CONSTITUTIONAL BALANCE

THE ACTS OF UNION AND THE PRINCIPLE OF CONSENT

JAMIE BRYSON

FOREWORD
BY RICHARD HUMPHREYS

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My Only Crime Was Loyalty- the story of the Union flag protests (2013)

Brexit Betrayed – Writings from the Referendum to the Betrayal Act (2021)

Justice, Law and Human Rights- A Community Handbook (2022)

NI Constitutional Law: The Acts of Union and NI Protocol (2022)

Law, Parading and Human Rights (2023)

FOREWORD

Thanks to the far-sightedness of anonymous officials in the Department of Education of Ireland, my generation of schoolchildren in the South were given as required reading the novel *Across the Barricades* by the Scottish writer Joan Lingard MBE, about the challenges of a cross-community relationship in a time of conflict. While the armed conflict is gone, in our more emotionally literate times, the need for reaching across divides of all kinds should remain centre-stage.

For that reason I commend Jamie Bryson for his invitation to write a foreword to his paper; particularly so where that will come as a counterpoint and contrast rather than as mere amplification. Generosity invites reciprocity, so I accepted the invitation with pleasure. That in microcosm is part of the future for the Union and indeed for Northern Ireland as a society; to generate virtuous cycles of mutual cultural and social accommodation and recognition, not to engage in a mere clash of fixed positions.

We also live in a highly democratic age, so legal discussion should not be the preserve solely of a limited caste of lawyers. Legal executives such as the author, or any intelligent citizen or subject, armed with an understanding of legal reasoning, are legitimate participants in that discourse. Jamie Bryson takes his place in that regard with this paper, and it is no surprise that in due course he will be aiming to read for the bar.

I share his encouragement to those from working class backgrounds who have an interest in law to seriously consider it as a professional option. Legal practice is highly diverse now and the professions generally represent the wider society more than they every have done. I would also welcome his suggestion that there should be greater unionist/ loyalist participation in constitutional and human rights law. Balance can only be to the good. And every step towards legal, political and institutional participation is a further step away from the violence of the past.

I also share (from a respectful distance) the author's anxieties about the possibility of "the whims of Parliament" overriding "constitutional conventions or high principles". Such concerns are why in Ireland we have a written constitution with entrenched procedures and rights that can only be changed by referendum. The UK organises itself differently, as it its sovereign right. That is one reason why the UK's treaty obligations are so crucial, because they provide a legally enforceable constraint on such whims. Yes, the UK Parliament could abolish judicial review as this paper points out, but they aren't going to, not just because of politics. Such a move would put the UK in breach of various human rights treaties, so we need to be grateful for that.

Likewise the author comments that the UK Parliament could do away with the legal provision for a referendum on Irish unity. So it could as a matter of domestic law – but to do so would not be lawful in terms of its treaty obligations. That again emphasises how important treaties are to ensure that states act in good faith. And indeed it underlines how damaging were the official steps taken at an earlier stage of the protocol controversy that would have undermined binding treaty obligations.

The author comments powerfully that "If we have no sacred constitutional principles grounding our Union, then there is no foundational constitutional balance". That may well

be so, but all it means is that unfortunately perhaps there is no foundational constitutional balance. Such balance as exists is pragmatic, practical, somewhat *ad hoc*, not excessively principled, somewhat makeshift and Heath Robinson. All terribly British.

It has never been totally clear to me why, with some exceptions, there has been limited enthusiasm within unionism for a written Constitution for Northern Ireland, based perhaps on the Northern Ireland Act 1998, let alone a written Constitution for the UK. There is something in that approach for all sides, assuming that people don't get so ambitious about what they want in such a document that agreement is precluded. A Bill of Rights was seen as an excessive demand by some, but perhaps a limited suite of relevant rights, balanced by relevant duties and other provisions, would make more sense within a written constitution. Perhaps something for future consideration.

This paper exposes an ambiguity in the term "law" itself. In everyday terms, the law is what the courts (and in particular the UK Supreme Court, or the apex court of any jurisdiction) say it is. Here, the author appeals to a somewhat more abstract conception – the law as it ought to be. Hence one can in theory say that a Supreme Court decision does not represent the best view of the law. But one has to ask what meaning this has and to what scenario is one appealing? If a given Supreme Court splits say 4-3 on a complex issue with highly nuanced facts and perhaps somewhat incomplete submissions, it may be meaningful to argue that the court has got some aspect slightly wrong and that the majority conclusion should be refined further when a similar problem next presents itself. But if the court simply rejects a proposition out of hand, unanimously, it is not clear whether there is much point in arguing that "the law" is or should be otherwise. The UK Supreme Court's interpretation of parliamentary sovereignty comes into that category.

The Constitutional Issues section of the Agreement is silent on the Act of Union. In explicitly repealing the Government of Ireland Act 1920 and having effect 'notwithstanding any previous enactment', and through juxtaposition with the constitutional language agreed for this jurisdiction, arguably this section of the Agreement is in effect a constitution of Northern Ireland. If the Act of Union had been supremely relevant, it would have been referenced here.

The paper goes on to postulate that, assuming for the sake of argument that the amendment to the Acts of Union amounts to constitutional change, this triggers the provisions of the 1998 Agreement relating to consent. Unfortunately, as indeed the UK Supreme Court has held, the terms of the legislation envisaged by the Agreement relate only to the constitutional status of Northern Ireland as part of the UK as opposed to of a united Ireland. They don't relate to other constitutional changes that affect Northern Ireland such as Brexit (which the author valiantly seeks to distinguish) or the Withdrawal Agreement and Protocol or other amendments to the Acts of Union (of which there have been many over the past 222 years).

Taking that as the legal position, the author's argument that there has been a breach of the Agreement rests on the proposition that the Agreement means something different to and wider than the legislation that is envisaged by the Agreement. Given that the terms of the legislation are set out in the Agreement itself, that is implausible. In addition, where the agreement refers to no change in "the status" of Northern Ireland, this comes immediately after the definition of that status as being "Northern Ireland's status as part of the United Kingdom". The word "status" does not plausibly mean something different

in a subordinate clause of the same sentence. The author offers a respectful complaint about the failure of unionist negotiators to align the political and legal texts, but there is no misalignment. One has to wonder why give a strained reading to produce a contradiction when on an ordinary reading there is no such contradiction. That said, one can well argue that there were many things that the 1998 negotiators did not anticipate, and many points on which their wording could arguably have been improved, but I don't think that this issue can properly be included in such a complaint. In a wider sense, the complaint within strands of unionism/ loyalism that the Agreement means more than it does has a counterpart (making the point again that virtually everything in Northern Ireland is reciprocal). That demand parallels other complaints in other traditions which seek to interpret the Agreement as meaning what people want it to mean as opposed to what it does mean. Occasional nationalist demands for joint authority, for example, fall into the same wishful category. Joint authority is not an inherently terrible idea in some absolute sense but it is just not one that is envisaged by the Agreement as it currently stands. Likewise, a prohibition on new trading rules occasioned by the Withdrawal Agreement isn't so envisaged either.

