] The significance of this finding in the recent LucidTalk poll is more pertinent because those who participate in such polls are mostly nationalists, Alliance-type voters or soft unionists. There are few and far between working class loyalists who participate in such polls. Overall, participation is likely skewed along such lines as the liberal/metropolitan twitter bubble which is dominated by those of a nationalist viewpoint.

[82] Therefore, this survey is not a finding almost two-thirds of hardline unionism/loyalism want the institutions collapsed (if purely loyalism was surveyed, the number we suspect would be closer to 90%) and has turned against the Belfast Agreement, but rather it is 63% mostly made up of soft unionists. That is a clear signal as to the collective antipathy of the unionist electorate towards the Belfast Agreement.

[83] The DUP, UUP, TUV, PUP and any independent unionists should set out a clear position on the Belfast Agreement, with specific focus on the principle of consent. It is

acknowledged the PUP have done so with the extensive constitutional documents, and the TUV have been consistent on this issue since their formation. All unionist parties should be clear as to whether post an election they will continue to operate the Belfast Agreement if the position remains that the principle of consent in section 1 (1) of the 1998 Act is merely symbolic (or territorial) and offers no protection to the substance of the Union, contrary to the understanding of those unionists who negotiated and recommended the Belfast Agreement to the unionist electorate.

[84] It is our view that there must be, at the very least, fundamental reform of the Belfast Agreement (inclusive of the restoration of section 42 of the 1998 Act in relation to the Protocol consent vote)- and crucially a strengthening of section 1 (1) of the 1998 Act to ensure the principle of consent protects the substance rather than merely the symbolism of the Union.

[85] Put simply, rather than being able to change everything in regards the substance in the Union, but the last thing (the last thing being the final territorial handover of sovereignty to Dublin), that section 1 (1) of the 1998 Act would rather ensure that you can't change anything of substance until you change the last thing. In short, the Union in substance has the protection of the principle of consent, rather than such a protection being merely symbolic or territorial.

[86] In a perceptive article in 1998, Robert McCartney QC said the following on this subject:

> *"The consent principle, which Sinn Fein has never accepted, allegedly ensures that Northern Ireland will remain part of the United Kingdom until a majority decides otherwise, but it applies only to the transfer of de jure sovereignty. The Belfast Agreement provides for the creation of institutions of Government that will progress towards a functionality and factually united Ireland. The result of such de facto united Ireland will render consent to the transfer of sovereignty either unnecessary or inevitable."*[3]

[87] The activism of grassroots unionist and loyalist communities significantly contributed to forcing the Government to produce their July 2021 command paper,

[3] Reflections on Liberty, Democracy and The Union – Robert McCartney QC [2001]

and the explicit recognition that the Protocol is incompatible with political and society stability.

[88] The tactic of street protests and unnotified processions not only acted as a force to drive political unionism into action, but played directly into the UK-EU negotiations. The Article 16 threshold was met (and we remain of the view it should have been triggered long ago) because of the activism of grassroots unionists and loyalists.

[89] There has been no diminution of enthusiasm for street protest should the political process fail to remove the Protocol. However, the tactic of protest having had the significant and desired effect, grassroots unionist and loyalist communities paused protest action to give space for the removal of the Protocol via the process of UK-EU engagement. The reasons for this approach were set out in a UVPS report towards the end of the summer of 2021.

[90] This 'pause' in protest action was never intended to be permanent, and if truth be told, has lasted longer than it ought to have. That is an indication of the reasonableness of the unionist and loyalist community.

[91] We now recommend that protest groups should begin planning for a resumption, on an escalated basis, of protest against the Protocol should there be a failure of political negotiations and litigation designed to eradicate the Protocol.

[92] In addition, we believe that the campaign against the Protocol has energised a new generation of loyalists, many of whom are capable of articulating loyalism's message in the public arena. We note the significant number of ***genuine*** activists who have come to the fore in various Coalitions, Collectives and advocacy groups such as Let's Talk Loyalism. These ***genuine*** 'new faces' should be encouraged, and where possible provided opportunities to speak from platforms and on the media, to broaden (and thus strengthen) the loyalist voice generally.

