THE PROTOCOL

SOME RECENT MYTHS AND SOME ENDURING REALITIES

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Introduction

This paper is designed to engage with, and debunk, a range of arguments made both within and outside unionism supporting the demand that unionism return to Stormont with the Protocol Framework in force, and thus with both the new Irish Sea border and the continued subjugation of the Acts of Union.

There are differing views within unionism, even within anti-Protocol unionism, on many of these points. But it is incumbent on those who have developed thinking on the issue to engage in the internal debate and, open their arguments up to scrutiny. Committing those arguments to written form will, it is hoped, facilitate exploration of their merits, or otherwise.

It is insufficient to merely reject, without more, the arguments being advanced by others, but instead it is imperative to engage diligently with them. This paper seeks to do that, and where there is disagreement to set out the basis on which objection is made.

This paper is deliberately written, in so far as possible, in ordinary language, and, as far as possible, overly legalistic wording and references are avoided. It is designed to address arguments in digestible chunks; indeed, many of the areas covered require- and the policy studies group shall be working on- detailed papers to be produced on those issues alone.

It is hoped this paper can make a useful contribution to the debate, and provide arguments and reasoning to be drawn upon by all those interested in these issues, and/or charged with negotiating or developing policy.

In the pages that follow, I make some criticism of recent commentary and arguments put forward by Sir Jeffrey Donaldson. This is (I hope) a thoughtful criticism of the arguments, it is not a personal attack. I should say that the argument I attack has only been broadly set out by Sir Jeffrey in his article, and- in my view- it would be of benefit if the true meaning of that which it is intended to convey (if different than how it appears on reading the broad brush assertion) were to be set out clearly, in order that the argument could be scrutinised on its full merits, rather than merely superficially.

It is entirely conceivable that people can disagree on ideas and viewpoints, but remain on good terms, and indeed continue to work together on other agreeable areas of mutual interest, and- more importantly- in the interests of the Union.

There is also significant criticism of the UUP, and specifically their leadership. Again, this attacks the substance of their arguments, not the people making them.

It is healthy for there to be disagreements and challenging debates on policy within the unionist family. It is all the more healthier if we disagree well, and by that I mean that arguments are focused on substance.

If there is disagreement with the arguments I set out in the pages that follow, I welcome counter-arguments and engagement on the issues identified. It is important that everyone who has an interest in these issues, actually enters the ring and fronts up and subjects their arguments and ideas to the scrutiny of challenge and critique.

Whilst this paper is published by Unionist Voice Policy Studies, as part of our ongoing constitutional work, the responsibility for the content is mine alone. This is an individual piece of work designed to compliment other ongoing work by our constitutional studies committee.

The conceptual cause of the Irish Sea Border

Two negotiating concessions gave rise to the Irish Sea Border as it now exists. The first was that there should be no hard border between NI and the Irish Republic. The second was that NI must continue to have unfettered access to the EU single market. There was no necessity for either concession to be made (and certainly not for both of them to be made) but a consequence of making them was that the 'hard border' on which the EU always insists had to go somewhere.

The 'somewhere' chosen is between GB and NI, and this is necessary (the EU argue, and nationalists agree because it assists their greater political goal of all-Ireland unity) to protect the EU single market. Otherwise, they say, there would be no border at all between the UK and EU single market, and all sorts of goods could flow in.

In order to achieve the objectives of this concept, NI must continue to be subject to EU law (so as the EU can be sure as to the standards of goods flowing over the open Irish land border), and there must be a border between GB-NI in order to ensure GB (which doesn't have to adhere to EU law) isn't benefitting from the same unfettered access to the EU market. And so, alongside the Irish Sea border, there must also as a condition precedent (otherwise there would be no border, and therefore the EU single market would be wide open) fetters on internal UK trade.

It ought to be obvious therefore that the price of the unfettered access to the EU single market is the continued imposition of EU law, an Irish Sea border and fetters on internal UK trade.

Therefore, as the concept is presently framed, you can either have the privileged access to the EU single market (and pay the constitutional price of that); or you can have the Acts of Union and NI being a full integral part of the UK: but you can't have both and it is intellectually dishonest to pretend that you can.

In his New Year message Sir Jeffrey Donaldson claimed that full restoration of NI's place in the Union was not mutually exclusive with NI's continued unfettered access to the EU single market. This was expressed in broad language, and the precise meaning of that which Sir Jeffrey sought to convey has not been expanded upon, nor has it been set out how this proposition interacts (if at all) with the proposed new arrangements.

