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The misrepresentation of Unionism and the Belfast Agreement

A response to Niamh Gallagher (Cambridge University)

By Jamie Bryson

Executive Summary

The academic paper on the Belfast Agreement produced by Ms Niamh Gallagher falls into error in the following general ways:

- It misunderstands the unionist arguments on the Protocol and erroneously conflates a number of different concepts, which in turn infects the entire paper.
- It fundamentally misunderstands the distinct concepts of constitutional consent (section 1 of the 1998 Act) and cross community consent (Strand One (5) (d) of the Agreement and section 42 of the 1998 Act). This error is compounded by conflating the two, and thus totally misunderstanding unionism's position.
- It entirely ignores the practical reality that the Belfast Agreement power sharing institutions require cross-community consent (a majority of both unionists and nationalists) to operate. As majority unionist consent has been withdrawn due to the Protocol breaching the fundamental safeguards unionism were told existed within the Agreement, the Agreement can therefore not function and is thus undermined by the Protocol.
- It entirely misunderstands and in consequence misrepresents the provisions of Strand Three of the Belfast Agreement.
- It fails to grapple with the reality that the subjugation of the Act of Union, the fundamental constitutional statute underpinning the UK, has caused constitutional change without consent.
- It is difficult to understand how Ms Gallagher rightly grasps the fact that the Belfast Agreement ensures that a majority of unionism and nationalism are separately required for power-sharing, but then goes on to find that despite a majority of unionism withdrawing consent for power-sharing, that this doesn't prevent power-sharing from functioning.
- In seeking to write about the unionist community and/or the Belfast Agreement, particularly with the objective of influencing policy, academics should at the very least properly inform themselves as to the relevant arguments and seek to competently understand the applicable legal principles.

Introduction

In setting the scene for the content of the paper, Ms Gallagher set her objective out as follows:

Foreign Secretary Liz Truss expanded on these claims in her speech to the House of Commons. She claimed that the Agreement was ‘under strain’ because the Executive was not functioning and ‘the Northern Ireland Protocol does not have the support necessary in one part of the community in Northern Ireland’. She highlighted problems including trade, health, and VAT divergences between NI and GB, claiming that ‘without resolving these and other issues, we will not be able to re-establish the Executive and preserve the hard-won progress sustained by the Belfast Good Friday Agreement’. This argument has been made in several subsequent media appearances. She identified Strand Three – ‘enhanced arrangements for East–West cooperation’ – as a cause for concern, concluding that ‘these practical problems have contributed to the sense that the East–West relationship has been undermined’. (See below on the term ‘East–West’ used here by Truss). Both ministers have now moved forward with their plans to rip up the Protocol; on 15 June 2022, Brussels launched legal action against the UK.

These arguments present direct links between the Protocol and different concerns associated with the Good Friday Agreement – a functioning Stormont, cross-community consent, trade between GB and NI (positioned as Strand Three of the Agreement) and most seriously, the preservation of peace in NI. The implication is that implementation of the Protocol is directly impacting these other issues, making peace harder to maintain.

This article explores the woeful misunderstandings in these characterisations. Policymakers must be aware of them if they are to focus on solving the real issues which NI grapples with today.

This flawed analysis infects the entire paper, because it fundamentally fails to understand the nature of power-sharing in Northern Ireland and the basis upon which it operates.

In the deeply divided Northern Ireland, the governance arrangements endorsed by a majority of the electorate in 1998 (but arguably a minority of unionists) were based around a carefully crafted compromise. In full disclosure, I oppose the Belfast Agreement because I believe it is inherently imbalanced and is designed to create the structure for the incremental dismantling of the Union.

However, that is not the focus of this paper. It is a fact that the majority of the electorate in Northern Ireland endorsed the Belfast Agreement, and it is that Agreement which has been adopted both domestically and internationally and treated almost as a holy writ.

Indeed, the ostensible objective of the Protocol is purportedly to protect the Belfast Agreement in all its dimensions.

In her paper, Ms Gallagher fails to understand that the architecture of the Belfast Agreement requires cross-community consent to operate. If there is no consent from one of the two majority traditions, then the governance arrangements are deadlocked. This was evident in the three years in which Sinn Fein withdrew their consent for the arrangements, and in more recent times when the DUP has withdrawn support.