Annexes

Baroness Hoey speech in House of Lords 19 January 2022

My Lords, I beg to move Amendment 5 and will speak to Amendment 7, both of which are in my name and that of the noble Lord, Lord Dodds. In Committee, the name of the noble Lord, Lord Trimble, was also on this. Unfortunately, through a communications error, his name did not appear. He could not be here today, but he wanted me to say clearly at the beginning that he wishes that his name was on it and he supports it fully.

I believe that this amendment goes to the heart of everything that we have been talking about today and, indeed, everything that we talk about in Northern Ireland and in relation to it at the moment: the word "consent". I have been making a note of every time that consent has been mentioned in this debate, and it is well into double figures, even in this short time.

I will talk about how the Government changed the consent principle in Northern Ireland last year, by inserting a provision, in paragraph 18(5) of Schedule 6A, into the Northern Ireland Act 1998 to expressly disallow the requirements for cross-community consent when it comes to the key vote in the future on the Northern Ireland protocol, if it is still there. Quite simply, this demolishes a core plank of the Belfast agreement and so causes many people to wonder what purpose is actually served by a cross-community protection for key decisions, as set out in paragraph 5(d) of strand one of the Belfast Agreement. The consent principle was one of the reasons that men and women in Northern Ireland supported the Belfast agreement in the end, despite their concerns about many aspects of it, like prisoner release, which has been mentioned already. They went in and voted, many of them with a heavy heart, because they thought that it was best for Northern Ireland at the time. As a pro-union community, they had a safeguard to stop something that was harmful in the future to their community.

So the Belfast agreement has been unbalanced with this government move. Even the Government's own barristers, in the High Court proceedings that I am part of in Belfast, accepted that this subjugated the Acts of Union. As I said in Committee, how can any noble Lord in this House stand over that approach? In their Command Paper, the Government themselves have conceded that the protocol has no consent from the unionist community and identified this as a core problem.

So, in these amendments, we seek to undo that injustice. Amendment 7 seeks to repeal Schedule 6A to, and Section 56A of, the 1998 Act and would undo the Government's

unilateral move to disapply community consent. Amendment 5 ensures that the 2018 Act provisions cannot, by implication or otherwise, subjugate the cross-community consent protections, which are so vital to peace and stability in Northern Ireland.

Of course, the move to disapply cross-community consent conflicts even with the protocol itself, which contains an express requirement to protect the Belfast agreement "in all its parts". This is further replicated in domestic law in Section 10(1)(a) of the European Union (Withdrawal) Act 2018, whereby there is a requirement to: *"act in a way that is compatible with the terms of the Northern Ireland Act 1998".*

The Government's approach to apparently acting compatibly with the 1998 Act and protecting the Belfast agreement "in all its parts" was to unilaterally, without the consent of a single unionist elected representative at any political level, disapply one of the key provisions of the agreement and of the 1998 Act. I am sure that many Members of your Lordships' House did not realise that this was happening. There was never a vote on any of this in our Parliament.

When faced with this issue, the Government's response was that the protocol consent vote is not devolved. I will make three observations on this. Paragraph 5(d) of strand one of the Belfast agreement and Section 42(1) are directed, respectively, to "key decisions" of the Assembly and "*a matter which is to be voted on by the Assembly*".

There is no constraint on the provision only being applicable to devolved matters. Secondly, if the provision had, in any event, no force or effect, why was it disapplied? Thirdly, in any event, the protocol consent matter is devolved. The 1998 Act lists matters that are excepted or reserved, and any that are not listed are therefore devolved. In paragraph 3 of Schedule 2 to the 1998 Act, "International relations" is listed as an excepted matter. However, paragraph 3(c) of Schedule 2 makes clear that this does not include *"observing and implementing international obligations".*

In undertaking the vote derived from Article 18 of the protocol, the Assembly is implementing and observing an international obligation. Therefore, it is devolved.