It will obviously be for the DUP leader to explain this in more detail, and set out his argument as to how any new arrangements are constitutionally compatible and consistent with the clear requirements of Article 6 of the Acts of Union ((i) addressing the core issue by ending default imposition of EU law in NI; (ii) removing all fetters on internal UK trade- trade from GB-NI must carry no addition burdens than trade between two locations in GB; (iii) removing the Irish Sea customs border which is a central tenet of both the Protocol and Framework; (iv) all parts of the UK being on equal footing, thus prohibiting any privileged access for NI which doesn't apply to GB).

However, for present purposes, I proceed on the basis of interpreting the ordinary meaning of the broadly articulated proposition, and- on this basis- with respect, I simply cannot agree with the assertion which is demonstrably wrong.

It is equally wrong in my view to claim, as Sir Jeffrey did, that NI's continued unfettered access to the EU single market does not create an "all-Ireland economy". It is patently obvious that is precisely the effect, and support is drawn for this from the detailed comments of a range of judicial figures throughout various aspects of the Protocol litigation.

Given you cannot have privileged unfettered access to the EU market without being subject to EU law and there being a customs border between GB-NI (otherwise the whole UK would have unfettered access to the EU single market, which is impossible without being in the EU), it is obvious that the unfettered access to which Sir Jeffrey refers leaves, in the words of Lord Justice McCloskey in *Allister*[1], NI belonging more to the EU market than that of the UK.

It is worth setting out, in full, McCloskey LJ's analysis as to the effect of the continued application of EU law and NI's unfettered access the EU single market:

> *[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.*

[1] *In an application by James Allister and others* [2022] NICA 15

[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.

[328] Outwith the provisions of the Protocol and the transition period having elapsed, the continuing impact of EU law in NI (and, indeed, the UK as a whole) is probably through the "retained" EU law & case law provisions of the withdrawal statutes. However, in those areas to which Articles 5 – 10 of the Protocol apply, specified provisions of EU law govern with unabated force. This means that in those areas the courts must apply the principle of the supremacy of EU law, make Article 267 TFEU referrals in relation to issues arising under Articles 5, 7 – 10 and 12(2) of the Protocol, apply the general principles of EU law, give effect to the CJEU jurisprudence in specified respects, observe the CFR and finally, it would seem, adjudicate in Francovich claims for damages. See McCrudden (op cit), p 127, per Professor Anthony.)

In consequence, Northern Ireland on vast swathes of our economy is aligned more with the Republic of Ireland (and indeed NI and ROI are treated as a unitary economic territory, with NI treated as the entry point into the EU single market[2]) than with the United Kingdom. How can it credibly be said this does anything other than create an economic United Ireland?

It would be equally dishonest (and, to be clear, Sir Jeffrey did not make this claim) to place reliance on GB also having 'access' to the EU single market, in effort to draw equivalence with NI. Whilst GB is a third country (and trades on that basis) in relation to the EU, NI is a third country in relation to GB and for the purposes of trade is treated as the entry point into, and thus part of, the EU single market.

Northern Ireland is, in perpetuity, subject in relation to trade to a vast swathe of EU law listed in Annex 2 of the Protocol (and vast other areas of laws in the areas of rights, anti-discrimination etc.). In GB EU law which existed pre-exit day was transposed into domestic law post-exit day via the concept of Retained EU law, which essentially copy and pasted the EU law into domestic law, but crucially that law could be amended or repealed by the UK Parliament alone. The situation in NI is markedly different; EU law continues to apply as EU law, which the EU can change (not the 'sovereign' Parliament of the UK). The Stormont brake, as will be addressed below, does nothing in regards the corpus of EU law which continues due to Annex 2 (or via Article 2) of the Protocol, and even in its supposed function as a 'brake' on amendments to Annex 2 law or new EU law, it is wholly impotent and runs contrary to the principle of sovereignty.

The only identified solution is found in the legal paper[3], to which this writer contributed, published in February 2023 that changed the concept at source. This paper won broad support across political unionism, grassroots unionism/loyalism and the ERG. It was provided to Downing Street, the European Union, and the Irish Government.

In short form, the paper proposed a solution which alters the concept at source by creating a scheme whereby those who wished to avail of a preserved entitlement to trade into the EU single market would have the option to do so, but in availing of the option the relevant business would assume the legal obligations which flow from such access (i.e, compliance with EU law) and be subject to criminal penalties for failing to do so.

The UK, as envisaged in the Protocol Bill, would recognise EU standards for the purposes of NI-GB trade, in order to offset the potential for businesses to be subject to the necessity of having two supply chains or to deal with any issues arising from UK divergence from EU standards.