It is interesting to note that Ms Gallagher further makes clear that it is wrong to present the Protocol as a threat to peace. This seems somewhat illogical. We are told the Protocol is there to protect peace, with the irresistible implication that if there was a hard land border then peace would be at risk. But when the Protocol imposes a Sea border, dividing the United Kingdom, we are told this presents no threat to peace.

In short form: *A hard land border represents a threat to peace, so as a solution an Irish Sea border must be imposed, which couldn't possibly present a threat to peace, because it is put there to protect peace.* The reasoning is entirely circular and wholly illogical.

If we break this down, does the position adopted by Ms Gallagher not lead to the inevitable conclusion that given a hard land border would present a threat to peace, that a veto over politics exists for those who would engage in violence if there were to be a hard land border?

This therefore leads to the conclusion that given apparently the GB-NI sea border presents no risk to peace, that this is the option which must be chosen, thus making unionism the losers because that section of the community does not present the same threat to peace as those who oppose a land border. I do not think Ms Gallagher has properly considered her submission on this point.

Since the imposition of the Protocol, there has been significant violent disorder on the streets, a hoax bomb attack on the Irish Government and loyalist organisations have withdrawn their support for the Belfast Agreement. In addition, a number of key loyalist negotiators and supporters of the agreement (such as Billy Hutchinson and Jim Wilson) have made clear they can no longer in good conscience recommend to the unionist/loyalist community continued support for the Agreement.

In a 2022 article, Billy Hutchinson made clear that had he known then what he does now about the outworking of the 1998 Agreement, then he would not have been able to convince the loyalist organisations to call a ceasefire and support peace.

All this disruption has come as a direct result of the Protocol, and its impact on the power-sharing arrangements in Northern Ireland. It would seem reasonable therefore to suggest that the imposition of the Protocol does present a risk to peace.

If I return to my earlier analysis, the difficulty with making the threat to peace a relevant consideration is that it gives those who would threaten violence for political leverage a veto. However, that is the principle (repugnant as it is) that the Belfast

Agreement itself was founded upon and indeed the Protocol itself was a result of threats to peace (including suggesting the possibility of IRA bombs) deployed by the Irish Government, EU and Irish nationalists in Northern Ireland.

The setting of that precedent may prove to be a historical error; it is most certainly immoral. But set it has been, and we therefore must face the situation which presently confronts us.

The unionist community has withdrawn consent for the Belfast Agreement and given a democratic mandate to the DUP to refuse to enter power-sharing again until the Protocol is removed. In this context, it is difficult to see how the suggestion by Ms Gallagher that the Protocol is not in fact impacting the Belfast Agreement, or risking peace, can sustain even the most basic scrutiny.

This withdrawal of consent for power-sharing is directly linked to the manner by which the Belfast Agreement has been deceptively deployed against the interests of the unionist community.

I will address these issues in greater detail below but in short summary the unionist community were sold the Belfast Agreement on the basis that the principle of consent protected the 'constitutional status' of Northern Ireland as part of the United Kingdom, and that *in addition* cross community consent provisions would apply to key governance decisions to be voted on by the Northern Ireland Assembly.

However, the Protocol has dismantled both of these consent concepts. The Union as a matter of law is the Act of Union. As Noble Peace prize winner and unionist Belfast Agreement negotiator David Trimble said in outlining the principle of consent to the unionist community: "*the Act of Union remains firmly in place...the Act of Union is the Union*".

The Protocol has been held by the Northern Ireland High Court and the Court of Appeal in *Allister et al* to "subjugate" Article 6 of the Act of Union. The subjugation of the fundamental basis of the constitutional arrangements of the United Kingdom is the very definition of constitutional change. This has been imposed by-passing the principle of consent, which has now been exposed as being a deceptive snare.

In circumstances whereby the principle of consent was the core reason as to why those within unionism/loyalism who supported the 1998 Agreement did so, the exposure of same as being entirely vacuous therefore in consequence removes the core basis of unionist support.