The Belfast Agreement is essential for protecting peace and stability in Northern Ireland. Protecting that agreement must mean protecting its provisions for the betterment of all citizens in Northern Ireland, rather than simply viewing the agreement through what effectively amounts to a principle of nationalist interpretation. It cannot

be the case that cross-community protections are for one community, when it suits, but not the other. Either the Belfast agreement serves the entire community equally or it has no point, from a pro-union perspective. So these amendments are fundamentally about restoring the careful balance negotiated by the noble Lord, Lord Trimble, and others in 1998.

I am for ever genuinely astounded by those who shout loudest, as guardians of the Belfast agreement, if they do not really mean it. They seem to demand that the Belfast agreement be construed in a manner conducive to certain objectives by certain communities. So we hear nothing from the SDLP, Sinn Féin or even the Alliance Party on the heinous move to trash cross-community consent protections at the very time that it seems to be working to the benefit of those who have overwhelmingly rejected the protocol.

Over many months, the record will show that many of us have warned the Government and raised the alarm on this issue. If the Belfast agreement is to continue, the fundamental balance must be restored. Otherwise, even those within unionism who supported the agreement could not conceivably recommend continuing in a process that is fundamentally imbalanced and to the detriment of the pro-union community and, indeed, the union as a whole of Great Britain and Northern Ireland—the United Kingdom.

We met with the shadow Ministers and, obviously, the government Ministers on this, and the former showed some genuine understanding of this and an acceptance of how it was causing real problems in Northern Ireland. I also know that the noble Lord, Lord Caine, was given very little time in Committee when this was proposed, because it came in quite late, and I am hopeful that he will be able to give us a little more of his real views on it today, having, I hope, gone back and talked to people in government.

I do not need to say much on the second amendment because its objective is clear: it seeks again to undo the damage done to the Belfast agreement by the unilateral move to disapply cross-community consent. It is restoring cross-community protections on the protocol vote to ensure that, if there is to be a protocol applying in Northern Ireland, it will require cross-community consent. Without that, it cannot survive. It fixes these amendments and the Government's error—I will put it no stronger than that—in inserting these provisions into the Northern Ireland Act without the consent of a single unionist elected representative at any level in Northern Ireland.

As I and many of us have said many times before, ultimately, the Government will have to choose between the protocol and the Belfast agreement. That is something I do not want our Government to have to do. But the reality of the situation in Northern Ireland, as has been said by many Members in this House, is very serious indeed, and there is very little time to get this sorted. It is not going to go away.

I am pleased there is a statement on the BBC because it probably means there are a few more people here than are normally here when we have debates on Northern Ireland. I appeal to noble Lords who may not have looked into this in great detail to think about this carefully, because this is crucial if we are serious about moving forward in Northern Ireland. If we cannot get this right and we break the Belfast agreement in this deliberate way, I am afraid that its long-term future is at risk.

I hope noble Lords will understand what may seem very technical but is actually very simple: do we mean what we said in the Belfast agreement and the Northern Ireland Act 1998? I beg to move.

Closing Speech

My Lords, I thank everyone for their contributions. This has been a thoughtful and useful debate on a part of the United Kingdom that gets far too little attention at any time other than when there is trouble. I will briefly address a couple of points that were raised.

I get tired of people going on about how the protocol is all about Brexit. Northern Ireland voted as part of the United Kingdom, and we voted as the United Kingdom to leave. Let us be realistic. What happened then is that Northern Ireland has not left the European Union. We are in the internal market for all sorts of aspects, and we are now seeing that working through in the constitutional issue which is part of this debate tonight: the question of consent.

I thank the noble Lord, Lord Hannan, for his short speech of support. As someone who was a long-time Member of the European Parliament, perhaps he more than anyone here realises, when we say, “We are waiting for these negotiations and so we cannot talk about this, vote on it or do anything now,” just how very unlikely it is that the European Union will cave in and give back what should never have been signed away. I

am not interested in who made the bad decisions, who is blaming who in Northern Ireland, or in which Government did it; I am interested now in sorting it. The only way we will do that is to stand up for our country—for a United Kingdom—and not use the excuses that have always been made about why we have a protocol.