While the author is of course correct that the Acts of Union remain in force and remain relevant (although in view of the 1998 Act possibly not essential) to the position of Northern Ireland within the Union, and while his historical point is also correct that "Ireland" in the context of those Acts now means Northern Ireland, the postulated conclusion does not follow.

Where his argument is at its strongest point is the contention that, if the UK Supreme Court is right, one could "salami-slice" the position of Northern Ireland within the Union and hand over all powers to outside entities (particularly "Dublin"), leaving only the shell of the Union behind and only formal sovereignty in place. In some legal contexts, an analogous salami-slicing argument could carry some weight. But I think it needs a reality check here.

First of all, I wonder can we banish the bogeyman of a predatory "Dublin" willing to take over Northern Ireland without agreement. As an empirical observation, the political and judicial institutions of the Irish state have no interest whatsoever in taking over control of functions of government in Northern Ireland. The only basis on which Ireland would engage in such government functions would be, under strand 2, on the basis of joint co-operation or a similar agreed treaty basis. Even in the event of a vote for unity, the mechanics of governmental decision making would be a matter for negotiation. Ultimately, that would have to be agreed with the UK government and would fall outside the formal stranded boundaries.

And as far as the problem of "handing lawmaking powers and judicial sovereignty over to a foreign entity (in the case of the Protocol Framework, the EU)" is concerned, it is in the nature of international and supranational co-operation that there is given and take, there are benefits and obligations. If Northern Ireland is to have the benefit of the single market, it must accept (or the UK state on its behalf must accept) the rules of the game. That is not quite the same thing as handing over sovereignty to a foreign entity. The outcome was (as the author to some extent acknowledges) a function of the difficulty that any given form of Brexit could not please everyone, leading to "a classic compromise". Again, very British.

The concept of self-determination is a delicate one, but one must go back to first

principles. In international law, the right of self-determination vests in “peoples”, not in regions, statelets, groupings, political movements and so on. The 1998 Agreement defined the relevant people as being the people of Ireland, who would exercise their right of self-determination by joint decision north and south. The inhabitants of Northern Ireland are not a “people” in international law terms for the purposes of this right. And the 1998 Agreement makes that clear. And even more obviously there is no such right for any political position that is on the minority side of a sovereignty referendum. Unionists as such don’t have such a right, and neither have nationalists as such. That is another reason why an accommodating society and legal framework is important, whoever has a majority.

Returning to the theme of our emotionally literate age, I think that it can be said that while one can contest some of the legal propositions, this paper does articulate an emotional truth about disillusionment within elements of unionism/ loyalism. That sense of understandings having been betrayed has a psychological resonance even if its legal scaffolding cannot carry the weight of that conclusion.

How to address that sense of disaffection is a delicate problem – too delicate for legal analysis alone. One possible contribution, although by no means the final answer, is to explain why such a conclusion is over-determined.

The author hits on a key point with the theme of balance. While not all balance can be exact, the concept remains central. The awkward problem of the terms of Brexit has defeated several British prime ministers in succession. It is all-too-obvious that no possible option, even those canvassed in this paper, can please everyone or meet all desiderata. That’s one reason why hard lines or mandatory tests are ultimately not going to work in such a context. There may come a point where political unionism may have to say, in effect, that it has taken the protocol issue as far as it can. At that point there might be a need to look for other ways in other contexts to balance and assuage the concerns within unionism/ loyalism. That must be an ongoing conversation. For those who feel that Northern Ireland’s place within the Union has been undermined by the protocol, there must be other creative and imaginative options, with legal dimensions, to balance that by strengthening the institutional linkages with mainland Britain and indeed by celebrating the British dimension within the Archipelago as a whole.

Richard Humphreys

September, 2023.

Introduction

This paper seeks to provide background to the enduring importance of the Acts of Union 1800 to the constitutional balance of, and in, the United Kingdom. It also flags up the inherent importance of the constitutional identity balance at the heart of the power-sharing settlement in Northern Ireland, which was designed to strike an equilibrium between unionism and nationalism as constitutional aspirations.

Whilst these are matters flowing from political agreements (particularly the Belfast Agreement and UK-EU Withdrawal Agreement), it is the legal implementation of these texts in UK law which is of primary but not exclusive importance. This paper looks, therefore, at the constitutional principles upon which identity in truth rests.

In the context of power-sharing arrangements, it is necessary for all traditions to feel respected, and for there to be a true balance, a true 'sharing'. This requires- as a matter of law (as it is law which governs our society)- that the foundational constitutional identity balance is both found and preserved.

The NI Protocol, and the subsequent Framework, has had a significant impact both due to the fact that, via a number of significant constitutional legal cases it has become apparent that- certainly from a unionist perspective- that the constitutional safeguards that it was believed was embedded in the political agreement, were not in fact embedded in the Northern Ireland Act 1998. The 'constructive ambiguity' between the lines of the 1998 political agreement was washed away- to the detriment of unionism- in the detailed legal analysis, primarily in the *Allister et al* trilogy of judgments (first instance, NI Court of Appeal and UK Supreme Court).

That has created a significant issue, and calls into question the legal framework which gives effect to the political agreement in 1998. That, in turn, throws into question power sharing per se, and- some have suggested- peace itself (although I do not believe peace ought to have ever been entwined with the political process, the two are separate concepts).

It is an honour that Mr Justice Richard Humphreys, a Senior Associate Research Fellow at the Institute of Advanced Legal Studies at the University of London and a Judge of the High Court of Ireland, has- writing in a personal and academic rather than judicial capacity- contributed the foreword to this paper.

Mr Justice Humphreys has written extensively on matters touching on the constitutional relationships between the UK and Republic of Ireland, and Brexit. Indeed, I once took it upon myself to critique some of his writings, and I am delighted that- via the medium of his contribution to this paper- he has returned the favour!