The concept of cross community consent was enshrined within Strand One (5) (d) of the Agreement. This directed itself to key decisions to be voted on by the Assembly and found domestic law effect in section 42 (1) of the Northern Ireland Act 1998.

In the consent vote on the Protocol the requirement for key decisions to be voted on by the Assembly to command cross-community support has been disappplied. This renders the safeguard for the unionist community to be entirely worthless.

It should come as no surprise therefore in that the hollowing out of all safeguards for the unionist community leads to withdrawal of support from that community for the offending arrangements.

It is disappointing that Ms Gallagher has invested her significant academic credibility in publishing such demonstrably unsustainable claims, and either accidentally or wilfully entirely misrepresenting the ongoing situation in Northern Ireland. That it is suggested policy makers should take onboard the plainly wrong claims in the paper is a matter of even more serious concern.

In her paper, Ms Gallagher breaks her contribution up into sections. I will adopt the relevant headings of the portions I seek to challenge, for ease of cross-reference. I should say, the framing of the headings illuminates what seems to be the inherent bias of that author and I adopt them merely for convenience of the reader.

The reasons for Stormont's collapse- a spotlight on the DUP

In this section, Ms Gallagher explains how power sharing arrangements work by requiring the consent of *the majority* of each of the unionist and nationalist community.

This is followed by a summary of the present positions of the relevant parties. Ms Gallagher outlines how the DUP and TUV (who together represent the majority of unionism by some considerable distance, with the DUP easily the largest unionist party) do not want to return to power sharing until the Protocol is removed. It is notable there is no mention that this position has been endorsed by around 265,000 unionist voters.

The paper then informs us that all nationalist parties and one minority unionist party the UUP, want to return to power sharing, as do Alliance who (it is claimed) have no constitutional preference.

Ms Gallagher then concludes with this finding:

The Protocol is therefore not preventing power-sharing from functioning, nor is there wider political disengagement which should cause concern about governance in NI; fault lies alone with one party whose actions have unilaterally prevented governance from taking place. Understanding their reasons is of course important, but this is an entirely separate problem to suggesting power-sharing is broken.

It is difficult to understand how Ms Gallagher rightly grasps the fact that the Belfast Agreement ensures that a majority of unionism and nationalism are separately required for power-sharing, but then goes on to find that despite a majority of unionism withdrawing consent for power-sharing, that this doesn't prevent power-sharing from functioning.

The final paragraph is simply arrant nonsense, and it is remarkable as to how Ms Gallagher reconciles her first and final paragraphs in this section.

This is very simple. Power sharing requires the consent of a majority of unionists and a majority of nationalists. The majority of unionists have withdrawn consent for power-sharing due to the Protocol. Therefore power-sharing cannot operate.

How can it therefore logically or seriously be suggested that the Protocol is not preventing power-sharing from operating?

This intellectual dishonesty alone damages the credibility of the entire academic contribution.

Does Stormont's suspension today threaten the Good Friday Agreement

In this section Ms Gallagher questions the claim that the Belfast Agreement and peace itself is under threat due to the suspension of the institutions. It is true to say there have been previous suspensions (not least for three years when Sinn Fein collapsed Government as leverage in their pursuit of a number of cultural policy objectives).

However, the present breakdown relates to unionist withdrawal of support for the Agreement itself, given that its purported safeguards have been exposed as being entirely hollow and indeed completely removable when unionism seeks to deploy safeguarding provisions.

Debunking the alleged threats posed to the Agreement by the Protocol

(i) The issue of 'cross-community consent'

This entire section is infected with a fundamental misunderstanding of the two distinct concepts of consent, and how they apply to the Protocol.

Firstly, there is the principle which I will term '*constitutional consent*'. This is not cross community consent, but rather is what is generally known as the principle of consent. It means that Northern Ireland remains an integral and full part of the United Kingdom until a majority of persons wish it to be otherwise.

The consent protection, which directs itself to Northern Ireland's *constitutional status* is enshrined in domestic law within section 1 (1) of the Northern Ireland Act 1998.

In present circumstances its application relates to the fact that the Protocol "subjugates" the Act of Union, which as a matter of law *is* the Union. Therefore, it is plain that the Protocol imposes constitutional change in relation to Northern Ireland's status within the United Kingdom, and thus should trigger the constitutional consent safeguard.