However, consistent with NI's constitutional position as part of the United Kingdom, the default would be that businesses in the UK are subject to UK law and move freely, unless- on pain of criminal penalty for breaching the obligation- they are trading with the EU, at which point they would be obliged to notify the relevant authorities and comply with necessary EU law. It would essentially invert the Windsor Framework arrangements whereby rather than everything being in the 'red lane' unless authorised

[2] See EU Regulation 2017/625

[3] Other contributors included Martin Howe KC, Barnabas Reynolds, Christopher Howarth and other senior counsel who wished their contributions to remain confidential.

to access the ‘green lane’, instead everything by default would move freely, and only those who self-declare as trading with the EU (with a criminal penalty for failing to do so) would be subject to the relevant requirements to follow EU law. There would be no need for checks, as a form of mutual enforcement could obviate the need for them.

“Fulfilling Article 6 of the Acts of Union”- The Constitutional Fundamental

The most fundamental constitutional test, which has consistently been central to unionism’s opposition to the Protocol and is the first of the DUP’s seven key tests, is the restoration of Article 6 of the Acts of Union.

In 1998 Lord Trimble said: “*The Act(s) of Union is the Union*”.

However, there has been both a worrying misunderstanding on the part of some within unionism, and perhaps even deliberate deceptiveness, as to what Article 6 actually means, and what restoring and fulfilling that fundamental provision actually requires.

There has been a covert but ever more obvious effort by some to ‘get around’ the clear requirements of Article 6 by instead viewing that provision as giving rise to abstract principles from which ‘rights’ can be subjectively deduced, rather than the statutory provision itself creating fundamental rights, set forth clearly within the text.

This has taken the form by floating language such as “fulfilling the guarantees of Article 6”, which is of course markedly different than fulfilling and restoring Article 6.

The interpretive route chosen is important, because it is central to the outcome. If the Acts of Union merely embedded abstract principles which were apt for subjective interpretation and from which differing meanings could be deduced, then this relegates the text of Article 6 itself to a lesser status, and instead provides the reader with moulding clay to make from it whatever they wish, within the confines of the broad abstract principle.

In this scenario, it is entirely conceivable that one could arrive at the point of claiming something “fulfils” the guarantee (which must, for the purpose of this argument, be read as purely reference to the abstract principle) within Article 6, notwithstanding that the text of Article 6 is not itself fulfilled or restored nor, in truth, what that texts defends and upholds.

The argument would go something along the lines of ‘*Article 6 was never intended to be rigid, it created broad abstract principles which were capable of evolving, particularly given the increased emphasis on devolution, and therefore what we have achieved fulfils the guarantee of Article 6 in a modern context*.’

Added to this, because it would have to be, would be the submission that *‘Article 6 was never intended to mean Northern Ireland (or Ireland at the time of enactment) was prohibited from being on a better footing*’.

The riposte to the proposition developed above is by simple reference to the words of Article 6, the ‘guarantee’ cannot be divorced from the statutory provision, because the

statutory provision is the guarantee. It is entirely circular; and this is why there is no intellectually credible means by which to square it.

Article 6 guarantees an 'equal footing' between constituent parts of the whole (the United Kingdom). How, logically and rationally, could it therefore ever be said that is anything other than a prohibition on one part of the Union being in a better position (on matters of trade and treaties with foreign powers) than any other?

However, more fundamentally, the text of Article 6 is admirably clear. It is not an abstract elusive statement from which differing subjective meanings can be drawn at will; it is instead a specific (and, in places, detailed) statement of fundamental principle enshrining within the constitutional settlement the economic right of each part of the United Kingdom to be on an equal footing with the other.

As put by Lord Justice McCloskey in *Allister*, the intention of Article 6 is "*unmistakable*".

It is intellectually dishonest to seek to fashion from Article 6 different meanings other than that which is set out clearly and expressly in the text itself. More centrally, as a first principle, how could you ever suggest that a statutory provision was fulfilled, if its clear intent is frustrated?

Let us suppose there was a statutory provision which says: '*Every citizen is entitled to an equal payment of £10'*. This provision couldn't be described as an abstract principle, but rather only as a clear and thus fundamental guarantee. It would be absurd to say that citizens of Northern Ireland are to be afforded £5 (or £15) and that this fulfils our hypothetical statutory provision.

This example exposes the folly of suggesting the unmistakable intent of Article 6 requiring equal footing, doesn't in-fact mean what it says, and rather unequal footing in the form of one part of the Union being in a more advantageous position than another, is consistent with the guarantee of equal footing. It is irrational.

