

**THE DALRIADA DOCUMENT:  
TOWARDS A MULTI-NATIONAL COMPROMISE  
THAT RESPECTS DIVERSITY IN THE UNITED KINGDOM**

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SUMMARY

This document explains how Northern Ireland and Scotland should and could stay within the European Union while remaining inside the United Kingdom; why this proposal need not prevent and may in fact facilitate England and Wales in leaving the EU; and why this compromise proposal is in accordance with the respective preferences of the peoples of the two Unions within the UK who voted in the advisory referendum held on June 23 2016. The new Prime Minister should address carefully the question of whether to trigger Article 50, or instead to give notice that only parts of the UK, England and Wales, will be leaving the EU.

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## **The Dalriada Document**

This document was written in a cottage very close to Dalriada Avenue in the village of Cushendall in the Glens of Antrim on the north-east coast of Northern Ireland. Across the North Channel the Mull of Kintyre is strikingly visible in good weather. Dál Riata, also known as Dalriada or Dalriata, was an Irish-speaking polity that included parts of western Scotland and northeastern Ireland. The argument advanced here is not a romantic fantasy that wills the resurrection of the ancient polity of Dalriada (or its language); instead the Dalriada Document responds to the fact that the present needs and mandates in historic Ulster and Scotland are in deep danger of being ignored in current political deliberations. What is sketched here is a multi-national compromise of potential benefit to the peoples of these islands, and the peoples of the European Union. It respects the preferences democratically expressed in different parts of the two Unions that make up the United Kingdom and those expressed in Gibraltar in 2016, *and* those expressed in both parts of Ireland in 1998, and in Scotland in 1997 and 2014.

## Names, Places, Agreements and Understandings

1. Words and abbreviations matter, especially when they mislead. BREXIT cannot and will not happen because ‘Britain,’ is not a polity, a sovereign state, or a member-state of the European Union. Precisely because Britain is not a political unit it cannot exit from any political organization, let alone the European Union.
2. To insist that UKEXIT rather than BREXIT is the correct abbreviation for the phenomenon that may unfold is not pedantic or professorial quibbling. ‘Britain’ is inaccurate shorthand for the multi-national state that is officially described as the United Kingdom of Great Britain and Northern Ireland—for which the usual abbreviations are either the United Kingdom, or the UK (UKGB & NI is an impossible mouthful). To use BREXIT is to do verbal violence to the nature of the UK, which is a double union, not a British nation-state. What follows is a political argument that properly respects the UK’s constitutional self-understandings.
3. UKEXIT is legally and politically possible, i.e., the secession of the entire United Kingdom from the European Union. Provisions exist in Article 50 of the Treaty of European Union to enable a member state to begin to negotiate its secession with its soon-to-be ex-partners in the European Union’s institutions. But before that article is engaged, a constitutional pause would be wise to consider the profound crisis of legitimacy that may follow if it is invoked, and followed through. This crisis would deeply destabilize two other Unions, the two that make up the United Kingdom. This vista should not be ignored in the hope that these difficulties will simply disappear, or that they will be easily resolved in or after negotiations under Article 50.
4. As new leaderships emerge from the two major parties in the UK it should never be forgotten that neither the Scottish nor the Northern Irish executive has any Conservative members. Equally important, the Labour party is not the leading opposition party in either Scotland or Northern Ireland. The two largest parties in England and Wales are the two largest parties in Westminster’s House of Commons, but neither enjoys a majority mandate from the 2015 general elections in *both* England and Wales. These two historically dominant parties need to be reminded that they have no significant internal Scots or Northern Irish mandates with which to consider the result(s) of the advisory referendum of June 2016.
5. Political and constitutional attention should focus on the damage that could occur if Prime Minister Theresa May and the Westminster Parliament resolve to take the entirety of the United Kingdom out of the European Union.
6. Careful thought about the UK, especially its internal constitutional rules, agreements, and conventions, and its treaties with its immediate neighbors, has to be part of the mature reflection warranted by the referendum result(s).
7. The United Kingdom is a multi-national state, a partnership of peoples, a country of countries, a nation of nations. It is neither an English nation-state nor a British nation-state. It is a union-state, not a unitary state. English politicians in particular have frequently told the Scottish and the Northern Irish as much, especially after

they have been reminded that the UK is not a synonym for Britain. Yet political steps currently being considered—and demanded—may well destroy forever the merits of defining the UK as a multi-national union-state. If these steps are completed, they will emphatically confirm the claims of those who have maintained that the UK is mere camouflage for what has always really been Greater England (or Greater England & Wales).