It has been held by High Court and Court of Appeal (the matter is still under appeal to the Supreme Court and is contested strongly) section 1 of the 1998 Act does not apply to anything other than the final formal hand-over of sovereignty.

The Protocol has therefore exposed that: either (i) (as contended by unionism) the subjugation of Northern Ireland's place in the Union does require section 1 consent due to the constitutional change it effects via the subjugation of the Act of Union; or (ii) section 1 does not apply to any constitutional change other than the symbolic severing of the last tie.

If it is (i) then the Protocol has infringed the fundamental tenet of the Belfast Agreement and more crucially section 1 of the Northern Ireland Act 1998. This demonstrates the Protocol fails to adhere to its stated objectives.

In the alternative if it is (ii) then the constitutional change- without triggering section 1- caused by the Protocol has exposed that the core constitutional protection in the Belfast Agreement is in fact a deceptive snare. Put simply, it means that when it comes to Northern Ireland's constitutional status *you can change everything but the last thing*, the last thing being merely the final formal handover of sovereignty.

If this is so, then the core basis for unionist support for the 1998 Agreement (both then and now) has been eroded. There is simply no basis for unionism/loyalism to support the power-sharing institutions if they are to be interpreted and operated in an imbalanced manner which runs entirely contrary to the promises made in 1998, and more fundamentally to the interests of the Union itself.

On this particular issue, Ms Gallagher further errs in repeating the SDLP's claim that if consent was required for the Protocol, then consent was equally required for Brexit. This rests on an elementary error. The error is compounded in Ms Gallagher's paper because she has not only misunderstood constitutional status consent, but has in addition conflated it with the entirely distinct cross-community consent concept.

Constitutional consent via section 1 of the 1998 Act directs itself solely to Northern Ireland's internal domestic constitutional status within the United Kingdom. It has no application to the external arrangements entered into by the United Kingdom itself.

Therefore, consent is required for the Protocol, because the Protocol changes Northern Ireland's domestic constitutional status internally within the United Kingdom. It was not required for Brexit, because that related to the United Kingdom's external international relationships.

The nationalist effort to apply the principle of consent to Brexit (as they repeatedly tried to do all throughout the Brexit negotiations) is an effort to deny the fundamental essence of the principle itself, which recognises that Northern Ireland is part of the United Kingdom (and therefore should leave the EU on the same terms as the rest of the UK) until a majority of persons wishes that to change.

Ms Gallagher appears to fundamentally misunderstand and conflate the two separate concepts of consent (constitutional and cross community), and then compounds the error by further conflating the broad practical reality that the Belfast Agreement requires cross-community consent to operate.

In her treatment of consent, Ms Gallagher appears to believe that the unionist argument is that in the Government agreeing the Withdrawal Agreement's NI Protocol element, this required cross-community consent. It seems to be the implication that reliance for this argument is placed upon the Strand One (5) (d) cross community consent protections, which are enshrined in section 42 (1) of the 1998 Act.

This is a fatal error. The unionist position is not that in making the treaty cross-community consent was required. This cardinal error leads to the somewhat confusing analysis that follows. There appears to be little merit in trying to disentangle that analysis, because it is so obviously misconceived.

The true unionist position in relation to the UK Government agreeing of the Protocol itself has two limbs:

The first limb is that the imposition of the Protocol required section 1 constitutional consent (which is not cross community consent) because it occasioned fundamental constitutional change to the status of Northern Ireland within the United Kingdom, as evidenced by the subjugation of the Act of Union.

This is interconnected with the second limb, which itself is made up of three strands, namely: (i) cross community consent (section 42 of 1998 Act); (ii) constitutional consent (section 1 of 1998 Act); and (iii) the Act of Union itself.

These three strands rest on one legal principle, namely that the Royal Prerogative cannot be used in a manner which conflicts with statute (see paragraph 55 of *Miller 1 UKSC*). It is true that Parliament could have expressly cured this illegality in the domestic law Withdrawal Act, but squarely confronting that they were acting in conflict with the Act of Union and Northern Ireland Act 1998, but they did not do so.