When viewed this way, there really isn't any wriggle room at all in the commitment to restoring Article 6 of the Acts of Union. It must mean, and can only mean, giving effect to the fundamental and unmistakable guarantee enshrined within that statutory provision, and that can only be achieved by that statutory provision prevailing.

If, as I contend it must be, this is accepted as true then the next stage is to look at that which is required to achieve this objective?

The 'subjugation' and 'suspension' of Article 6 of the Acts of Union is brought about by section 7A of the European Union (Withdrawal) Act 2018. This provision acts as a conduit pipe through which the obligations in the Withdrawal Agreement (which includes the Protocol and its addendum known as the Windsor Framework) not only flow into, but have supremacy within, domestic law.

Put simply, if any other statutory provision (whenever made) conflicts with a provision which flows down the section 7A 'conduit pipe', then the inconsistent provision yields. It is through such an exercise that Article 6 of the Acts of Union finds itself subjugated and suspended.

As a most obvious starting point therefore, it can be said that to restore, fulfil or otherwise give full effect to the guarantees in Article 6, this can only be achieved by either (i) removing the source of the inconsistency itself (i.e., changing the Protocol/Windsor Framework at source, namely in the treaty. And so, no inconsistency with Article 6 ever enters the section 7A 'conduit pipe'); or (ii) disapplying the effect of section 7A in domestic law for specified purposes (such as the interpretation of Article 6), or alternatively making section 7A subject to (and thus yielding) to Article 6, in effect switching the supremacy in domestic law.

The inconsistency with the equal footing guarantee in the Acts of Union, as identified in the *Allister* litigation, is found in the continued application of EU law; the fetters of trade between GB-NI creating additional burdens than applies for those trading between two locations in GB; and NI's privileged access to the EU single market, thus creating an inequality between NI and GB.

It should be obvious therefore that you cannot restore Article 6 of the Acts of Union and have privileged dual market access. This, as a matter of the most compelling logic, amounts to unequal footing. And, if this elementary point isn't clear, then it has already been put beyond doubt by the courts.

The privileged access to the EU single market which some have foolishly championed brings with it the Irish Sea border, the continued application of EU law and the fetters on internal UK trade. That is the price of such privileged access.

To remove the inconsistency occasioning the breach of the Acts of Union at source, this requires re-opening (and changing) the most fundamental elements of the Protocol and Framework. This, both the UK and EU have been clear, is not going to be considered. Therefore, it is impossible to remove the inconsistency at source, and so it must be presumed provisions which conflict with the fundamental guarantees of Article 6 of the Acts of Union will continue to flow into domestic law via the section 7A 'conduit pipe'.

Therefore, the question becomes, does Article 6 or section 7A prevail? And from this, we can take a short-cut and arrive at our answer as to whether the Acts of Union are restored and the guarantees fulfilled, or whether they are subjugated by the Protocol Framework.

In short form: if section 7A continues to prevail, then Article 6 continues to yield and thus notwithstanding any other attempted superficial legislative drafting 'magic trick' that is conjured up, the Acts of Union remain subjugated and in suspension.

And, if that is the outcome, then the DUP has no intellectually and legally credible argument by which to contend that the Acts of Union are restored and thus the fundamental constitutional guarantee to equal footing is fulfilled.

This may to some seem a largely technical legal argument, and it would seem to me that Peter Robinson in his recent 'intervention' was seeking to fashion an escape-hatch from such legal tests. The reason for this is obvious, if you want to sell a deal which achieves much less than you committed to achieving, then abstract political arguments provide much better terrain upon which to make good your escape, rather than having your 'deal' scrutinised against objective legal tests.

The law is what it is: the Acts of Union are either subjugated or they are restored. There is no credible way around facing up to that question, and thus carrying the consequences of the answer.

If, however, matters are viewed through the prism of abstract political theory, then this is clay from which a whole host of arguments can be fashioned in order to dissemble and conceal that which is truly happening.

That is why the real danger for unionism is being lured into broad abstract political arguments, and simultaneously distracted from the objective and clear constitutional tests.

"Unionism is denying democracy"

The charge is that unionism, by using the veto built into the Belfast Agreement, is 'denying democracy'. The answer to that is that if Northern Ireland operated as a normal functioning democracy, then there would be no such veto available.

But this is not the governance arrangements chosen for Northern Ireland; rather, it has been embedded that consensus, with the majority always being subject to the minority, is the foundation for devolved Government in Northern Ireland and thus this is our own unique version of Belfast Agreement democracy.

