

It is an honor to address the Faculty of Advocates and I would like to thank Peter Sellar and James Mure for inviting me here. I am a specialist in power-sharing: I played a minor background role in the making of the Good Friday Agreement of 1998, have subsequently served in the UN's Stand-by Team as a power-sharing advisor, and advised the Kurdistan Regional Government during the making of Iraq's now failed federal constitution. That may make you think that I have been invited as someone determined to keep the UK together come-what-MAY—to use the inevitable pun. That is not so, though I would like the EU, the most successful power-sharing experiment in human history, to survive and flourish. I am also fully sympathetic to the democratic and civic traditions of both Irish and Scots nationalism, and equally conscious that the vista both of these traditions now confront is dramatically stark.

Both Scotland and Northern Ireland are about to be taken out of the European Union—and the Single Market and the European Customs Union—against the express democratic will expressed in both polities. In both places the local Remain majorities (62% and 56% respectively) were larger than the percentages favoring Leave in England and Wales. And in the elections just held in Northern Ireland on March 2 a majority endorsed the parties who had advocated Remain. Nevertheless, the Westminster government is fully intent on testing, possibly to destruction, the frayed multi-national legitimacy of the United Kingdom. In 2009 I coauthored "*Must Pluri-National Federations Fail?*" in an academic journal.<sup>1</sup> The argument, which so far has not been refuted, was based a survey of twentieth-century cases of breakdowns of federations or union-states. The evidence

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<sup>1</sup> McGarry, J. and B. O'Leary (2009). "Must Pluri-National Federations Fail?" *Ethnopolitics* (Special Issue: Federalism, Regional Autonomy and Conflict) 8(1 (March)): 5-26.

overwhelmingly suggests that multi-national federations and polities break down not because they are multi-national, or because of the inevitable successes of organized secessionists, but rather because the relevant central or federal government triggers the breakdown, and usually does so by violating the constitution of the relevant federation or union by unilateral acts, usually unilateral acts of recentralization. The arguments of that article are about to be tested in these islands. The costs of UKEXIT may well be the break-up of the two Unions that comprise the UK: the Union of Great Britain, and the Union of Great Britain with Northern Ireland. I use the accurate abbreviation UKEXIT rather than BREXIT because Northern Ireland is not part of Great Britain. The pertinence of these propositions to the paper *Scotland's Place in Europe* will become clearer upon elaboration.

As *Scotland's Place in Europe* accepts, there is a democratic mandate for England and Wales to leave EU, but none to remove Northern Ireland and Scotland against their will—except, of course, for those who believe that the UK is and should be a unitary state, or that the UK is a British nation-state, or, differently put, a Greater England. In the case of Northern Ireland, forced exit from the EU will also be contrary to the treaty made with Ireland in 1999—incorporating the provisions of the Good Friday Agreement of 1998. The reason I emphasize that point here is simple. It is going to be easier for the Government of Ireland to negotiate to keep all of Ireland within the Single Market and the Customs Union, or something close to their functional equivalents, than it will be for Scotland's Government to attain the same objectives. For plausible reasons I think that the viable compromise of enabling Northern Ireland to have special status in relation to the EU has some prospects of success, even if it not officially called 'special status.' Simply put, the political prospects of

Scotland obtaining the same viable and sensible compromise are not as good.

First Minister Nicola Sturgeon appropriately reminds us in *Scotland's Place in Europe* that Theresa May, before she became UK Prime Minister, referred to the four entities that comprise the United Kingdom as “equal partners.” What has unfolded in May’s subsequent conduct is a telling falsification of these previous pieties. No legislative consent motions will be placed before the legislatures of Scotland, Northern Ireland and Wales before the Westminster government triggers Article 50 of the Treaty of European Union—and there has been no commitment to make such motions after the outcome of the UK’s withdrawal is known. There has not even been a commitment to keep Scotland’s and Northern Ireland’s recognized legal powers as they are, let alone a commitment to enhance them. Likewise, no serious inter-governmental forum has been built to agree a common-UK strategy for exiting from the European Union. No cross-party forum or institutionalized consultation has been built. The Conservative Government, on a mandate of about 36% of the UK-wide vote, and on a manifesto that did not include the ambition to leave the EU, or the Single Market and the Customs Union, is proceeding to the exit with no attempt to work its way out through the institutions of the Union or to build a cross-party consensus.

