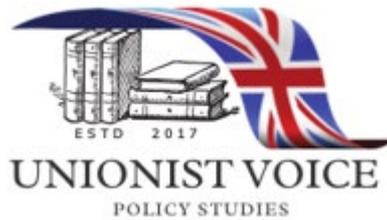


The Acts of Union 1800 Fundamental Constitutional Law

By Jamie Bryson

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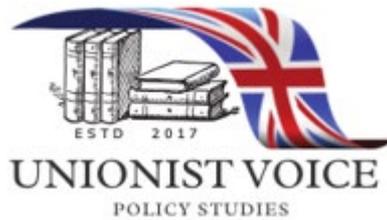
- (i) Promoting the constitutional position of Northern Ireland as a full and integral part of the United Kingdom in line with the Acts of Union 1800*
- (ii) Advocating for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy*

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About Unionist Voice Policy Studies

Unionist Voice Policy Studies ('UVPS') is an organisation established with the following objectives:

- (i) To promote the constitutional position of Northern Ireland as a full and integral part of the United Kingdom in line with the Acts of Union 1800*
- (ii) To advocate for the interests of the Unionist/Loyalist community in Northern Ireland with specific focus on the areas of Media, Law and Public Policy*



The Acts of Union

The Acts of Union 1800 refers to a treaty between Ireland and Great Britain to bring together the separate countries of Ireland and Great Britain- to be thereafter the United Kingdom of Great Britain and Ireland- under one Parliament. This was achieved by the parallel legislation in the Ireland and Great Britain Parliaments via the Act of Union (Ireland) Act 1800 and Union with Ireland Act 1800, the former of which abolished the Irish Parliament.

The Act of Union (Ireland) 1800, although passed by the old Irish Parliament, was carried into domestic United Kingdom law.

Therefore, constitutionally the United Kingdom as a legal construct is the Acts of Union. It is those Articles which set out the core principles and fundamental law of the United Kingdom.

It is at least arguable as a novel theory that as Article 3 of the Acts of Union created the United Kingdom Parliament, that the Acts of Union is the absolute fundamental law of the United Kingdom, and not even Parliament could therefore interfere with it. For example, Parliament could not interfere with Article 3 by abolishing itself.

Recognising the Acts of Union's fundamental constitutional status as the bedrock of the Union, the repeal of the Acts of Union has been a long-time nationalist objective. Indeed, they thought they had achieved this key objective via the Belfast Agreement and subsequent Northern Ireland Act 1998.

In 1998 Martin McGuinness said:

"We fought for and got the repeal of the Government of Ireland Act, which underpinned the union, and insisted that other relevant legislation including the Act of Union and the NI Constitution Act 1973 must also be altered, repealed or rendered inoperable by any new Act ... The union has undoubtedly been weakened as a result of the inclusion of a clause limiting the life of the union to the will of a majority in the Northern state ... There is now no absolute commitment, no raft of parliamentary acts to back up an absolute claim, but only an agreement to stay until the majority decides otherwise."
(emphasis added)



As it can be seen from these comments to a Sinn Fein meeting, nationalism's key strategic objective to undermine the Union included ensuring the Acts of Union were "*altered, repealed or rendered inoperable*".

The comments of Martin McGuinness, a former IRA commander turned Sinn Fein leader, *supra* outline the crucial nature of the ongoing battle for the restoration of the Acts of Union, which are violated by the Protocol.

If anyone doubted the political reason for nationalism's emphatic affiliation to the Protocol, it can be found in the fact that it purports to deliver a key objective by deconstructing the Acts of Union, and thus removing the fundamental construct underpinning the Union itself.

Contrary to nationalism's belief in 1998, the Acts of Union was not repealed- either expressly or by implication. Repeals are listed in Schedule 15 of the 1998 Act. If Parliament had wished to repeal a constitutional statute (which is immune from implied repeal), it could have done so. It did not.

The Acts of Union- underpinning the Union- remains in force, and the key objective for unionism must be the restoration of Article 6. A failure to do so will have fundamental constitutional consequences.