8. The new UK Prime Minister, the Westminster Parliament, especially English and Welsh Conservative MPs, and the Constitutional Committee of the Lords, need to consider whether they would be wise to take steps that may break up the Union of Great Britain, and, equally vital, to ponder the collateral damage that may occur to the intricate and delicate agreements and conventions that qualify the Union of Great Britain and Northern Ireland. UKEXIT may gravely damage the internal stability of Northern Ireland, and the UK's relations with Ireland. Prudence alone requires that negotiating teams currently being established in Westminster and Whitehall should recall that Ireland will remain a member-state of the EU, and that it would be wise to retain friends within the counsels of the EU.
9. Northern Ireland is in partnership in a union state. But, unlike Scotland, it has never been a state, except in colloquial usage. It has, however, recently been on track to become a 'federacy,' i.e., engaged in a distinctively federal relationship with Great Britain, in which its constitutional and institutional arrangements would not be disturbed by unilateral measures taken by the Westminster Parliament. In solemn UK declarations, statutes and agreements, *in conjunction* with the rest of Ireland, Northern Ireland has been recognized as a twin unit in exercising the right of self-determination. In the Joint Declaration for Peace, the Downing Street Declaration of 15 December 1993, the Prime Ministers of the two sovereign states agreed that, 'The British Government agree that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, 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.' The declaration also recognized the right of both parts of Ireland to remain divided until such concurrent consent occurred, but subject to the arrangements subsequently agreed in 1998.
10. A settled expectation in the making of the Declaration, subsequently built into the agreements that constitute the Belfast or Good Friday Agreement, was that both the UK and Ireland would be members of the European Union—both had just ratified the Treaty on European Union before the Declaration was issued.
11. The constitutional fact of two unions, different in nature, is not reflected in current discourse in England and Wales, and that has to change lest relations become even more fractious. The Union of Great Britain encompasses islands off the coasts of Scotland and England, but no part of the island or islands of Ireland. 'The British mainland' is the contiguous landmass of Scotland, England and Wales, in contradistinction, for instance, to the Scilly Isles, Anglesey and the Hebrides, to name a few genuinely British (though also Celtic) isles. Northern Ireland is not geographically British, as a map-inspection and the historical record confirms. The Union in which Northern Ireland is a partner is with Great Britain—the previous relevant Union was between Great Britain and Ireland; the

Union of Great Britain which preceded these unions with Irish entities runs in parallel with them: it is the Union of Scotland with England (in which Wales was presumed incorporated). There are two unions, different both in the modes in which they were made, and in the ways in which they have evolved. Its proponents have defended neither Union as a Greater England.