Therefore, those who bemoan unionism, quite legitimately, exercising the veto, cannot simultaneously with credibility maintain their support for the Belfast Agreement. You cannot have one without the other.

It is, of course, of note that whilst the starting point for advocates of the Protocol was that it existed to "*protect the Belfast Agreement in all its parts*", given that it has in reality demolished the 1998 Agreement, the argument has now come full circle with calls that we must *"change the Belfast Agreement to protect the Protocol*".

If, as the Belfast Agreement and those who cling to it claim, Northern Ireland's governance is based upon consensus and cross community consent, rather than majority rule, then proponents of that argument must face up to the reality that for so long as the Protocol Framework remains, there is no majority unionist consent for power sharing which is based on that constitutional quick sand.

Unionism should not implement the subjugation of the Union – the arsonist and the fireman

The UUP argument that the best way to preserve the Union is to return to Stormont and implement and embed its subjugation is akin to arguing that there can be a point of compromise between the arsonist and the fireman.

Think of it; the arsonist's objective is to set fire to the house; the fireman's objective is to prevent or extinguish fire. You cannot be both and arsonist and a fireman. Imagine for one moment if your house was on fire, and the fire brigade arrived and started pouring fuel onto the flames, whilst simultaneously shouting 'strategy over tactics, we shall save this house by assisting in burning it down'.

Put simply; you cannot credibly claim to be preserving the Union, whilst at the same time collaborating in dismantling it. This ought to be obvious, but sadly- obscured by catch-phrases and wilful ignorance, it seemingly isn't.

There is no doubt that being in Stormont brings with it the legally binding obligation to implement the very arrangements which every unionist agrees is fundamentally harmful to the Union. That is established beyond any doubt by the judgment of Colton J in *JR 181 (3) and Rooney's application.*

The UUP seek to get around this issue by saying that they will be "*in the arena to challenge*" the Protocol/Framework, usually accompanying this pronouncement by reference to the famous poem, 'The Man In The Arena'. This is either knowingly dishonest, or rooted in a fundamental inability to understand the Protocol/Framework.

Whilst the 'in the arena' poem is great on its own merits, and has the ability to generate a warm fuzzy 'can do' feeling, it is misused somewhat when the arena is the equivalent of constitutional quicksand from which there is no escape.

It would be prudent to explore what 'the arena' actually is, before valiantly charging into it. In this scenario the UUP are charging into constitutional quicksand, but whilst in there they are flailing around and shouting proudly *but we are in the arena.* Yes, great. Have a look around you.

The UUP solidify their position (they think) by listing (i) the Stormont brake; (ii) the review of the TCA; (iii) the Article 18 consent vote on Articles 5-10 of the Protocol as their means of 'challenging' the Protocol/Framework.

Taking each misguided claim in turn; (i) as will be explored further below in this paper, the Stormont brake is not a true brake at all. In any event, sovereignty does not reside with the UK Parliament, even if Stormont notifies that they wish the brake to be pulled and the UK Government agrees, but rather the final say rests with an international arbitration body pursuant to Article 175 of the Withdrawal Agreement. To endorse the brake, is to embed the removal of UK Parliamentary sovereignty over the laws which govern Northern Ireland.

(ii) the review of the TCA is a review, it is not a renegotiation. In any event, that review is conducted by the UK Government, relating as it does to international relations. The UUP's argument for implementing the Protocol by returning to Stormont is that the UK Government cannot be trusted to act in the best interests of unionism. True through this may be, it is illogical to on one hand say 'we must implement the Protocol ourselves because we can't trust the Government who will implement it anyway', and then supplement this argument by relying favourably upon a review to be conducted by the same Government.

(iii) the Article 18 consent vote operates on the basis of the disapplication of one of the core pillars of the Belfast Agreement, which the UUP champion. That they are nevertheless prepared to legitimise this by not only participating, but indeed advocating this as a 'solution', sends a worrying signal that there is nothing sacred or fundamental, even when it comes to the UUP's fidelity to the Belfast Agreement.

The absence of cross community consent in the Article 18 vote leads to a 'review' of the operation of the Protocol. As pointed out concisely by Jim Allister KC; if this review is undertaken in the context whereby unionism is compliantly implementing the Protocol/Framework, the review is unlikely to be much more than a tick-box exercise. The review would, of course, take on much greater significance if it were in the context that the Protocol Framework continued to act as a permanent barrier to power sharing.