We are at the end of the beginning. In January the UK Supreme Court found that the UK government was intent on violating the old Constitution: it had been *cavalier*—cavalier with both a big c and a small C. The Court merely smacked the government’s wrists, however, and told it that parliament must legislate to start the withdrawal process. The

parliamentary process at Westminster is near completion, and May's government is fully intent on overturning two entirely reasonable amendments from the Lords: protecting the rights of EU citizens resident here, and the Westminster parliament's right to vote on the final package, or, would that be "the transitional package"? To be discussed. The Court avoided, ignored, or disrespected the constitutional status that Scotland and Northern Ireland thought they had achieved in 1997-98 and after. The Sewel convention, even though it had been put in a statute, was, the Court said, still just a political convention—even though there could be no better example of when the Court should have upheld a convention vital to the functioning of a multi-national Union. When the reckoning is made the Court too will have played its part in breaking up the two Unions. In short, what is unfolding as a by-product of the referendum is a Conservative project to unwind and reverse key features of the new UK constitution accomplished in the late 1990s, a project that seems destined to end in both tears and tears. Further delays to the triggering of Article 50 are extremely unlikely: the Conservative government's attempted secession from the EU is about to commence.

The question formally before us is whether the entirely reasonable second-best arguments put forward in *Scotland's Place in Europe* have already been politically excluded by the May government? Formally, I believe they have. The UK Government, taken at its word, is not interested in either full membership of the Single Market or the Customs Union if either option involves the free movement of people, restrictions on the UK's ability to make separate trading agreements with third parties, or the jurisdiction of the European Court of Justice. Since these matters cannot be negotiated away by the EU's negotiators, and it would likely be too

humiliating for the UK government to retreat on these matters, we are left gazing at possible compromises which it is the duty of the Scottish Government to explore that fall short of Scottish membership of the single market or the customs union. While they do that I shall focus on Scotland's difficulties through an Irish prism.

It is the final endgame of the UK-EU negotiations that should determine strategic assessments and conduct. We should look first to the end to determine options; that is, map backwards from there to make our rational assessments. Simply put there are two broad possible outcomes to the negotiations. The first is that there is **no agreement**—that is, no agreement is reached within Michel Barnier's specified time-frame, and there is a hard UKEXIT by default. The timing, even with an agreed extension, cannot go beyond the next European Union elections of May 2019. Barnier has warned that the UKEXIT negotiations, once commenced, will have to be shorter than London was expecting, to enable the EU-27 and the European Parliament to ratify any agreement: it was a sign of London's poor preparation that the thought appeared not to have previously occurred. Barnier politely told Westminster and Whitehall, in English and French, that's it's not all about you—and those who know him tell us we can expect him to hold to that line.

With no withdrawal agreement the UK would face a chaotic exit into the world of WTO rules; automatic EU tariff walls against the UK; numerous ongoing legal disputes over assets and liabilities between the EU-27 governments and private organizations and their UK counterparts; and potentially nasty consequences for the rights of EU citizens in the UK, and UK citizens elsewhere in the EU who are not dual citizens of another

member-state. Discussing this scenario in depth would require at least a digression over whether the UK would still be in the European Economic Area after its declaration of independence from the EU, and whether that scenario would require the Westminster parliament's approval to withdraw from the EEA.

This hard exit may be the one that some UK cabinet ministers prefer, notably Mr Liam Fox: I see no reason to concede the title doctor to a GP, especially one with no evidence of a PhD, significant diagnostic skills, or interest in research. More importantly, however, it's much less clear that the UK Cabinet, especially its chancellor and prime minister, want a chaotic exit, even as a bluff, not least because of the possibility of an adverse reaction in the City, triggering an investment strike, and a further collapse of confidence in sterling. Since we can all foresee this scenario it seems highly likely that any UK bluff to go it alone, with a unilateral exit without a withdrawal agreement, will be fully tested by the EU-27.