Within the body of this paper there is, therefore, a counter-view which critically takes to task the propositions put forward. I hope that this is an occasion not only for the setting out of a Unionist perspective but also for engagement with a scholarly critique of that perspective. So often constitutional positions are thrown into a self-perpetuating and self-validating echo chamber to the advantage neither of enlightenment nor the fun of intellectual stimulation for readers or contributors.

These issues are, of course, complex and attract different views and commentary. I hope the commentary of Mr Justice Humphreys in his foreword, even that which challenges.

That Justice Humphreys takes an opposing view to the propositions I seek to develop, is in of itself a significant contribution to the ongoing debate. Moreover, I hope on some issues it is apparent that solutions which can square the circle, are possible.

I concede the difficulty in presenting an unorthodox view of higher constitutional principle, in the sense of 'constitutional' which sees an inadequacy in the Diceyean view of the unconstrained and unlimited extent of Parliamentary Sovereignty.

Improbable as it may be but if, for example, Parliament decided to abolish Judicial Review (improbable , as Mr Justice Humphreys points out for, both political reality and treaty obligations), the improbability is not relevant if the improbable comes to pass, and given the prevailing authority on the nature of Parliamentary Sovereignty, Parliament could freely operate in breach of international treaty obligations or dispense with deeply embedded constitutional and common law rights and there is nothing the courts could do about it.

I accept that the draft text of section 1 of the Northern Ireland Act 1998 was contained within the Belfast Agreement. But if I am correct (and Mr Justice Humphreys contends that I am not) about the true meaning of section 1 which ought to have been taken from or informed by Article 1 (iii) of the Agreement, then the fact that the deceptive text of the future legislative provisions were separately contained within the Agreement speaks more strongly, perhaps, about the failure of unionist proponents of the Agreement to ensure that the legal text was consistent with the political text, or at least the unionist understanding of that text so as to amount to an effective safeguard rather the inadequacy of section 1.

In addition, I do not share the confidence- from a unionist perspective- particularly in relation to the seemingly legally permissible 'salami slicing of the Union', in placing reliance upon political reality rather than effective statutory guarantees as a constitutional safeguard against what Dublin, or the UK Government at whatever period in time, would or would not (politically) do.

That being said, and despite the competing views, theories and interpretations, the contribution of Mr Justice Humphreys is a valuable (and much appreciated) one, which raises significant challenges for all communities in Northern Ireland.

In much of constitutional law, it comes down to competing theories. There is, very often, no definitive right or wrong answer. Our most eminent legal minds have disagreed on various constitutional issues for time immemorial. That is what makes the subject so enticing. In having Richard Humphreys contributing to this paper, it brings a different 'constitutional' law perspective. That can only benefit the debate, and this paper itself is the better for his critique

There has been, in my view, a dearth of contributions from unionism, let alone grassroots unionism/loyalism, articulating from a constitutional and legal perspective the importance of the issues I seek to address in this paper. For instance, whilst the centerpiece of the campaign against the Protocol has been rooted in the Acts of Union, there has hitherto been an absence of detailed material and arguments presented in academic or legal texts which makes the case for the importance of this issue.

In my book *'Constitutional Law- Acts of Union and the NI Protocol*' I sought to remedy that slightly, and this paper is an effort to further expand on some of the themes therein.

It is important to meet head on some of the challenges which have been presented to the arguments made by and on behalf of unionism.

Finally, I would reiterate my call for more persons from the unionist/loyalist community (particularly young people) to take an interest in law generally, but particularly constitutional law. The law belongs to everyone, and there ought not to be a glass ceiling (or glass walls), or a (sadly, well founded) sense that the legal profession is beyond the reach of young working class persons from any community.

It is trite to point out that for those who have a political motivation, the law is one of the most potent tools available both to advance constitutional causes, and protect basic rights (which have much relevance to culture and identity).

I hope this paper provides a useful contribution, and acts as a reference point for what is needed to restore the constitutional balance in a United Kingdom context, but also the constitutional identity balance which is necessary to restore and then preserve solid foundations for power-sharing in the contested space of Northern Ireland.

Jamie Bryson

September 2023

Summary

This paper advances six core propositions (weaved throughout the paper not necessarily in this order); (i) the Acts of Union remain fundamental constitutional law; (ii) an alteration of the Acts of Union, even if legally permissible in exercise of Parliamentary sovereignty, amounts to a constitutional change; (iii) the failure of such a change to trigger the constitutional safeguard in section 1 of the NI Act 1998 exposes that provision as being defective and contrary to Article 1 (iii) of the constitutional issues section of the Belfast Agreement; (v) a solid foundation for power sharing requires the constitutional safeguard to be meaningful vis-à-vis the substance of the Union; (vi) additionally, the constitutional identity balance which sits at the heart of power sharing has been unbalanced by the Protocol/Framework, and restoring such balance requires an imaginative solution which preserves access to the EU market for those who wish to avail of it and thus subject themselves to EU law, without imposing such obligations on those trading in the UK internal market.

In advancing these propositions, the aim is to explain and justify- from a constitutional law perspective- unionism's opposition to the Protocol/Framework, and to set out the type of solutions which would restore the necessary balance to power sharing in Northern Ireland.

A key principle to bear in mind throughout is that just because something is 'legal', does not mean it is constitutional. There is often tendency to conflate the two. There is no doubt that the Protocol and its embedding Framework, flowing down the domestic 'conduit pipe' of section 7A of the European Union (Withdrawal) Act 2018 is a legal 'steamroller'. It cuts down everything in its way; it doesn't matter how constitutionally important any statutory provision is: if it comes into conflict with section 7A, the constitutional provision must give way.

That has been upheld as 'legal' (without any commentary on overriding constitutional principles- indeed the Supreme Court studiously avoided that territory) in a maximalist interpretation of the principle of parliamentary sovereignty; i.e, there is nothing Parliament cannot do.

This would seem to subjugate constitutional conventions or high principles to the whims of Parliament. If, for example, Parliament decided to abolish Judicial Review- a long established constitutional principle- would the courts refuse to intervene? If we apply the principles set out in *Allister et al*, then the answer- at least in regards the present Supreme Court- is yes.

This paper squarely argues that there are constitutional principles, and at least one statute (the Act of Union itself) beyond even Parliament's power to degrade. That is an unorthodox view, but certainly not one unsupported by obiter judicial comment and weighty academic opinion over the years. But it has support in a long line of Scottish analysis of the Union of 1707.

If we have no sacred constitutional principles grounding our Union, then there is no foundational constitutional balance.