In addition, given Lord Trimble's dicta ("the Act(s) of Union is the Union") is somewhat of an obstacle for the UUP (given their commitment to implement the subjugation of the Acts of Union) they have sought to create a new version "*the people are the Union".*

This catchphrase, which seems to be a new version of "*Union of People*", may seem superficially catchy, but it is without any substance and indeed, followed to its logical conclusion, in fact contains dangerous weak-spots.

The first question to ask is if the Union is the people, then surely it must follow that the continuation of the Union is vested in the people. But herein lies the first weakness, particularly for the UUP.

Having been ardent supporters of the formulation of the principle of consent and the butchered concept of self-determination (inconsistent with international legal norms, see *Lord Advocate's Reference (Scotland)* [2022] UKSC 31, paras [88]-[90]) found in section 1 of the NI Act 1998, the UUP have supported arrangements whereby the future of the Union rests not in the hands of all the peoples of the United Kingdom, but rather in NI- a small constituent part of the whole- and indeed, in the Republic of Ireland.

Indeed, unlike even citizens of the foreign jurisdiction of the Irish Republic, the people of the Union in England, Scotland and Wales have no say at all in the future of the Union. As a consequence of section 1 of the 1998 Act, the people of NI alone in conjunction with the foreign Irish Republic, are the custodians of whether the Union in its present unitary form continues.

If the UUP were to make the argument that the future of the Union ought to be a question for the people of the Union (which must mean the people of the whole United Kingdom), then that would be a worthwhile argument and indeed carry with it logic, constitutional good sense, and consistency with the internationally recognised principle of self-determination.

However, to speak of 'Union of people' whilst being the most ardent supporters of the very arrangements which does the very opposite of vesting the question as to the future of the Union into the hands of all the people of the Union, is typical of the kind of intellectual incoherence which has become so characteristic of the UUP.

The underlying issue is that, it seems, there is no price the UUP would not pay for Stormont, even if that means self-inflicting harm on the Union itself or, as with the Protocol/Framework, incrementally dismantling that.

The obvious question, to which I have yet to hear the UUP answer, is how far is too far? Is there any line beyond which the UUP would not go in order to preserve Stormont?

They have been strong champions for implementing the subjugation of Article 6 of the Acts of Union, what about subjugation of Article 3 with Executive powers transferred to Dublin?

At that point, would the UUP withdraw from enabling and legitimising such an Executive, or would the Stockholm syndrome infatuation with Belfast Agreement devolution trump all?

It should, of course, be remembered that after the continued existence of the IRA was exposed in 2015 after their 'Belfast brigade' had carried out a murder, the UUP resigned from the Executive, presumably seeing that as a legitimate tactic when it suited their political agenda.

The UUP retort is that people like me are just opposed to the Belfast Agreement. That is of course absolutely true. The UUP sold the Belfast Agreement to the unionist people on the basis of the principle of consent acting as a safeguard against any diminution of Northern Ireland's constitutional status (leaving aside the fundamental problem with granting to one constituent part of the Union the ability to end the Union unilaterally).

In the words of the UUP's leader at the time of the 1998 Agreement, Lord Trimble, it was on this basis- and only this basis- he was able to persuade at most a slim majority (some suggest in fact a majority of unionists voted no) of the unionist community to support the 1998 Agreement.

Lord Trimble's affidavits in the Protocol legal cases (*Allister*) are illuminating. They make clear that the Protocol exposed the principle of consent as a deceit, and indeed the UUP- via the agency of former leader Steve Aiken- were party to that litigation. Both written and oral submissions were made on their behalf that the principle of consent was a "*deceptive snare*".

If this is so (and it indisputably is), and the UUP accept that is the case (as Lord Trimble did, and the UUP did via the *Allister* case), then what now is the core selling point of pro Agreement unionism?

Given they sold the agreement on the basis of something which has been exposed as a deception, how now can pro Agreement unionism continue to advocate for unionist support for those arrangements?

The emperor has truly been exposed as having no clothes.

This all leads to the inescapable conclusion that the UUP will pay any price for Stormont, even if the price is the end of the Union. This is hard to fathom, particularly given they are unable to mount any credible defence of the Agreement, other than by

reference to abstract catch-phrases (such as “the people are the Union”, which of course precisely because the Belfast Agreement, is wholly untrue).

In my view, the UUP have become captured by a small group within the leadership who are paying far too much attention to the largely nationalist dominated world of social media, and the liberal-elite commentariate. In the last three Lucid-Talk polls, the UUP leader has been more popular with nationalists than unionists. That ought to raise concerns, at least with that leader.