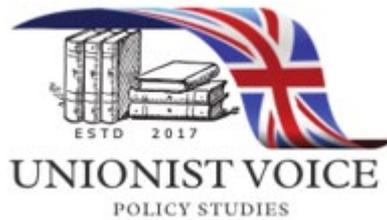
The Acts of Union remains fundamental constitutional law

The Government of Ireland Act 1920 did not in any way interfere with the Acts of Union 1800, rather it simply made provision for two separate devolved arrangements in one part of the United Kingdom (at that time Ireland) which was to be divided into two distinct Parliaments, but crucially remaining under the sovereign Parliament of the United Kingdom.

It is clear therefore that the 1920 Act did not in any way amend or repeal the Acts of Union 1800.

Indeed, Sir Arthur Quekett viewed the Act as the means "*by which a constitution within the United Kingdom has been bestowed upon Northern Ireland*", Ulster Unionists having "*accepted a local constitution as the only means whereby the close connection of Ulster with Great Britain under the Act of Union could at that time be preserved*".

The 1920 Act was plainly operating within the overarching fundamental constitutional principles of the United Kingdom, rather than in any way subverting them.



Northern Ireland was defined in section 1 (2) of the 1920 Act as follows:

(2) For the purposes of this Act, Northern Ireland shall consist of the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone, and the parliamentary boroughs of Belfast and Londonderry, and Southern Ireland shall consist of so much of Ireland as is not comprised within the said parliamentary counties and boroughs.

On 6 December 1921, the Anglo-Irish treaty was signed in London between the United Kingdom Government and Sinn Fein (the treaty is a little odd given that treaties were generally between sovereign states, and the Southern Parliament was not sovereign as it fell under the provisions of the 1920 Act, and the then extent of section 75 of that Act).

The 1921 treaty agreed that the 26 counties of Southern Ireland would secede from the United Kingdom, and instead become a dominion under the British Crown.

The Free State Agreement Act 1922 via section 1 (2), which give effects to much of the Anglo-Irish treaty of 1921, and thus provided that the Southern Parliament created by the 1920 Act would be dissolved.

The Irish Free State (Consequential Provisions) Act 1922 (the 1922 Act) provided that the 1920 Act ceased to apply beyond Northern Ireland. In consequence, section 75 of the 1920 Act was amended to state that the “*supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in [Northern Ireland]*”.

In consequence, Southern Ireland no longer remained part of the United Kingdom. This did not alter the fundamental constitutional law of the United Kingdom in the form of the Acts of Union, but rather simply modified the territorial application of that fundamental constitutional law.

Northern Ireland- as defined territorially within section 1 (2) of the 1920 Act- remained part of the United Kingdom and under the Parliament created by Article 3 of the Acts of Union.

This change in the territorial application of the Acts of Union was constitutionally permissible, because it was expressly given effect by the sovereign Parliament created under Article 3 of same.

In 1949 the Irish Free State left the commonwealth. This was given effect by the Ireland Act 1949 (‘the 1949 Act’). The introductory text of the 1949 Act stated:

An Act to recognise and declare the constitutional position as to the part of Ireland heretofore known as Eire, and to make provision as to the name by which it may be known and the manner in which the law is to apply in relation to it; to declare and affirm the constitutional position and the territorial integrity of Northern Ireland and to amend, as respects the Parliament of the United Kingdom, the law relating to the qualifications of electors in constituencies in Northern Ireland ; and for purposes connected with the matters aforesaid.

In section 1- titled 'Constitutional provisions' it was provided:

"1 Constitutional provisions.

(1) It is hereby recognised and declared that the part of Ireland heretofore known as Eire ceased, as from the eighteenth day of April, nineteen hundred and forty-nine, to be part of His Majesty's dominions.

(2) It is hereby declared that Northern Ireland remains part of His Majesty's dominions and of the United Kingdom and it is hereby affirmed that in no event will Northern Ireland or any part thereof cease to be part of His Majesty's dominions and of the United Kingdom without the consent of the Parliament of Northern Ireland.