When do we get a vote on this? The noble Lord, Lord Caine, talks about the legal action. Will we get a vote after that? I believe that all the other arguments used to explain why there cannot be a vote tonight are just procrastination. The people of Northern Ireland are fed up with this place and the other place not really ever accepting that they are part of the United Kingdom. I wish people would be honest. There are Members in this House who do not want Northern Ireland to be part of the union but they will not say it. Behind the scenes, we in Northern Ireland do not believe that we have the total support of Peers in this House and Members of Parliament in the other House. I believe that we should be voting on this tonight, but I am aware that there are Members here who have said to me that they genuinely do not think that this is part of this Bill—that it should not be in it. I do not agree with them, but I know that they will use that as their reason—understandably and perhaps genuinely honestly—not to support it.

I want the people of Northern Ireland to know that we have discussed this and that we mean what we say. I will withdraw my opportunity to have a vote, because I know that if this did not pass tonight, that would be used by people to say, "There is no support for getting back cross-community consent", and I do not believe that is true.

I therefore thank Members who have spoken and—I am not being patronising to noble Lords—I hope that some people tonight have genuinely learned something about what is happening in Northern Ireland at this moment. We can talk about New Decade, New Approach and we can say that this is what the Bill is about. There will not be any New Decade, New Approach discussions or anything coming out of New Decade, New Approach until we sort the protocol out and until Northern Ireland is fully part of the United Kingdom again. That is what this debate is really about. I beg leave to withdraw the amendment.

Lord Dodds speech House of Lords 19 January 2022

My Lords, it is a pleasure to follow the noble and learned Lord. I share his wish for a successful outcome to the negotiations that addresses the fundamental problems that are part of the Northern Ireland protocol. However, I fear that time is very short now and there is little willingness, from what I can see, on the part of the EU to address the fundamental points. It has put forward various mitigations but none of them addresses the governance issue which we are talking about today, none of them addresses the democratic deficit, and none of them addresses the fact that part of this United Kingdom in the 21st century will have laws made for it by a foreign institution, in its interests, over which no elected representation of that part of the United Kingdom has any vote or say. That is an outrageous position.

We have to address this point. The points that have been set out in the amendment proposed by the noble Baroness, Lady Hoey, have gone to the heart of trying to address this matter by saying that we have a problem. I accept what the noble Lord, Lord Bew, said, that the most recent agreement had in it something that Theresa May's agreement did not, which really was a role for the Assembly. He is right and reminds us that when people now tell us that Theresa May's deal was a great deal for unionism and we should have accepted it, that was not the case. It did not have any democratic legitimacy, it created a regulatory border down the Irish Sea and it would have put Northern Ireland completely inside the customs union. A lot of revisionism goes on over these matters.

The problem is that although the agreement gives a role to the Assembly, it does not give it any democratic say. The issue of the democratic deficit cannot go away. You cannot have citizens of this part of the fifth-biggest economy of the world having laws made for them that separate us from the rest of the UK—and will separate us more and more over the years to come—and create differences, not just small regulatory ones but massive differences, to our economy when we have to align with the European Union while England, Scotland and Wales go down a different path.

Remember that we in Northern Ireland do more trade with the rest of the United Kingdom than the rest of the world and the EU put together, never mind the constitutional issues. In the meeting the other day with Chris Heaton-Harris, referred to by the noble Baroness, Lady Ritchie, he reported that every business he talks to reports a problem with the Northern Ireland protocol. Yes, some businesses that export to the EU might find it convenient, but the vast majority of our trade is with the rest of

the UK. Not least, some of those businesses that export to the EU take many of the inputs to their manufacturing process and so on from Great Britain. Some 20% of all checks on goods from across the world into the EU are carried out in Northern Ireland, between one part of the UK and the other. Remember that that is in a situation where we are in a grace period and 90% of the protocol has not actually been implemented yet.

This situation cannot endure. It must be resolved. One suggestion that we have looked at, and this is the purpose behind the amendment, is to say, "For this vote that's going to happen in the Northern Ireland Assembly in 2024, let's restore the voting mechanism under the Belfast agreement whereby it's a cross-community vote." As I said, this is the only significant key vote that is given to the Northern Ireland Assembly that is incapable of being a cross-community vote. It is a majority vote. For 99 years of Northern Ireland's existence we were told that majoritarianism and majority rule was unacceptable, but the Northern Ireland protocol it the one area where the UK Government changed the Belfast agreement through an SI—not even primary legislation, but a piece of delegated legislation in Committee one day a couple of years ago. The purpose of the SI was to change the Northern Ireland Act.