12. Northern Ireland is neither legally nor geographically part of Britain; it has a separate statute book, and a separate judiciary; and it has a distinctive power-sharing executive and assembly, the rules of which reflect an agreed partnership among those who designate as unionists, nationalists, or others. Its current arrangements, whose complexity need not be fully described here, were established in two referendums held in both parts of Ireland on the same day in 1998.<sup>1</sup> One question now before the Westminster Parliament—and the institutions of the European Union—is why a referendum held in 2016 within the UK and Gibraltar, in which the weight of Great Britain was preponderant in population, must be read by the Westminster Parliament unilaterally to supersede or abrogate key features of the agreement ratified by referendum in both parts of Ireland in 1998, and subsequently ratified in a treaty registered at the United Nations, which affects two member-states of the European Union, not just one. That treaty and the agreement it protects contain implied or explicit provisions that assume the sovereign states of the UK and Ireland are member-states of the European Union.
13. The Westminster Parliament must therefore reflect on whether the damage to the arrangements within Northern Ireland that would flow from the United Kingdom's complete withdrawal from the European Union would be just, democratic, or necessary. It would not be just because a UK referendum mandate cannot wipe out a Northern Ireland and Ireland referendum mandate unless both parties to the previous referendum result agree that it may have such an effect. It would not be democratic because there is no common demos across the UK and Ireland, *and* because the people of Northern Ireland, a distinct partner to a recognized right of self-determination with Ireland, voted solidly to remain within the EU. It is also not necessary, because the referendum is advisory, and a constructive compromise is available that would be both just and democratic.
14. On English understandings, Scotland had statehood before the Union of Crowns of 1603 and until the Union of Parliaments of 1707, though subsequently a new Scottish Parliament was established under delegated authority from the Westminster Parliament in 1997. The Scottish Parliament, Scottish lawyers, and Scottish nationalists have their own understandings, however. They do not all regard the Act of Union as an incorporating Union, though they know that English judges and jurists act and talk otherwise. They do not accept that the establishment of the Scottish Parliament was merely a revisable and delegated act of the Westminster Parliament. The people of Scotland in a referendum held in 1997 ratified the reformation of the Scottish Parliament, and it has subsequently expanded its powers, with the consent of its people, albeit in negotiations with the Westminster Parliament. Under the Sewel convention Westminster normally legislates on devolved matters only with the express agreement of the Scottish

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<sup>1</sup> See O'Leary, B. (1999). "The Nature of the Agreement." *Fordham Journal of International Law* 22(4 (April)): 1628-1667. The negotiated text is officially called *Government of the United Kingdom* (1998).

Parliament, after proper consideration and scrutiny of the proposal in question, which raises the question of whether the Westminster Parliament will break with this convention in order to accomplish UKEXIT.

15. As with Northern Ireland, the Westminster Parliament must also reflect on whether the damage to the recent arrangements agreed with Scotland that would flow from the United Kingdom’s complete withdrawal from the European Union would be just, democratic, or necessary. It would not be just partly because it would reverse express commitments given when Scotland voted in a referendum in 2014 to remain within the UK; it would not be democratic because the people of Scotland, a recognized unit within the Union of Great Britain, voted solidly to remain within the European Union; and it is also not necessary, because the referendum of 2016 is advisory, and a constructive compromise is available that would be just and democratic.

**Reading the Referendum Result(s) is Not Straightforward**

16. The 2016 referendum was held to advise the decision-making of the Government and Parliament of the United Kingdom. The result(s) of the referendum is/are not binding on the Government or Parliament, though it would be bizarre and unreasonable for the result(s) to be completely ignored. The use of result(s) in the phrasings employed here is deliberate. ‘The people’ did not speak with one voice—see Table 1.

Unit in Which Ballots Were Counted	Percent Voting to Leave the EU	Percent Voting to Remain in the EU
United Kingdom & Gibraltar	<b>51.9</b>	48.1
England	53.4	46.6
Wales	52.5	47.5
<b>Northern Ireland</b>	44.2	<b>55.8</b>
<b>Scotland</b>	38.0	<b>62.0</b>
<b>Gibraltar</b>	4.1	<b>95.9</b>

**Table 1. The Referendum Outcomes in the Constitutionally Distinct Territories of the United Kingdom and Gibraltar**

17. The four peoples who comprise the United Kingdom provided four different mandates, two for remaining and two for leaving the European Union. And in each of the two Unions one partner voted to leave and one voted to remain. England (& Wales), one partner in the Union of Great Britain, voted to leave, whereas Scotland voted to remain. In the other union, Great Britain (as a whole) voted to leave, whereas Northern Ireland voted to remain.
18. The ballot papers cast in the 2016 referendum were counted in the electoral constituencies that fill the House of Commons in Westminster; in the constituent units of the two Unions that make up the United Kingdom (i.e. England, Northern

Ireland, Scotland and Wales); and in Gibraltar, a British Overseas Territory, formerly a Crown Colony, whose enfranchised denizens were allowed to vote because its jurisdiction is within the European Union. Since the counts deliberately allowed these outcomes to be clear to all they require the mature consideration of the constitutional authorities of the United Kingdom, and its partners in the European Union—with whom it would have to bargain if Article 50 of the Treaty on European Union is invoked.