Rationalist bargaining theory tells us that the party that has most to lose is likely to back down first—but we'll see how rational these agents are; some are doing a good job of imitating irrational bargainers; perhaps their public boasts and contradictions are stratagems, perhaps they are just as foolish as they seem. The simple point is that the London Cabinet is divided and unresolved on the subject of a hard exit without an agreement. The cabinet's median position is likely a hard exit with a transitional agreement on trade matters. The UK Cabinet has been both expressing and papering over these differences—with talk of wanting to have its cake and to eat it too, as if the EU-27 had no say in the eventual consumption patterns. Or, following the Prime Minister, the future negotiators have been

whistling the maxim that the UK does not face binary choices. As if the choice-set is solely in their gift. We know the tough questions. Will they have to agree the exit bill first before other matters are discussed? That is the current position of the Commission President. We shall see whether it holds. If it does, there will be much rage in the tabloid press, and the wailing and gnashing of teeth, even though €62 billion could be spread over a long time horizon. If negotiations do not break down on the UK paying its known club membership fees, and a negotiation on transitional matters does take place, then the question will be what a bespoke deal between the UK and the rest of the EU will look like. Will it resemble the EU-Canada agreement just concluded? Will it be focused on places where the Conservatives have current or future electoral interests? What cherries in the Single Market will the May cabinet want to pick, and what will it be asked to pay for them by the EU-27? I don't pretend to know the answers to these questions, and I respect anyone who does, and would like to walk with them to the bookmakers. But, I do think that there is definitely one binary choice: an agreement under Article 50 or not.

It's uncontroversial under Art 50 that a withdrawal agreement requires a qualified majority of the European Council as well as the European Parliament to agree. That's quite a hurdle for the UK negotiators to reach. But it could be even higher. I leave to one side the potential debate on whether any agreement would have to be ratified by the provisions of

Article 48 of the TEU,<sup>2</sup> on which lawyers disagree. But on that, it seems to me that after UKEXIT has occurred, each member-state may have a veto on transitional arrangements. Plainly what first matters, however, is what is covered in the withdrawal agreement. If it covers only issues within the exclusive powers of the EU only a qualified majority of member-states is required to approve the agreement. Any agreement must include settling the administrative terms of the divorce, but the UK will also likely seek some trade agreement, whether transitional or de facto permanent. But if that becomes “a mixed agreement,” because it affects both exclusive and concurrent powers within the EU, that is, because it would affect more than trade, it may require treaty ratification procedures to be triggered in all the member-states of the EU-27 according to their respective constitutional requirements. Won’t agreements on Northern Ireland and Gibraltar make the overall package a mixed agreement?

This is where things may become interesting. The stakes are so high in the EU’s first full member-state secession that the EU-27 are likely to move at the pace of their most reluctant-to-compromise members—and to forego QMV protocols, *because that is what is normally done, when the EU faces tough decisions*. The Commission tried to make the EU-Canada agreement an EU-only matter but then had to bend to member-states’ concerns. I suspect the same may happen here. In short, to achieve any

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<sup>2</sup> Agreements reached under Article 48 of the TEU are governed by ordinary provisions for change, namely consensus rules apply, i.e., each member-state has a veto. But under the simplified revision procedures for change, qualified majority procedures can be used to change the treaty provisions, if the Council so suggests, but then each member-state parliament must be consulted, and they may block such procedures. Either way, there could be an Irish veto, held either by the Government of Ireland or by Dail Eireann, and currently Ireland has a minority government which does not control the Dail. But some legal opinion suggests that the withdrawal agreement may not be governed by Article 48, which would only apply after the UK had left the EU.

worthwhile withdrawal agreement the UK government is staring at 27 potential treaty-ratification processes, and as many as 38 institutional veto points, given bicameral and other constitutional requirements in some member-states—as illustrated in Wallonia’s parliamentary hold over the Canadian-EU trade agreement. Even though the UK Foreign Office is currently on a charm offensive with the small member-states, it’s a very tall-order to work out how all the veto hurdles can be cleared — even for the alleged Rolls Royce of diplomatic machines. We need not pity Mr Johnson’s factotums.