People tell us that the Belfast agreement and the Northern Ireland Act are sacrosanct and cannot be changed. Indeed, the Northern Ireland protocol itself says it is designed to protect the Belfast agreement "in all its parts". I would have thought that included the cross-community mechanisms and supporting the Northern Ireland Assembly. As we have said in previous debates, that is at the heart of the Belfast agreement, as amended by the St Andrews agreement and all the rest. It is also in the Belfast agreement itself: paragraph 5(d) of strand 1 says that all key decisions should be under the cross-community consent mechanism.

It really is important that this matter is addressed. It goes to the heart of one of the problems that bedevil the stability of the institutions. As the noble Lord, Lord Bew, referred to, massive damage has been done to strand 3 of the agreement regarding the east-west relationship between Northern Ireland and the rest of the UK, but massive damage has also been done to strand 1 through the working of the Assembly because it has been interfered with. I will not go into the arguments about whether this is a devolved matter because the noble Baroness, Lady Hoey, set them out very clearly, but if you give a decision to the Northern Ireland Assembly then it should be given on the basis of the Belfast agreement as amended. That is the basis on which the Assembly

has operated since 1998 but it was unilaterally changed for this particular issue.

We have to restore that important principle of cross-community support. It is the Northern Ireland protocol and its outworking that is causing the instability in Northern Ireland. That is the inevitable result of the trade barriers, the friction and the fact that in many instances citizens in Northern Ireland cannot order goods on the internet from the rest of the UK any more. Costs are being racked up by businesses. The UK Government are spending hundreds of millions of pounds a year, which could go into investment, productivity and boosting the economy, on administrative officials under the trade support mechanisms to basically administer all the customs checks on behalf of businesses. That is an amazing dereliction of the responsibilities of the UK Government to the citizens of Northern Ireland.

I plead with noble Lords to restore the proper role of the Northern Ireland Assembly in this matter. The Government clearly now have three choices when it comes to the protocol. They are imminent choices, matters that have to be decided within a very short period. Either they will reach agreement, as we said earlier, although it is doubtful that that will happen, or they will take action on their own part, either alongside or apart from the instigation of Article 16 of the protocol—or, if neither of those happens, the resulting instability in the institutions will lead to their demise. Those are the only three options now open. I sincerely hope that the Government do not allow the third one to happen. This mechanism would provide a democratic route, in line with the Belfast agreement, to give people a political way forward and restore some kind of route map for people in Northern Ireland, whether they agree with the protocol or not, to have a vote on a cross-community basis.

Jamie Bryson UVPS legal action article published in Newsletter 6 January 2022

The successful legal steps taken against the Protocol, reported on in detail over recent days in this paper, are significant and potentially a defining moment. On BBC Nolan yesterday, the SDLP leader was unable to substantively engage with any of the relevant points I had set out. To paraphrase a hero of mine, Maggie Thatcher "if they attack you personally, it means they have not a single political argument left".

This article seeks to set out clearly (in so far as the complex arguments can be distilled into one article) the legal argument which has been made. It is prudent to do so both to ensure political unionism stays the course, but also to allow the arguments to be subject to public scrutiny.

The Belfast Agreement, transposed into domestic law by the Northern Ireland Act 1998 ('the 1998 Act') had several inbuilt cross community protections, with later additions following the St Andrews Agreement in 2006. For present purposes there are two key provisions in the 1998 Act; section 28A which regulates Executive decision making, and section 42 (1) which deals with cross community consent on matters coming before the Assembly. The latter provision has been controversially disapplied in order to neutralise unionists, this is presently subject to legal challenge in the case brought by Allister et al and was comprehensively and cogently addressed by Baroness Hoey in this Newspaper last week.