In making the Withdrawal Agreement treaty inclusive of the Protocol, the prerogative was used in a manner inconsistent with the three aforementioned statutory provisions in the following ways:

- Article 18 of the Protocol requires the disapplication of section 42 of the 1998 Act and thus cross community consent, and in consequence Article 18 conflicted with statute at the time the treaty was made.
- The imposition of internal UK constitutional change *vis-à-vis* Northern Ireland without consent offends section 1 of the 1998 Act. This is bound up with the Act of Union, because it is the breach of Article 6 of that fundamental constitutional statute which in consequence causes the breach of section 1.

- The requirement on Northern Ireland to follow EU Laws and effectively remain in the EU Single Market creates an unequal footing between constituent parts of the United Kingdom offending the first limb of Article 6 of the Act of Union, and equally offends the second limb because all parts of the United Kingdom are required to be on an equal footing in all treaties made with foreign powers.

It seems Ms Gallagher fundamentally misunderstands unionism's argument (now seemingly accepted by the Government) regarding consent for agreeing the Protocol at all, and hasn't grasped the two limbs of complaint.

Put simply the true position is that in agreeing the Protocol the Government made a treaty which breached fundamental constitutional law provisions by subjugating the Act of Union, and in doing so further occasioned a breach of section 1 of the 1998 Act.

This is objectionable both on grounds of the breach of the constitutional consent protections within section 1 which gives effect to the key pillar of the Belfast Agreement, and also on the improper use of the Royal Prerogative in making the treaty.

In turn, the breach of the relevant provisions in the 1998 Act (section 1 and section 42) as a practical consequence erodes unionist support for power-sharing and has led to a withdrawal of consent for same. As power-sharing requires a majority of unionists and nationalists, this therefore means absence this cross-community consent, power-sharing cannot operate.

Separately, unionism's argument as to cross community consent relates to Article 18 of the Protocol. This argument directs itself solely to the 'consent' vote created by Article 18, and is entirely distinct from the matters already addressed.

In her paper, Ms Gallagher has erroneously conflated different concepts and this has led to the inevitable confusion which is evident throughout.

Although entirely confusing cross-community consent with unionism's argument as to consent for the agreeing of the Protocol itself, which I have set out above, Ms Gallagher does seek to (albeit in the wrong context) provide an overview of section 42 of the 1998 Act.

This provision gives effect to the international treaty obligations in Strand One (5) (d) of the Belfast Agreement which requires that "*key-decisions be taken on a cross community basis*". It will be noted that there is no qualification, rather it is simply key decisions taken in the institutions which are to attract the safeguarding protections.

Section 42 (1) of the 1998 Act directs itself to "*matters to be voted on by the Assembly*".

If the provision had sought to constrain the exercise of the use of the cross-community consent safeguard only to devolved matters within the legislative competence of the Assembly, then that would be one thing. But it does not contain any such constraint.

Therefore, the consent vote (currently scheduled for 2024) as to the continued imposition of the Protocol is held in a manner which expressly disappplies cross community consent and in consequence renders the safeguard measures obsolete for unionism.

Ms Gallagher contends that section 42 relates only to devolved matters being dealt with by the Assembly. There is of course absolutely no textual basis for this either within Strand One (5) (d), or section 42 itself.

But this contention is defeated even further by a simple fact. The Government via Regulations unilaterally amended the 1998 Act, inserting a new section 56A and Schedule 6A, which expressly disappplied section 42 and thus cross community consent on the Article 18 Protocol consent vote.

If the cross-community consent mechanism could never apply to the Protocol vote, then why did the Government expressly disapply it for that purpose?

As a practical observation, could one imagine the outcry of the core cross community protections in the 1998 Act were unilaterally disappplied to the detriment of nationalism?

So, the real position as to cross community consent is that unionism objects to the key safeguard being removed for the Protocol consent vote. This is a different argument than that relating to constitutional consent which relates to the impropriety of agreeing the Protocol at all.

(ii) Misunderstanding 'East-West relations' in Strand Three of the Agreement

In this section Ms Gallagher charges that the Foreign Secretary and UK Government collectively misunderstands Strand Three of the Belfast Agreement.