It follows that Scotland’s government needs to consider what features of a compromise UKEXIT, as sought by the Conservatives—are most likely to irritate EU member-states, and to conduct the requisite para-diplomacy in Scotland’s interests. After all, nothing much can be expected to remain secret once negotiations begin. It will then be known what features of a compromise UKEXIT are most important for Scotland even if they fall short of Scotland staying in the single market or the customs union.

Here I get to my key point. Namely, the full plenitude of Ireland’s position, of which its government and its officials do not speak, perhaps because they are polite, frightened, or keeping their powder dry. According to Irish constitutional practice, since the case of *Crotty vs. An Taoiseach* (1987), it is generally regarded as settled law that any treaty or agreement signed by its government that affects the sovereign rights of the Irish people, especially an EU treaty, requires a constitutional amendment before it is ratified. In Ireland such amendments require a double majority: in both chambers of our parliament and in a referendum. There’s one important qualification to what I have just said: the Attorney-General

advises the Government on whether a referendum is necessary. In my opinion any Irish Attorney-General who advised that one was unnecessary in this case would quickly face a court challenge requesting the Supreme Court to obligate the Government to conduct a referendum before the treaty is ratified. The UK's withdrawal from the EU would unilaterally alter the British-Irish treaty of 1999 and the Good Friday Agreement—and, I believe, thereby affect the power of the Irish executive, and thereby require a constitutional amendment before Ireland accepts the EU's agreement with the UK.

If any of these arguments are correct then what Flann O'Brien called the 'plain people of Ireland,' probably alone among the publics of the EU-27, may have a veto over any trade or transitional agreement reached during UKEXIT if it has a mixed character and addresses Northern Ireland, but probably not the divorce agreement, because Ireland ratified the Treaty on European Union. Rather than purr with pleasure at the prospect I'd like quickly to explore the implications.

### **Feasible Compromises?**

No referendum in Ireland on such an agreement is likely to pass if it is significantly adverse to Irish interests, convenience, or pride, or can be portrayed as such. Ireland's national interests publicly include the full preservation of the Good Friday Agreement, the recital to which—embedded in the British-Irish Agreement of 1999, a treaty—presumed the membership of the two sovereign governments in the EU, and which set out both in Irish and UK law provisions for the North-South Ministerial Council that gave it jurisdiction over EU issues. Ireland's convenience, and the terms of the peace agreement, demands that there be no re-erection of

a land border across the island—whether a customs border or a migration border manned by armed police. Any new border should be located in the Irish sea. Ireland’s pride requires that any agreement meets the minimum requirements of Northern nationalists and liberal unionists who voted to remain in the EU with Ireland, and that the UK acknowledge that its referendum on EU membership does not warrant the breaking of a solemn international treaty that encompasses an agreement ratified in two referendums held on the same day in Ireland in May 1998. Minimally all of that requires UK concessions to Ireland.

Going forward the Irish Government is like Ulysses binding himself to the mast while endeavoring to sail past the Sirens—who will sing to Dublin in a heavenly chorus of English upper class accents. The Irish Government will be bound by its way of ratifying treaties to avoid initialing an agreement that would not be passed by its citizens — who could, like citizens everywhere, vote against the Government’s stance in a referendum for reasons not connected with the question(s) on the ballot paper. Ireland’s Government has not talked about these matters in public, but it would be remiss on the part of the Irish civil service if these matters had not been brought to the attention of Irish ministers. The UK House of Lords report, which adopted a principled tone, does not address the matter, but its plea for a special bilateral deal between the UK and Ireland suggests that at least some of its members know that any UKEXIT agreement may be affected by the long shadow of a veto by the plain people of Ireland.