The Acts of Union – Fundamental constitutional law

The Acts of Union 1800 are the means by which the separate countries of Ireland and Great Britain are united in one United Kingdom of Great Britain and Ireland. These Acts are simultaneously an international law treaty (both use the language of 'articles' rather than sections) and Acts of two domestic legislatures, one of Ireland, the other of Great Britain. Both domestic legislatures were replaced by the Parliament of the United Kingdom but, analogously with the Scottish Union, the new Parliament would occupy the physical space of the Parliament of Great Britain.

Through these Acts of Union the United Kingdom came into being and these Acts continue to serve as the fundamental law of the United Kingdom. Parliament derives its very existence and authority from Article 3 of the Acts of Union.

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 (Ireland) which was to be divided into two distinct Parliaments both of which remained subject to the sovereign Parliament of the United Kingdom.

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 or impairing those principles.

Northern Ireland was created and 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, what is often called the Anglo-Irish treaty was signed in London between the United Kingdom Government and representatives of the Sinn Fein movement. This was not a treaty; it consisted of 'articles of agreement for a treaty'. The 26 counties of Southern Ireland would, under these articles of agreement become a dominion under the British Crown similar to Canada.

The Irish Free State Agreement Act 1922 which gave 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 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 brought about by the sovereign Parliament created under Article 3 of those Acts.

Although never the subject of formal judicial determination, the position of the Irish representative peerage does appear to have been affected by the 1922 settlement in a way that was not explicitly provided for. Quite apart from the debate about Article VI of the Acts of Union the restoration of rights of the representative Irish peers would be a powerful reinforcement of the principle that constitutional change cannot occur by implication, and an emphatic statement of the value of the Union to the entire island of Ireland.

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.*

The Acts of Union were equally not repealed in 1998- 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.

There is an additional, and somewhat silly 'social media' point that 'Ireland' as referred to in the Acts of Union no longer exists. The answer to that is simple: the law was changed in 1923 via the *Statutory Rules and Orders, 1923, No. 405. Irish Free State. The Irish Free State (Consequential Adaptation of Enactments) Order, 1923* to provide that references to Ireland was to exclude the Irish Free state. Therefore, from that point onwards, in interpreting the Acts of Union, reference to 'Ireland' was in fact reference to the six counties under jurisdiction of the Crown (Northern Ireland).

The subjugation of the Acts of Union represents constitutional change

It is undoubtedly true that the prevailing authorities (including the recent Supreme Court case of *Allister et al*) in general have adopted the Diceyean orthodoxy which *inter alia* holds that Parliament can make or unmake any law it wishes, and, key for present purposes, that no Act is above the authority of Parliament.

However, there is a competing view (albeit it is acknowledged unsupported, at the present time, by any established line of authority) that given that Parliament's authority comes from the Acts of Union (Article 3), that the Acts of Union are fundamental constitutional law beyond even the reach of Parliament.

This proposition has attracted much academic commentary over the years, and was discussed in the courts (with obiter statements) in *MacCormick v Lord Advocate* [1953] SC 396 and *Gibson v Lord Advocate* [1975] SLT 13. The obiter comments of a number of judges in both judgments at least raised the issue as to whether the Acts of Union could, constitutionally, be fundamental law.

The great Scottish lawyer Thomas B Smith, in his classic essay '*The Union of 1707 as Fundamental Law*' in 1957 argued that:

> "*the entrenched provisions of the Act of Union could only be superseded by revolution- in a sense of a fundamental reconstruction of the British constitution".*

The Supreme Court in *Allister et al* took an orthodox (if simplistic) view, and simply resolved the case before it by holding that Parliament could make or unmake any law (and by implication, rejected the proposition the Acts of Union had a higher status) and that Parliament had knowingly subjugated and placed into suspension Article 6.

This was a discrete legal question; the court did not opine much less make any finding as to the constitutional impact of this subjugation, but rather- as a pure matter of law- held that Parliament, in the exercise of its sovereignty, could bring this about.

However, even if Smith's proposition (with which I agree) on the present line of authority does not prevail on the concept of a 'higher fundamental constitutional law', or even if the much-debated concept of Laws LJ of constitutional statutes (see *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)) which the Supreme Court studiously sidestepped equally falls, then it is surely nevertheless unimpeachable to assert that altering the Acts of Union (by whatever means, including in lawful exercise of Parliamentary sovereignty) amounts- at the very least- to a significant constitutional change.

What Parliament can do (i.e. subjugate the Acts of Union), and what Parliament has done (or at least the consequences of such significant constitutional change), are two different things. Parliament, according to Lord Stephens in *Allister et al,* could lawfully subjugate the Acts of Union, and he arrived at this finding by concluding that Parliament had intended to elevate s7A of the European Union (Withdrawal) Act 2018 above all other domestic law, including the Acts of Union (by pursuing this line of argument, this allowed Lord Stephens to avoid the concept of constitutional statutes, much less

fundamental constitutional law). Leaving aside that there remains significant academic and legal commentary which views the answer adopted by Lord Stephens as distinctly dubious, the finding nevertheless says nothing as to the constitutional consequences of Parliament's actions.

If the proposition is good that altering the Acts of Union, the constitutional foundation of the United Kingdom, is a constitutional change (and, with respect, how could it be anything otherwise?), then such a change- certainly in the wording of the international law political text of Article 1 (iii) of the Constitutional Issues section of the Belfast Agreement ought to trigger the safeguards which sit at the heart of constitutional identity balance in Northern Ireland.

It is often argued that the Acts of Union even if still in force (which they indisputably are), they are rendered irrelevant by the more recent statutes in relation to Northern Ireland's place in the Union. That, I suggest, is wrong.

The Government of Ireland Act 1920, NI Constitution Act 1973 and NI Act 1998 (giving effect to the Belfast Agreement) did not redefine the constitutional architecture of the Union itself, instead these statutes all directed themselves to the territorial extent of the Union (and, in relation to the NI Act 1998, the means by which this could be ended *vis-à-vis* NI), and the devolved governance arrangements, albeit with all authority flowing through Parliament (whose authority is derived by Article 3 of the Acts of Union).

Therefore, when, as in the Belfast Agreement and NI Act 1998, discussing Northern Ireland's place within the United Kingdom, the obvious point is, what constitutes 'the United Kingdom'?