(3) The part of Ireland referred to in subsection (1) of this section is hereafter in this Act referred to, and may in any Act, enactment or instrument passed or made after the passing of this Act be referred to, by the name attributed thereto by the law thereof, that is to say, as the Republic of Ireland."

Firstly, and most crucially, there is developed in the introductory text two distinct concepts, namely 'constitutional position' and 'territorial integrity' of Northern Ireland. What do these distinct concepts each mean?

The constitutional position of Northern Ireland must refer to the fundamental constitutional law of the United Kingdom: The Acts of Union 1800, which is described in Halsbury's statutes in the following terms:

"...the Act remains the statutory warrant for the continued incorporation of Northern Ireland with the United Kingdom".

The territorial integrity of Northern Ireland means simply what it says. It relates to the geographical extent of Northern Ireland, as set out in section 1 (2) of the 1920 Act.

In 1973 the Northern Ireland Constitutional Act 1973 ('the 1973 Act') repealed section 1 (2) of the 1949 Act, instead providing Northern Ireland:

"...remains part of Her Majesty's dominions and of the United Kingdom, and it is hereby affirmed that in no event will Northern Ireland or any part of it cease to be part of Her Majesty's dominions and of the United Kingdom without the consent of the majority of the people of Northern Ireland voting in a poll held for the purposes of this section"

Section 4 (4) of the 1973 reasserted the legislative supremacy of Parliament (created by Article 3 of the Acts of Union).

It will be noted the 1973 Act is effectively a forerunner to section 1 of the Northern Ireland Act 1998 which provides:

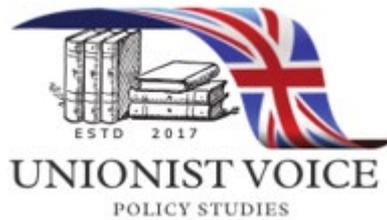
"Status of Northern Ireland

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland."

Whilst not the subject of this paper (UVPS is currently undertaking the publication of a separate paper on Section 1 of the 1998 Act), it is obvious to point out that the 1998 Act did not strengthen the principle of consent, which was always there from as far back as the 1920 Act, the 1949 Act and the 1973 Act. Rather it weakened it by inserting subsection 2 thus expressly placing a duty on the Secretary of State to call a border poll in defined circumstances.

In the 1949 Act, the 1973 Act and subsequently in section 1 (1) of the 1998 Act, there is a failure to transpose the distinct concepts of 'constitutional position' and 'territorial integrity' into



the relevant constitutional provisions, which seem on a *prima facie* basis to be purely territorial/ geographical rather than relating to the substance of the constitutional position of Northern Ireland within the United Kingdom (as defined by the Acts of Union).

However, the Acts of Union remain in force, and therefore reference to Northern Ireland's status within the United Kingdom must be construed in accordance with the Acts of Union. Put simply; protections for Northern Ireland's status within the United Kingdom can not be circumvented by changing the fundamental constitutional basis of the United Kingdom itself. And so, Northern Ireland's status within the United Kingdom, must ensure protection for the fundamental constitutional law of the United Kingdom itself (the Acts of Union).

If it were to be the case that Northern Ireland's status in the United Kingdom is construed as purely territorial (and thus symbolic) rather than fundamentally constitutional (and thus substantive) then, for example, governance powers over Northern Ireland could be devolved to Dublin, with the Irish Supreme Court made supreme over Northern Ireland, so long as territorially the six counties of Northern Ireland remained symbolically part of the United Kingdom. This type of approach is precisely that which has been adopted in relation to the imposition of the Protocol, which the Government seeks to argue "subjugates" the Acts of Union. This is a plainly absurd proposition, which is corrosive to the fundamental constitutional status of the United Kingdom itself.

The Acts of Union and the Protocol

The Acts of Union- despite nationalism's claims to have abolished it- remains in force, or at least did until the imposition of the Protocol.