The legal challenge which was brought on behalf of Unionist Voice Policy Studies focused on the section 28A of the 1998 Act provision. It resolves in simple terms to this; the implementation of the Protocol- both continuing and any intensification of same- is significant and controversial. That it seems to me is beyond any doubt. Indeed, in a recent application before the High Court, Mr Justice Scoffield stated that the Protocol was a matter of "significant political contention".

On that footing, it is therefore clear that there is a legal obligation to refer such a decision to the Executive. Crucially, when a matter falls within the significant, controversial and/or cross cutting category, the relevant Minister is deprived of authority to act (see section 28A (10)). Put simply; in the absence of Executive approval, there is no authority to implement the Protocol. While it may be said that the point should have been caught earlier, it matters now that the point is caught in time.

In any event the matter has become even clearer as a result of the detailed analysis of the s28A provisions in recent High Court judgments and intimation of a legal challenge by UVPS has alerted the DAERA Minister to the constitutional environment in all its depth. . And so, the duty to refer applies.

The next stage is for Minister Poots to bring a paper to the Executive. As a pure strategic matter, that paper will have to request permission for the checks to continue, and make clear if this is not forthcoming in a matter of days or weeks, then all implementation will halt. It is necessary to frame it this way in order to ensure the veto works for rather than against unionism. And, of course, it is the duty of every unionist to vote against the granting of such authority.

There has been a faint (and legally flawed) effort to claim that the protections of section 28A must yield to international obligations (or those imposed by regulations by the UK Government). Not so, the NI Act reigns supreme as a constitutional statute. If tit is sought to disapply its protections, this must be done expressly by another statute.

It is hard not to be struck by the hypocrisy of those who present themselves as guardians of the Belfast Agreement, raging against unionism simply deploying one of the mechanisms inherent with the Agreement. It seems the real position of nationalism is 'cross community protections for me, but not for thee'.

This strategic approach, which is set out in detail in the UVPS report published yesterday, will wound, but not in of itself defeat the Protocol. To really defeat the Protocol requires acceptance that for so long as NI remains trapped in the EU single market, that this is incompatible with the Acts of Union. That is the definition of constitutional change. The fact that the principle of consent was seemingly powerless to guard against that fundamental altering of NI's place in the United Kingdom, raises a more fundamental question for unionism.

The fatal imbalance in the Belfast Agreement (not least in the exposure of the principle of consent as purely symbolic) has now been laid bare. That gaping hole can no longer be concealed. Therefore, unionism must confront the larger questions about participations in the institutions per se. In my mind, even fixing the Protocol is not enough. Unionism must instead take the last best chance to secure a fundamental renegotiation of the Belfast Agreement itself.

List of Statutory Provisions and International Agreements

Statutory provisions

Section 42 of the Northern Ireland Act 1998

Section 56A of the Northern Ireland Act 1998

Schedule 6A of the Northern Ireland Act 1998

Section 10 (1) of the European Union (Withdrawal) Act 2018

Section 7A of the European Union (Withdrawal) Act 2018

Article VI of the Acts of Union 1800

International Agreements

The British- Irish Agreement (incorporating the Belfast Agreement)

The Belfast Agreement

The Northern Ireland Protocol (incorporated within the UK-EU Withdrawal Agreement)

List of Relevant Cases

Re Buick's application (ARC 21) [2018] NIQB 43

Re Buick's application (ARC 21) [2018] NICA 26

Re Bryson's application [2022] NIQB 4

Re NIHRC's application [2021] NIQB 91

Re Napier's application [2021] NIQB 120

Re Chuinneagain (Caoimhe Ni's) Application [2021] NIQB 79

Re Safe Electricity A&T Ltd and Woods' Application [2021] NIQB 93

List of Abbreviations

NICS – Northern Ireland Civil Service

The 1998 Act- The Northern Ireland Act 1998

The 2018 Acr- The European Union (Withdrawal Act) 2018

DSO- Departmental Solicitors Office

DAERA- Department of Agriculture, Environment and Rural Affairs

UVPS- Unionist Voice Policy Studies

DUP- Democratic Unionist Party

UUP- Ulster Unionist Party

PUP- Progressive Unionist Party

TUV- Traditional Unionist Voice

MLA- Member of the legislative assembly

MP- Member of Parliament

Peer- Member of the House of Lords