The answer is found both in the words of Lord Trimble in 1998 who said, "*The Act/s of Union is the Union"*, and the dicta in Halsbury's statutes which states "*…the Act remains the statutory warrant for the continued incorporation of Northern Ireland with the United Kingdom"* (it might be thought that the use of 'incorporation' here is unfortunate – what happened in 1800 was a union between two countries, not the absorption of one country by another)

The purpose, scope and enduring nature of the Acts of Union is unambiguous. It was summarised by McCloskey LJ in *Allister et al* [2022] NICA 15 at paragraphs [368] and [377]

> *[368] The Act of Union is an indelible, and fundamental, part of the vexed history of the island of Ireland. In enviably uncluttered language, it united the two kingdoms of GB and Ireland, creating a single kingdom. Uniquely, its contents were agreed by two separate legislatures. For some 122 years of its existence the populations of the previously two separate kingdoms were the subjects of the Sovereign. This new constitutional order was radically altered a century ago as regards the inhabitants of the Republic of Ireland. However, it endures for the population of NI. For many this altered constitutional order is no less contentious today than it was upon its inception. This has been exhibited in, inter alia, the divisive debates encircling both Brexit and the Protocol among the 1.5 million inhabitants of NI.* (Underlining added)
>
> **…**

> *[377] I consider the underlying intention to be unmistakable: from 1 January 1801 all subjects of this newly unified single state were to be treated equally in the respects specified. While the more expansive language of the second part of the first clause invites the argument that its scope and operation are not confined to trade or trade-related matters, this issue does not arise for determination in these appeals. I consider that the second clause is to be viewed as one specific outworking of the first part of the first clause.* (Underlining added)

It is plain therefore from the opinion of McCloskey LJ that (i) the Act/s of Union remain in force; (ii) the Act/s of Union are a fundamental part of the Union; (iii) the Act/s of Union have the unmistakable intention of requiring all citizens of the unitary started of Great Britain and Ireland (now to be read as Northern Ireland) to be on equal footing in respects of trade.

I will explore further *infra* the constitutional impact of the Protocol, in advancing the proposition that the Protocol Framework has imposed constitutional change and thus ought to trigger the consent safeguards (at least as written in the Belfast Agreement), but it is important- at this juncture- to digest the full scope and extent of the Acts of Union, and therefore consider the 'identity' impact on the Unionist community of the subjugation and suspension of those provisions.

The constitutional safeguard (Article 1 (ii) and (iii) constitutional issues Belfast Agreement and section 1 (1) of the Northern Ireland Act 1998)

I turn now to look at how the purported 'constitutional safeguard' in the Belfast Agreement was transposed into domestic law, and in doing so candidly accept that the draft legislative text was annexed to the Belfast Agreement. It is a matter of significant regret that the unionist proponents of the Agreement failed to properly examine the proposed legal text to see whether it matched the safeguards in the purely political text.

In any event, that error does not alter the fact that- as presently applied- the principle of consent, as a matter of law, does not operate to protect the *substance* of Northern Ireland's place in the Union.

At this point, before exploring the principle of consent in detail, it is convenient to dispense with the proposition that if the principle of consent were to be triggered by the Protocol, then so too would it be triggered by Brexit.

This is demonstrably incorrect. The principle of consent, on either a maximalist or minimalist reading, directs itself to the *internal* constitutional relationships between Northern Ireland the rest of the United Kingdom. The Protocol alters the substance and nature of Northern Ireland's place in the United Kingdom, it is therefore an internal constitutional issue. The United Kingdom leaving the EU is an *external* matter relating to the relationships of the United Kingdom as a whole and other international powers.

The Belfast Agreement contains two provisions in the constitutional issues section which prima facie directs themselves towards consent, they are found at Article 1 (ii) and (iii), and state:

> *1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:*
> *….*
>
> *(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;*
>
> *(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make <u>any change in the status of Northern Ireland</u> save with the consent of a majority of its people;* (underlining added)

The 'principle of consent', in this text, has two different elements: Article 1 (ii) appears to direct itself towards the purely 'territorial' (and thus symbolic) element; i.e., who retains ultimate sovereignty. This, put simply, is *symbolic* sovereignty, but says nothing about the *substance* of the Union.

For example; can you change everything but the last thing about the Union, the last thing being merely the final formal handover of sovereignty?

This, as we will see *infra*, is what is transposed into section 1 of the NI Act 1998, however this legislative provision- which purports to give effect to the consent safeguards in the Agreement- completely disregards Article 1 (iii) which makes clear, *inter alia*, that "…i*t would be wrong to make a<u>ny change to the status of Northern Ireland</u> save with the consent of a majority of its people*".

Article 1 (iii) plainly protects more than the final surrender of formal territorial sovereignty, and is directed towards protection of the substance of the Union. As matter currently stand, section 1 in the view of the Supreme Court does not prevent the handing over of legislative authority to any foreign legislature. But Article 1 (iii) is fundamentally opposed to any incremental salami slicing of the Union, such as handing lawmaking powers and judicial sovereignty over to a foreign entity (in the case of the Protocol Framework, the EU).

If you can hand such powers to the EU, then it is surely the case that such powers- of lawmaking and judicial nature- could be handed to Dublin, without impinging the principle of consent. That, I suggest, exposes the deceptive nature of a narrow reading of the principle of consent.

The error, of protecting the symbolism but not the substance of the Union, infected constitutional statutes vis-à-vis Northern Ireland long before the 1998 Act.

In section 1 of the 1949 Act- 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.

However, the introductory text (which, of course isn't itself law but is a permissible interpretive aid) to the 1949 Act provides:

> *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.* (underlining and emphasis added)

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.

It is obvious to point out therefore that the 1998 Act did not strengthen the principle of consent, which was always there from as a 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 (and certainly as was held in *Allister et al*) 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).

It is also necessary to point out that the concept of 'self determination', which is given effect- in a misconfigured form in section 1 of the 1998 Act- is wholly inconsistent with the internationally recognised concept of self-determination, which was conveniently summarised recently in the Supreme Court in *Lord Advocate's (Scottish) Reference* [2022] UKSC 31:

88. There are insuperable obstacles in the path of the intervener's argument based on self-determination. First, the principle of self-determination is simply not in play here. The scope of the principle was considered by the Supreme Court of Canada in the Reference re Secession of Quebec [1998] 2 SCR 217. There, the Governor in Council referred a series of questions to the Supreme Court including whether there exists a right to self-determination under international law that would give Quebec the right to secede unilaterally. In its judgment the Supreme Court explained (at paras 136-137) that Canada was a sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction. It considered that the then current constitutional arrangements within Canada did not place Quebecers in a disadvantaged position within the scope of the international law rule. It continued:

> *"In summary, the international law right to self determination only generates, at best, a right to external self determination in situations of former colonies; where a people is oppressed,*

> *as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions." (at para 138)"*

It went on to say that in other circumstances peoples were expected to achieve self determination within the framework of their existing state:

> *"A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the Page 33 circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally." (at para 154)*

89. In our view these observations apply with equal force to the position of Scotland and the people of Scotland within the United Kingdom. They are also consistent with the United Kingdom's submission to the International Court of Justice in the case of Kosovo, adopted by the intervener as part of its submissions in the present case: "To summarise, international law favours the territorial integrity of "States. Outside the context of self-determination, normally limited to situations of colonial type or those involving foreign occupation, it does not confer any 'right to secede'": Written Proceedings in relation to UN General Assembly Resolution 63/3 (A/RES/63/3) (8 October 2008), Written Statement of

> *the United Kingdom in response to the Request for an Advisory Opinion of the International Court of Justice on the Question, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?", (17 April 2009), para 5.33. The submission went on to state that international law does not, in general, prohibit secession; but the relevant point, in relation to the intervener's submission based on a right of self-determination under international law, is the absence of recognition of any such right outside the contexts described by the Supreme Court of Canada, none of which applies to Scotland.*

It is plain therefore that, in fact, applying the recognised international law concept of self determination, the people of Northern Ireland alone ought not to have the right to unilaterally secede from the United Kingdom and this ought to be a question for all the peoples of the United Kingdom.

This principle has plainly been improperly conceded in the Scottish Referendum but it demands urgent reconsideration and re-assertion. It cannot be right that a matter that affects (for example) people living in the North of England or Scots living in London should be decided without reference to their views. Even in the simplest of planning applications, neighbours have the opportunity of expressing their views about the impact the demotion or extension will have on their lives and property.

The acceptance in the Belfast Agreement (and indeed in orthodox unionist opinion at least from the 1949 Act and 1973 Act) as to the deconfiguration of the recognised principle of self-determination is certainly legally and constitutionally a significant (and politically- which isn't the focus of this paper) concession and plainly arguably an error.

In addition, even as a fall back bespoke arrangement, the formulation of the principle of consent has a baked-in imbalance in so far Northern Ireland is seemingly treated as a distinct entity- in so far as the 'people of Northern Ireland' are sovereign over membership of the Union- however, the people of the Republic of Ireland are required to consent to absorbing Northern Ireland. There is no rational reason therefore why, even applying the principle of consent as presently formulated, that the people of the rest of the United Kingdom should not equally be required to consent to Northern Ireland leaving the Union.

However, treating- for present purposes- the principle of consent as currently formulated- this paper argues reference to Northern Ireland's status within the United Kingdom must constitutionally be construed in accordance with the Acts of Union. If section 1 of the 1998 Act is incapable (as the Supreme Court has held) of lending itself to such an interpretation, then that is a failure to transpose the political agreement into domestic law in a faithful manner.

If, as discussed *supra*, 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, and the Supreme Court has held, "*subjugates*" the Acts of Union.

In the first instance judgment (upheld by the Court of Appeal and Supreme Court on this specific reasoning on this ground) 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* (which was upheld in the Court of Appeal and Supreme Court) 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 of the Acts of Union.

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.

The Windsor Framework has not corrected that fundamental constitutional degrading of Northern Ireland's place in the Union. As set out in the opinion commissioned from former Attorney General for NI John F. Larkin KC and published by the Centre for the Union, the Windsor Framework at least fails to remedy the breach of the Acts of Union, and in fact arguably further embeds the subjugation of Article 6.

In implementing the Protocol and the Framework embedding it, there remains the requirement for Northern Ireland to, in practical terms, be treated as the entry point into, and thus part of, the European Union's territory (see EU regulation 2017/625 and Official Controls (NI) Regulations 2023).

The practical consequences of this were summarised succinctly by Colton J in *Edward Rooney and JR181 (3)* [2023] NIKB 34 whereby he made clear that the effect of the Protocol (specifically EU Regulation 2017/625 which applies due to Annex 2 of the Protocol given effect by s7A of the EUWA 2018) is that the UK is no longer to be treated as unitary state; that NI is a third country vis-à-vis GB and that, in legal terms, entering NI is to enter the terrority of the EU. Colton J stated at paragraph [179] – [181]:

> *[179] Thus, the UK is not to be treated as a unitary state for the purposes of OCR checks coming from GB into NI. This textual analysis is entirely consistent with the purpose, intention and objective of the Protocol itself.*
>
> *[180] This interpretation is reinforced by what has happened in domestic law with respect to the OCR. Thus, the regulations which apply in GB post withdrawal (the Officials Controls (Animals) Feed and Food, Plant, Health etc (Amendment) (EU Exit) Regulations 2020) refer solely to Great Britain – see Article 3(40) as amended which provides that "entering Great Britain or entering into Great Britain means the action of bringing animals and goods into Great Britain from a third country. In similar vein, Article 3(40A) provides that "'first arrival' means the point of first arrival in Great Britain from a third country;" which was provided for by the same regulations.*
>
> *[181] Therefore, the regulations in relation to official controls are treated differently for GB and NI. GB is subject to domestic norms whereas the regulations in respect of NI are governed by EU norms.*

The constitutional impact of the Protocol is put beyond doubt by the analysis of McCloskey LJ (who admirably doesn't seek to conceal or sugarcoat the extent of constitutional change inflicted by the Protocol) in Allister

> *[325] The effect of the Protocol is that NI on its own, without GB, is in regulatory alignment with an extensive body of EU rules governing manufactured and agricultural goods: per Article 5(4) and Annex 2. This is conveniently summarised by Professor Stephen Weatherill in McCrudden (op cit), pp*

71 – 72. Annex 2 to the Protocol lists 287 EU legislative instruments: a non-static list which is subject to amendment and enlargement. The NI/EU alignment also embraces EU customs regime trade rules, VAT and excise rules, the single electricity market and specific state aid rules: Protocol, Articles 5 to 10. All of this means that the treatment of NI products differs from that of GB products. By virtue of these divergent regulatory regimes there is a customs and regulatory border between NI and GB. In consequence, NI belongs more to the EU internal market than the UK internal market. Resulting alterations in trade patterns are inevitable. The trial judge, Colton J, commented that the evidence of this impact is vague, adding that the advantages of NI's access to the EU internal market must not be overlooked.