Scotland therefore needs to consider how to react to the possible emergence of special status for Northern Ireland, that may flow from EU-UK negotiations and tacit or parallel London-Dublin negotiations. Such

special status may not emerge for the legal and political reasons I have just mentioned, and my legal reasoning may be questionable; it is certainly not professional. But such special status *may* be politically accomplished anyway because the rest of the EU are aware of the consequences of UKEXIT for Ireland, and for the Good Friday Agreement, and will not wish to be a party to damaging the core-interests of one of its continuing members.

We all know that the Government of Northern Ireland has been deeply divided on UKEXIT since the EU referendum campaign started. The Democratic Unionist Party indulged its ideological dispositions during the referendum campaign—many of its leaders were convinced, in my view, that an overall Leave vote was not going to materialize. But now its most thoughtful members know that being on the winning side in the referendum has been a Pyrrhic victory. Not only will Northern Ireland lose a series of beneficial EU programs, ranging from the CAP to cross-border funds—including in Arlene Foster’s constituency which voted to remain in the EU—but Northern Ireland’s hard-won agreement from the London Treasury, to have a corporate tax rate competitive with Ireland’s, is now rendered potentially meaningless if Ireland is in the EU and Northern Ireland outside—excluded by a customs and migration border. There is also little electoral incentive for the Conservatives to be kind to Northern Ireland: the Conservatives won a third of one percentage of the vote in the elections held on March 2. Politically the DUP knows it will pay a price if UKEXIT goes badly for the local economy. Twice in eighteen years it has been on the losing side of a referendum in which northern nationalists and liberal unionists and ‘others’ voted together. And the DUP has just experienced a major electoral setback: it is now neck and neck with Sinn Féin in seats

held in the Northern Ireland Assembly. And overtly Unionist parties no longer have a simple majority in that Assembly. In these circumstances it is likely that it will be DUP that has to make concessions if the power-sharing executive is to be composed as per the 1998 agreement. And as all of you who follow the news know it is an open question whether the power-sharing executive in the North will be restored or not.

Let us imagine that it is; in that scenario a majority in the Assembly will be comprised of pro-Remain parties, who will argue, like the Government of Scotland that it is in Northern Ireland's interests to remain within the Single Market and the Customs Union. Let us, conversely, imagine that it is not, and that a period of direct rule ensues. In that scenario, there is little doubt that international opinion will reasonably see the collapse of the Northern Ireland institutions as collateral damage from the UK's referendum to leave the EU. If direct rule is restored, however, then the Conservatives will have a binary choice, and will be much less unconstrained by the DUP. Namely, do they make compensatory concessions to Ireland over their prospective exit from the EU? And what will those be? And can they make such concessions without Scotland demanding the same?

Irish politics, North and South, are undergoing decisive change. Sinn Féin is the largest Northern nationalist party, historically less pro-EU than the SDLP, but now firmly locked into both constitutional and pro-EU politics. It is the third largest political party in the South, with prospects of further electoral growth. On at least two occasions it was the leading light in defeating Irish governments over EU referendums—winning, for example, the concession that every member-state retains a commissioner. Ireland's

two historically largest parties, Fianna Fáil and Fine Gael, are Sinn Féin's rivals in the South, which now has a clear left right spectrum — running from SF on the left to FG on the right with FF in the center—**but** any Irish Government has to recognize Sinn Féin's role as the leading light of Northern nationalists, and as a potential referendum-spoiler. So to know what the Irish Government and the plain people of Ireland will agree to in a referendum a very good place to start is to ask what Sinn Féin will agree with as a compromise.

In "*The Case for the North to Achieve Designated Special Status within the EU*" Sinn Féin has set out a measured platform, with remarkable parallels to that of the Government of Scotland. In what appears to be its bottom-line, it demands:

- \* the protection of the peace process, and the full integrity of the Good Friday Agreement;
- \* access to the single market —with full freedom of movement for “our people,” good, services and capital on a north/south basis and between the other member states of the EU;
- \* that the North remains part of the common travel area [undefined]—with the free movement of people and goods without trade tariffs, physical checks or passport controls; and I quote, ‘External international EU land borders and border controls within the island by land, air or sea would be strongly opposed’; &
- \* the maintenance of all EU funding streams.