There may be some who will say ‘that is good, winning converts to the Union’. But, of course, that is the height of naivety. The UUP aren’t growing, but shrinking. The nationalists who approve of the UUP leadership aren’t converts to the Union, but rather approve of the UUP because they are weak on the Union.

In the same way, many unionists would approve of any nationalist leader who was prepared to bend over backwards to appease unionists, and via their actions strengthened the Union.

“If unionists are against implementing the Protocol, why not resign from Westminster?”

This argument (or, in fairness, perhaps it is better described more as a probing challenge to those of us who support collapse of Stormont) has been advanced perhaps most prominently by respected and experienced commentator Alex Kane. These challenges posed by Alex are always worth engaging with, and- when disagreeable propositions are advanced- challenging in substance. In my view whilst the proposition set forth by Alex is a superficially attractive point, in substance it is without merit and fails to appreciate the distinction between the Executive and the Legislature.

In Stormont, unionism must exercise Executive functions (i.e., serve as the Ministers actually implementing the subjugation and suspension of the Union), whereas in Westminster unionism is merely part of the Parliament which holds the Executive to account and can disagree – at times vehemently – with it. Alex fails to take sufficient account of the different mode of Governance in NI whereby almost all major parties are, as of right, in Government rather than as in in a true democracy where the majority govern and the others act as an accountability body (Parliament).

In answer to that, some may say either (i) well what if HMG takes on responsibility for implementing the subjugation of the Union, so unionist hands can be said to be clean; or (ii) unionism should go into Stormont opposition.

Firstly, as to (i), the simple riposte to this proposition would be to ask: what then is the point of devolution? It would also amount to unionism being willingly part of a conspiracy to implement the subjugation of the Union, by simply participating via wilful ignorance whilst someone else carries out the wrongful act.

In regards (ii), what would be the point- having for more than two decades given up the democratic right to govern to a minority veto- surrendering access to that very veto the first-time unionism was in a numerical minority within Stormont?

The consequence of course would be to usher in effectively a nationalist government for a nationalist people, thus delivering on nationalism's true objective, namely having used the 'minority safeguards' and pretence of 'equality' as merely a stepping stone to achieving their own supremacy.

This objective is obvious: the first-time unionism sought to rely on the cross-community safeguards (Strand One (5) (d) of the Belfast Agreement given effect by section 42 of the NI Act 1998), these safeguards were simply disapplied. Imagine, for just one moment, they had been disapplied to the detriment of nationalism. This would never have even been countenanced.

"Imperfect devolution v imperfect direct rule"

Again, picking up on a theme developed by Alex Kane, which it is important to engage with, it has been suggested the choice for unionism is between "*imperfect devolution v imperfect direct rule"*. I cannot agree with the premise.

Firstly it is important to engage with Alex's point, it would appear directed at those of my viewpoint, that we simply do not want devolution so nothing will satisfy us. That is not entirely true; I oppose (and, I think Alex would concede have always been consistent and very open as to my views on this which have been set out in voluminous written material) the structure of Belfast Agreement devolution for reasons I have set out (and touch upon slightly in this paper). I will continue to seek to press that argument within the unionist family, seeking to win support for it. In recent years, certainly going by polling and some policies mainstreamed by political unionism, that objective has achieved a measure of success. There are a number of positions once viewed as 'extreme' and unthinkable for mainstream political unionism which have been mainstreamed and, crucially, last year a LucidTalk poll found a significant majority of unionists now opposed the Belfast Agreement. So too has many of the advocates of that agreement recanted.

However, I also believe that- if the imbalance and injustice of the Protocol Framework is remedied- that a majority of unionists, reluctantly, would support devolved government. On the ideological fundamental position about the frailties and dangers of devolution itself, there is more work to do in terms of winning that argument, notwithstanding the relevant success of recent years.

And so, if the Protocol Framework was removed (and it is only by removing it that the Belfast Agreement, imperfect as it is, can operate with any semblance of credibility/balance) it is accepted that returning to devolved Government would likely be the wishes of a (perhaps slim) majority of unionists.

Returning to the argument of devolution v direct rule, the proposition rests upon (and can only rest upon) the notion that devolution provides for unionism at least some

safeguards against constitutional harm inflicted by direct rule, given the propensity of successive UK Governments to betray unionism and the Union.

But this is a non-sequitur. The devolution arrangements, even in devolved areas, have been shown to be utterly impotent and incapable of safeguarding unionist interests. The Government has intervened to legislate in devolved areas, against the wishes of unionists, on issues such as abortion and the imposition of an Irish Language Act. It further, as discussed elsewhere in this paper, simply disapplied the cross-community safeguards for the Article 18 Protocol 'consent' vote.