[326] By way of resume, the Protocol has the following characteristics and effects. First, it represents an attempt to preserve the soft texture, or invisibility, of the NI/ROI border pre-Brexit. This is both economically and politically significant. Second, the de facto external border between NI and GB is located within the territory of, and policed by, a non-Member State (the UK). Third, the economic freedoms and internal market rules affecting NI are divided. Fourth, the border between NI and GB is of the trade variety and is not an international one. The effect of all of the foregoing is that the NI/GB geographical border has become hardened, in contrast with the arrangements of the preceding three centuries. In overarching terms, the Protocol and its associated arrangements were driven by the EU's need to preserve the integrity of its heavily regulated internal market which, in turn, required protection by an external border. In basic terms, the international deal, ultimately, struck between the UK and the Union sacrificed the long standing soft border between NI and GB (dating from the Act of Union) and altered internal trading arrangements, while simultaneously perpetuating the application of a discrete and potentially evolving corpus of EU laws in NI.

[327] In a nutshell, the Protocol creates a customs and regulatory border between NI and GB in those specified areas of trade to which it applies. It positions NI primarily within the EU internal market rather than that of the UK. With hindsight, there is general agreement that in the aftermath of the Brexit referendum vote there were only three choices: (i) no hard border between NI and GB; (ii) no hard border between NI and ROI; and (iii) regulatory autonomy for the whole of the UK. Only two of these outcomes were achievable (see McCrudden, op cit, pp 5, 71 and 72). The solution effected by the Protocol enshrines a classic compromise, the effect whereof is to subject NI to a uniquely

regulated trading regime.

Paragraphs [325]-[327] are vivid judicial analysis of the true extent of the Protocol, and the constitutional impact it has. It is this constitutional change which is exercised the Unionist community, and brought into sharp focus the true meaning of the legislative provisions which, purportedly give effect to the multi-party Agreement arrived at in 1998.

Constitutional balance in resolving the current impasse

It is a matter of some debate as to whether the Belfast Agreement and Northern Ireland Act 1998 fairly and equitably, in reality and in substance, protected the constitutional balance of the United Kingdom, and applied that to strike a separate 'constitutional balance' between the competing aspirations of Union (remaining within the United Kingdom) and unity (a United Ireland).

However, at least symbolically, there was a balance struck whereby both major constitutional traditions felt comfortable and content within the proposed arrangements (evidenced by the democratic support for the Agreement, albeit a significant minority, and possibly a slim majority, of unionists opposed it, primarily on issues such as prisoners and decommissioning, or lack thereof).

A notable manifestation of this balance, in terms of identity, was found in the 'junction-box' type concept which addressed itself to the issue of citizenship. In simple terms, those who wished to avail of Irish citizenship had the entitlement to do, but this entitlement- whilst available to all to avail themselves of- did not require the imposition of Irish citizenship on those who did not wish to exercise the entitlement.

There is no reason why the same concept cannot be used as the model by which to deal with the constitutional identity issue which arises due to the application of EU law to Northern Ireland.

Those who wish to avail of access to the EU single market, either for business or who want this access choice for identity issues, should have the entitlement preserved to do so. That is an important part, it seems, of Irish nationalist identity. Those who wish to avail of this entitlement (which is voluntary) would then be subject to the requirements to follow the relevant EU law and standards, and declare as an EU exporter (on pain of criminal penalty for a failure to do so).

In those circumstances, EU law would continue to dynamically apply to EU exporters. However, for those who do not wish to trade with the EU, and who instead trade solely within the UK internal market or with non-EU countries, the default position must be that UK law and that regulatory regime applies.

It is constitutionally unbalanced, and in truth an absurdity, that EU law would apply- within the UK- to goods moving solely within the UK internal market. That permits the EU writ to run- legally and constitutionally- in the sovereign territory of the United Kingdom, in relation to goods which are not destined for the EU single market.

It is no answer to say that this is solved by the so-called 'green lane' addresses this issue; it does not. This is so for two reasons; firstly, in order to access the green lane a business must be "*authorised*" and provide information for "*customs purposes*" (see Article 9 (1) and (2) of the EU-UK Joint Committee decision 01/2023).

This means that those trading from GB-NI within the UK internal market must obtain authorisation (i.e, permission) and provide information for customs (thus exposing the Irish Sea customs border) and therefore this is a fetter on GB-NI trade. The consequence of this is that Northern Ireland is on an unequal footing vis-à-vis the rest of the United

Kingdom, and this offends Article 6 of the Acts of Union (which the Government have expressly promised to restore).

A correction of this derogation from sovereignty- via the proposed 'junction box' type concept proposed *supra*- in practical terms *vis-à-vis* Northern Ireland's status in the United Kingdom would solve all of the constitutional issues which make the Protocol, and its new enabling Framework, fundamentally unacceptable to the unionist community.

It would also restore Article 6 of the Acts of Union, which directs itself to internal UK trade. The requirement to follow EU law for those who choose to avail of an entitlement to trade externally with the EU would not offend Article 6 anymore than a requirement for those trading with Canada to comply with relevant standards would.

In equal terms, it would restore the free flow of trade *within* the UK internal market because for goods moving therein, UK law would apply. Those trading from Liverpool to Belfast would face no additional fetters to those trading Glasgow to Liverpool.

There would, of course, be a risk of exporting to the EU via the Irish land border from the UK internal market goods non-compliant with EU standards, but firstly this risk is already there in relation to goods manufactured in Northern Ireland given the open land border, so the additional risk would be negligible, and this can be policed by (i) in-market surveillance and monitoring both within the UK internal market, and within the EU market on the Irish side; (ii) the reality that there would be substantial criminal and financial penalties for non-compliance with the requirements to comply with EU law as an exporter, and/or to have registered as same.

It ought not to be the case that a trader within the UK internal market must register to become a trusted trader to trade freely GB-NI or vice versa. The default position must be that in the UK, UK law and the UK regulatory regime applies. This is a constitutional fundamental, and that being so, it is a non-negotiable requirement to satisfy the constitutional balance in so far as it relates to respecting unionist identity.

The issue in relation to those trading with both the EU and the UK, and who therefore in theory could be required to set up two supply chains, can be resolved by the fact that the UK has already guaranteed recognition of EU standards (and indeed also envisaged this in the Protocol Bill) in a form of dual regulation.

Constitutional identity balance requires that- as a matter of legal and practical reality- unionists as well as nationalists feel content and that their competing identities are respected. This can be achieved by the above referenced concept which preserves entitlement, but not imposition.

However there is, thus far, no sign that this solution has been seriously considered by the Government, as there is seemingly an unshakable desire to preserve the core aspects of the Protocol and its embedding Framework in place.

The legal requirement- adopted politically by those from a unionist tradition- is for the 'restoration of Article 6 of the Acts of Union'. This is (rightly in my view) a constitutional 'red line'. The legal reality is that try as the Government might to fudge the issue, there

is no path by which to restore the Acts of Union, whilst the Framework remains in place. The two simply cannot co-exist.