In the first instance judgement in *Allister et al's application [2021] NIQB 64* Colton J expressly made clear that not only do the Acts of Union remain in force, but that the Protocol clearly conflicts with Article 6:

[62] Although the final outworkings of the Protocol in relation to trade between GB and Northern Ireland are unclear and the subject matter of ongoing discussions it cannot be said that the two jurisdictions are on "equal footing" in relation to trade. Compliance with certain EU standards; the bureaucracy and associated costs of complying with customs documentation and checks; the payment of tariffs for goods "at risk" and the unfettered access enjoyed by Northern Ireland businesses to the EU internal market conflict with the "equal footing" described in Article VI. (emphasis added)



The Protocol interferes with Article 6 of the Acts of Union, and thus fundamentally undermines the foundational constitutional principles of the United Kingdom itself. In short, the Protocol causes a fundamental change to Northern Ireland's status within the United Kingdom, by overriding a key foundational constitutional principle of the Union itself.

In addition, and importantly for proponents of the 'best of both worlds' theory, paragraph [60] of Colton J in *Allister et al* also makes clear that Northern Ireland's unfettered access to the EU single market (which is not bestowed on the rest of the United Kingdom) amounts to a violation of Article 6.

In a briefing note published by UVPS on 18 February 2022 the constitutional incompatibility of the 'best of both worlds' theory (NI having dual access to the EU single market and UK internal market) was set out.

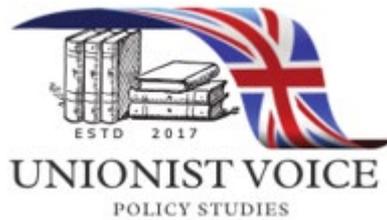
The constitutionally compatible route to reconciling Article 6 with the 'best of both worlds', so say proponents of such a proposition, is to suggest that the Acts of Union does not prohibit NI being in a more advantageous position than the rest of the United Kingdom, but merely prevents NI being in a disadvantaged position.

That proposition is fundamentally wrong; firstly, it requires mental gymnastics to overcome that which is plainly set out in Article 6. Equal footing means what it says. Secondly, if Article 6 does not prevent NI having privileged status, then in consequence it doesn't prevent any other part of the UK being disadvantaged vis-à-vis other constituent parts of the UK. As such it would render the 'equal footing' clause in Article 6 redundant, and bestow NI with some strange enhanced position under the Acts of Union.

It follows that constitutional fidelity requires Northern Ireland to be on an equal footing with the rest of the United Kingdom. The Protocol offends that constitutional requirement, and thus corrodes Northern Ireland's constitutional status itself.

Conclusion

The Acts of Union is the fundamental constitutional framework of the United Kingdom. It sets forth the key constitutional principles of the Union. The application of these principles can adapt as time evolves, but they can not bend or break- except with the express will of Parliament (notwithstanding that there is a novel argument that as fundamental constitutional law, the Acts of Union may be beyond the reach of even Parliament).



The fundamental birth certificate of the Union of Great Britain and Northern Ireland is the Acts of Union. And thus, Northern Ireland's position within the United Kingdom must be in line with the fundamental principles of the Union itself.

There may be an interesting argument as to whether Northern Ireland's status within the United Kingdom can be maintained notwithstanding a change to the United Kingdom itself. To use a loose analogy; if you have a tenancy to live in house X, does your tenancy remain secure if house X itself is subject to fundamental changes in its foundations and core structure, but nevertheless you are still permitted to live within its boundaries?

That is a much wider constitutional debate, but as someone who believes that constitutional fidelity can only be achieved by strict adherence to the fundamental and foundational constitutional principles set forth within the Acts of Union, I believe that if anyone wishes to reform the Union itself, then this requires the proponents of such to squarely confront the constitutional infidelity of their proposition.

In any event, the protection for Northern Ireland's status within the Union in the form of the principle of consent must be construed as a constitutional protection for the Union itself. The principle of consent cannot be reduced to relating merely to territorial extent rather than substantive constitutional position.