The reality is obvious, there is no additional harm can be done by direct rule than is already done anyway notwithstanding devolution. The problem is not the form of governance, but rather the entire concept underpinning the deceptively named 'peace process'. I say deceptively named because it entwines the absence of violence with a political policy, creating the moral blackmail that suggests, at least implicitly, that peace rests upon the necessity for society to support a particular political agreement (in this case the Belfast Agreement).

The underpinning concept is that the 'process' has a defined end-point (and it is the only, and indeed the final, end-point envisaged in the Belfast Agreement) of a yes vote for a United Ireland, and the continuation of the process (which, we are told, is a pre-requisite to peace) must therefore necessitate that it continues to incrementally move ever closer to its pre-ordained end-point. This is described as "*progress*", "*progressive politics*" and "*protecting the process*". And so, this objective can only be achieved by consistently weakening the Union, and building momentum for Irish unity. If it was anything other, then it would be inconsistent with the clearly defined terms of 'the process'.

Put more bluntly: unionism must give, and nationalism must get…until the point unionism has nothing left to give, and thus the end of the Union is achieved or inevitable.

There is a simple formulation to present to anyone who seeks to contest that this is the concept which centrally underpins the Belfast Agreement and the arrangements it creates. The proposition can be demonstrated simply: (i) is the very essence of a 'process' is that it has a beginning and a defined end-point? (ii) what is the only final ending envisaged by the Belfast Agreement?; (iii) so what is the end of 'the process'?

The next question ought to be: why would any unionist participate in such a process?

Stormont brake- a children's toy

The Stormont brake is the equivalent of having a young child in the back seat, and for the journey providing them with a rubber steering wheel and brake. The child of course thinks this is great, not realising that their brake isn't in fact attached to anything and pulling it doesn't actually do anything. Indeed, the most the child can achieve, is to shout 'brake' whilst pulling their make-believe handbrake, and if the driver decides to pay any heed, they can pull the actual brake.

Of course, in regards the Stormont brake, pulling the actual brake doesn't actually work in the long-term either, because the driver (in this analogy) the UK Government can only do so temporarily, the final say whether the brake can remain 'pulled' and thus do what is intended, actually rests with a passenger (international arbitration panel) and that decision is binding.

A core principle of sovereignty, so central to the entire Brexit project and British way of life, is that the final say rests with the UK Parliament (subject of course to my view that there are some fundamental constitutional principles, such as the Acts of Union, which ought to beyond the reach of even Parliament).

The Stormont brake expressly vests the final say- and thus sovereignty- over vast swathes of laws applicable to NI, not in the UK Parliament but rather in international arbitration panel which can be called upon by the EU if they wish to enforce EU law in NI. A ruling by the arbitral panel against the UK means the EU law automatically comes into force in NI.

If, as it ought to be, the first principle for unionism is that of equal citizenship, then that requires being governed by laws made by the British Parliament, and administered by British courts. The Stormont brake not only fails those fundamental tests, but in fact creates the exact opposite effect.

The Protocol is not just a trade agreement, it effects every aspect of life

Whilst beyond the scope of this paper to cover this issue in detail, it is wholly inaccurate to say that the Protocol is merely a trade agreement. Article 2 of the Protocol embeds a broad range of 'citizens rights', creating a clear citizenship difference between GB and NI.

This means on a broad range of issues (wholly separate to trade) NI is aligned more with the Irish Republic (as an EU member state) than with the rest of the United Kingdom.

The effect can be seen in the Rwanda Bill, whereby the Government's policy cannot be enforce in the same way in Northern Ireland, due to the continued application of EU law flowing through Article 2 of the Protocol, including the Charter of Fundamental Rights.

Conclusion

The arguments for implementing the Protocol (i.e., returning to Stormont) do not stand up to scrutiny. There are no intellectually honest and credible arguments for unionism participating in the dismantling of the Union.

This short paper is designed to highlight, and debunk, some of the common arguments presented by those who wish to collaborate or actively advance the implementation of the subjugation of Northern Ireland's place in the Union.

If there are alternative views, then I would welcome- as would our broader policy studies group- those who hold such views committing them to writing and engaging with the arguments. It is easy to post motivational quotes or slogans on social media; now is the time for genuine debate and the testing of arguments.

It is incumbent on those, particularly within unionism, who advocate unionist collaboration in implementing the subjugation of the Union to make their case and subject their arguments to scrutiny, and to engage with challenges arising when inconsistencies are exposed.

I hope this short paper provides a useful resource for the ongoing internal debate within unionism.

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