It is contended that "*Strand Three of the Agreement, which deals with East-West relations, is between the Republic of Ireland and GB, not between NI and GB...*".

The problem will be immediately obvious. If Strand Three, as suggested, relates to merely the Republic of Ireland and GB, then what role does Northern Ireland have to play?

This constitutionally erroneous analysis almost operates on the basis that Strand Three is about the relationship between two co-equal parents (ROI and GB), with Northern Ireland the shared property of both.

That offensive analysis demonstrates Ms Gallagher's fundamental misunderstanding once again. Northern Ireland is part of the United Kingdom. The Republic of Ireland relationship with GB is not distinct to that with Northern Ireland, rather both GB and Northern Ireland are equal constituent parts of the United Kingdom.

In any event, Ms Gallagher's contention is just plainly wrong. Strand Three (1) and (2) outlines the British-Irish council in the following terms:

1. A British-Irish Council (BIC) will be established under a new British-Irish Agreement to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.

2. Membership of the BIC will comprise representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and, if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Man and the Channel Islands.

It is apparent from Strand Three (1) that the purpose *inter alia* is "the development of the *totality of relationships*..".

The totality of relationships plainly includes the internal UK relationships between NI and GB. This alone defeats the contention of Ms Gallagher on Strand Three.

However, Strand Three (2) puts the incorrectness of her claims beyond any doubt. It outlines that membership comprises representatives of the British and Irish Governments and the devolved institutions.

The reference to the British Government is a reference to the Government of the United Kingdom, which is made clear within the Agreement itself is sovereign in relation to Northern Ireland (an equal constituent part of the UK). This therefore entirely refutes the nonsensical suggestion that Strand Three is between the Republic of Ireland and GB.

Debunking the claim that the Protocol threatens the Good Friday Agreement

In the second last section, Ms Gallagher returns to where she started in the impugned paper by contending that the Protocol does not threaten the Belfast Agreement.

This would appear to align with Ms Gallagher's own political view, which has been infused into and thus conflated with her academic work, but it is in fact monstrously untrue.

It need not repeat it in detail. But the Belfast Agreement creates the political institutions. In order for those institutions to function, cross community consent- in the form of majority unionist and nationalist support- is required.

The Protocol, due to its breaches of the core safeguards in the Belfast Agreement, has caused unionism to withdraw consent for the power-sharing arrangements.

It is therefore somewhat farcical that any serious contributor would continue to suggest, in comical Ali fashion, that the Protocol poses no risk to the Belfast Agreement. It has literally caused the majority of the unionist community with withdraw support for it.

Conclusion

Ms Gallagher's paper is riddled with errors of law, fundamental misunderstandings of the relevant arguments made by unionism, and of the Belfast Agreement itself. It is regrettable that someone of such academic standing would produce such a demonstrably flawed piece of work, which seeks to influence (and thus misdirect) policy-makers.

Throughout Ms Gallagher misrepresents and misunderstands unionism's positions, and the relevant legal principles. This response seeks to highlight those errors, and put clearly on the record an accurate analysis unionism's position.

In summary:

- The unionist argument on constitutional consent is that due to the Protocol subjugating the Act of Union this amounts to a change to Northern Ireland's constitutional status, and thus offends section 1 of the 1998 Act. This is entirely distinct from cross community consent, which is an altogether different concept found in distinct provisions.
- The Protocol conflicts with statute, primarily the Act of Union but also the Northern Ireland Act 1998, and therefore it was an impermissible use of the Royal Prerogative to make this part of the Withdrawal Agreement treaty.
- The combined effect of the eroding of the substance of constitutional consent (section 1 of the 1998 Act) and cross-community consent (section 42 of the 1998 Act) is that unionism has withdrawn the necessary consent for operating the power-sharing institutions. It follows that in consequence the Protocol has undermined the Belfast Agreement, because the cross-community consent necessary for the operation of the Belfast Agreement itself has been eroded.

In seeking to write about the unionist community, academics should at the very least properly inform themselves as to the relevant arguments and seek to competently understand the applicable legal principles.

It is unfortunate Ms Gallagher did neither, and therefore it has proven necessary to debunk the stream of errors and misrepresentations- both as to unionism and the Belfast Agreement- contained within her paper.