Sinn Féin also demands the maintenance of EU social, employment, environmental and healthcare rights and programs, and the formalization of

the rights of Northern Ministers to attend Council of Ministers' meetings, and, more boldly, and implausibly, to have 3 more MEPs added to Ireland's share in the European Parliament, and increased Irish representation on the Committee on the Regions and the Economic and Social Committee.

I do not invite you to consider the merits of each of these demands, or to assess their feasibility for the EU-26, though that's a conversation worth having in Dublin or Belfast. But these demands have to be taken seriously as the benchmarks of a party capable of playing a decisive role in an Irish referendum ratifying a UK-EU 27 agreement, either a mixed agreement as part of the withdrawal agreement, or a trade agreement after the UK has exited. Sinn Féin is also capable of doing well in the next Irish general election, and has signaled its willingness to be part of a coalition. The point is that an Irish Government that fails to achieve special status, in practice, for the North, along some of the lines just sketched, would struggle hard to win a referendum. Such a program is therefore in Dublin's interests even if a particular Irish government has no sympathy with Sinn Féin.

Even if the entirety of my legal story is questionable, I still think that it is in the interests of all three major Irish parties, and most of their minor rivals, to argue for special status for the North, to reduce the damage to the Good Friday Agreement and to cross-border economic co-operation, and to do so, for the first time, with the grain of a majority in Northern Ireland. The core of special status would be Northern Ireland's membership of the EU's single market and the customs union. If Northern Ireland is to win such special status Scotland's government will certainly argue that it too should have the same treatment. The Government of Scotland's paper

*Scotland's Place in Europe* is a more sophisticated, less populist, and more detailed paper than Sinn Féin's *Case for the North to Achieve Designated Special Status*, but the latter is more likely to have traction for the political reasons I have given. The UK has no international treaty with an external state, which affects how Scotland is run: or does it? There is after all the British-Irish Council, of which Scotland is a constituent component. One future question, not of immediate pertinence, is how might Scotland leverage its role in that institution?

In the Dalriada Document that I wrote, and is the reason I am invited here, I argued that it was legally possible for Northern Ireland and Scotland to remain within the EU and the UK, even if England and Wales leave.<sup>3</sup> But, to be compliant with EU law the UK would have to remain as a member-state of the EU, albeit with the bulk of its population and territory no longer within the EU. The document sought to work out how Scotland and Northern Ireland could share the diminished representation and power of the UK within the EU. The argument was not intended to be a satirical intervention, but to reflect and balance the different democratic mandates in the different parts of the UK, and to facilitate alliance-building among those who would prefer to remain within the EU, whether or not they they wanted the UK to end or to survive.

The Conservatives have set their face against such asymmetrical and differentiated proposals. Yet the argument of the Dalriada document lingers on in a different form. Sinn Féin's special status demand is practically identical to demanding that Northern Ireland remains in the EU without representation—with the notable exception of its demand that Northern

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<sup>3</sup> O'Leary, B. (2016). "The Dalriada Document: Towards a Multinational Compromise that Respects Democratic Diversity in the United Kingdom." *Political Quarterly* 87(4): 5618-5633.

Ireland's MEP allotment to go to sovereign Ireland. It is my reading of Nicola Sturgeon's minimal demands that Scotland should remain within the EU for all practical purposes, except without representation, i.e., within the single market, and inside the customs union, or else there will have to be a referendum on Scotland's final status.

The platform of the Dalriada Document — to keep Scotland and Northern Ireland within the EU within the UK; to keep their MEPs within the European Parliament; to rotate the responsibility to appoint commissioners and European justices; to share or rotate membership of functional Council of Ministers' meetings; and to have a UK High Representative in the European Council—was not crazy. And it has been in the interests of the SNP and of the pro-Remain majorities in Scotland and Northern Ireland to exhaust the *within-the-UK within the full EU* options before other compromises are considered, such as their joint special membership of the EEA and/or staying within the Customs Union if England and Wales are determined to leave. Fortune does not always favor the brave or the wise but it does not consistently favor those who cede their normative ground too quickly.

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