That is so because the ‘green lane’ (requiring authorisation and the provision of information for ‘customs purposes’ to trade internally within the UK) is not only a visible and legal manifestation of an internal Irish Sea customs border as a core foundational basis of the Framework, but is unmistakably a powerful fetter on internal UK trade, thus placing Northern Ireland on an unequal footing to the rest of the Union. That alone drives a coach and horses through Article 6 of the Acts of Union.

This is compounded by the continued application of swathes of EU law (without discrimination between those trading with the EU and those trading in the UK) to Northern Ireland, which obviously creates a distinct (and divergent) regulatory regime for NI vis-à-vis GB.

The idea has been floated by the Government that, as a ‘solution’, they would remedy the subjugation of the Acts of Union (as exposed by the Allister et al litigation) by laying legislation (likely a statutory instrument) to create a statutory duty to ensure compliance with the Acts of Union prior to the laying of any regulations which leads to GB-NI divergence. The problem is obvious: this isn’t restoring the Acts of Union, but rather merely creating a vague (and, ultimately worthless) ‘duty’ not to further diminish it. Put simply, it does not fix what is broken, but rather embeds the damage imposed, whilst promising not to damage it further.

In addition, there is an inescapable legal problem. Any proposed secondary legislation (and primary legislation unless it squarely confronts the issue) would continue to be subservient to section 7A of the 2018 Act, which is, at present, all conquering. And so, if any duty created ran up against a provision flowing down the section 7A conduit pipe, the duty would have to give way (unless primary legislation made the provisions ‘notwithstanding section 7A’ and placed the Acts of Union above it, but how would it do this without altering the Framework? It, as far as I can see, could not- certainly not in any substance.

Alongside the suggested way forward I have set out on how to manage the EU law issue, I was additionally struck by the urging of Mr Justice Humpreys to look at other counter-balancing measures. I do so, but from a slightly different perspective; rather than as an alternative to primary resolutions sought, there are some additional ideas which could be explored. It is beyond the scope of this paper to do so in detail, but some potential ideas include restoration of the Irish representative (as discussed above) and reform of section 1 of the Northern Ireland Act 1998 to ensure that it protects the substance of the Union rather than its shadow.

Conclusion

The Act 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 cannot bend or break. There are some (and, as I have candidly accepted, they are supported by the present prevailing legal authority- but remember, in the US for decades it was the prevailing authority that there was a constitutional right to abortion; in 2023 that was emphatically reversed in *Dobbs*) who argue that Parliament can subjugate, suspend or repeal these fundamental principles.

I take a different (admittedly unorthodox) view, which I have set out in this paper. In short form, I say the Act of Union is the Union, and given Parliament derives its authority from Article 3 of the Act of Union, then Parliament cannot interfere with those fundamental central principles anymore than it could constitutionally abolish itself. That is an interesting legal and constitutional debate, with competing views. As a fall back, and slightly less purist position, I could live with Sir John Laws theory of constitutional statutes (see *Thoburn*).

However, setting aside the correctness or otherwise of that core proposition (as to the immutable nature of constitutional rights), in the real politic of Northern Ireland, subjugating a core part of the identity of one community is never going to provide the type of balance and thus stability necessary to sustain power sharing.

It is not a satisfactory answer to say ‘But Parliament could do this’. That, on the prevailing legal authority, may well be formally correct. But would the same proponents of that ‘solution’ (or, in truth, non-solution) to the present impasse be pleased to say the same thing if, for example, Parliament decided to do away with any provision of a referendum on a United Ireland?

As a matter of Parliamentary sovereignty (which, by the way, domestically prevails over international law which is non-justiciable, meaning no refuge can be found in recourse to the British-Irish treaty to defeat Parliament’s will) the UK Parliament could eliminate those parts of the Belfast Agreement’s domestic incarnation (the NI Act 1998) which nationalists treasure. Is there anyone who thinks this would be met with the same arguments as is advanced by those who support the imposition of the Protocol and its embedding Framework?

It would inevitably be the case that such an upsetting of the constitutional identity balance would lead to the collapse of power sharing due to nationalist refusal to participate. In such a circumstance, pointing to the prevailing legal theory as to the absolutist nature of Parliamentary sovereignty, would hardly be seen as a ‘solution’ to the problem.

If mere legislative authority were enough to solve the contested space of Northern Ireland, then the 1949 or 1973 Act would have been suffice to settlement matters. Sadly, that was not so.

This paper has focused on legal and constitutional analysis of the present issues, however we cannot escape the fact that the impasse is purely political and in a power

sharing system such as Northern Ireland, the foundation of which is cross community consent, then- in my humble opinion- the necessity is to shape the law within the political reality, rather than using the law (i.e, taking refuge in Parliamentary sovereignty) to deny political reality. The latter approach (which has prevailed) not only sustains the problem, but it compounds it.

In this paper innovative legal and constitutional solutions- which seek to respect the identity and entitlements of both communities- have been set out. This doesn't propose a unionist defeat of nationalists, which would be equally counter-productive, but nor does it pretend that legally and constitutionally – and thus in reality politically- the Protocol Framework is anything other than a victory for nationalists and a defeat for unionists.

It is that reality which has upended the balance, and the denial of that reality has ensured that the present impasse continues.

This paper is to be formally published on Ulster Day 2023. That date has been picked for (obvious) symbolic reasons. The unionists/loyalists of the Covenant thought deeply about the nature of our constitutional relationship, cherishing- among other things- equal citizenship within the Union.

It is therefore incumbent on unionism/loyalism in 2023, and into the future, to think deeply about constitutional law and the founding principles guiding it. That means learning, writing and developing intellectual capital which can be drawn upon when advancing legal and constitutional arguments.

I hope that this paper will have provided food for thought and it will, I suspect, ignite some debate around the propositions developed and advanced. That is how it should be.

In this paper I believe the constitutional positions set out are reflective of the political views of the vast majority of unionists (indeed, the Act of Union has become somewhat of a constitutional sacred cow- and rightly so!) and as such it is these issues which must be digested and grappled with by anyone seeking to secure a lasting and durable solution to Northern Ireland's present political, cultural, constitutional and legal impasse.

Finally, I want to again thank Mr Justice Richard Humphreys for his contribution which provides a counter-balance to the constitutional and legal analysis advanced. There is little point in talking up legal and constitutional theories and analysis, if there is no willingness to subject such arguments to the scrutiny of critical friends.