19. The vote in Gibraltar obliges special reflection, and not just because almost 96 per cent of the enfranchised on the Rock voted to remain in the EU, but also because their votes rendered the referendum anomalous—which is not to suggest any view about irregularities in voting. Though the question posed in the referendum was about the future of the United Kingdom in or out of the EU very strangely the right to answer the question was not confined to the units of the UK. Instead it was confined to territorial units subject to the legal sovereignty of the Westminster Parliament that were within the European Union's jurisdiction, i.e., the United Kingdom (of Great Britain and Northern Ireland) *and* Gibraltar. Had the result of the referendum been even closer than it was in the UK as a whole it is entirely unclear what constitutional reasoning would have justified potentially pivotal ballots in Gibraltar shaping the membership decisions of the UK. Consider what would have happened had Gibraltar's approximately 20,000 remain votes been decisive in the total vote count: within the UK a crisis of legitimacy, and calls for a second referendum, would have immediately occurred among the supporters of leaving the EU. The appropriate question to have put to the relevant voters would have been, 'Should the United Kingdom and the British Overseas Territory of Gibraltar remain within the European Union or leave the European Union?'
20. Not only must the Westminster Parliament and the institutions of the EU reflect on the different result(s) of the referendum in the five constitutionally distinct territorial units where votes were aggregated, but they must also recall that there was a mismatch between the question-wording and the places where it was posed. It was a hybrid referendum question, because it bound entities together that are not organized under the same set of constitutional norms. The proposal advanced here is to consider a compromise that would satisfy the mandates expressed in the referendum in all four units of the two Unions, and Gibraltar.

### **The Case for the Compromise Stated Negatively**

21. The compromise proposed here is a constitutional salvage operation, proposed to prevent damaging consequences ensuing to two recent constitutional settlements regarding Scotland, and in and over Northern Ireland. During the 2016 referendum debates these settlements were not centre-stage among the English and Welsh publics, nor discussed among voters throughout the United Kingdom in an informed manner. The proposed compromise is therefore partly advanced in a negative vein. Though the compromise proposed here is driven by the need to avoid potentially negative consequences from UKEXIT, especially for Northern Ireland and Scotland, it also has positive merits, which will be presented later.

22. For those concerned about the future of Scotland in the UK, the compromise would help avoid the prospect that a referendum on Scottish independence, promoted by the SNP and the Green Party, will lead to the break-up of the union of Great Britain. The Dalriada Document takes no views on the normative merits or otherwise of Scottish independence. Politically the Scottish Parliament has every right to hold such a referendum in pursuit of independence. Not just because such a referendum has been lawfully held before, but also because the terms specified in the Scottish National Party's election manifesto have been met. In launching the SNP's 2016 manifesto Nicola Sturgeon declared that, 'We believe that the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people – or if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will.' Significant and material prospects now exist that Scotland will be taken out of the EU against the will of its people. The political mandate of the SNP to pursue such a referendum, measured by its share of the vote received from the Scottish electorate in 2016 (46.5%), is actually much more securely grounded than that received by the Conservative Party in the UK in the general elections of 2015 (36.1%).
23. The same constitutional compromise could diminish the likelihood of constitutional turbulence spilling into and over Northern Ireland, and destabilizing both the peace process and its union with Great Britain. The Dalriada Document takes no view on the normative merits of Irish reunification, but all careful observers will have noticed that on the same day that First Minister Nicola Sturgeon publicly indicated her intention to start preparations for a second Scottish referendum, the Deputy First Minister of Northern Ireland, Martin McGuinness of Sinn Féin, equal in powers and status to the First Minister, Arlene Foster of the Democratic Unionist Party, demanded that a poll be held, as is possible by law, to enable the reunification of Ireland to be voted upon. Sinn Féin's assembly leader had a point. Many fear that UKEXIT will restore a hard border across Ireland, and strip away core European components of the Good Friday Agreement of 1998. Politically the idea that the narrow outcome of a UK (and Gibraltar)-wide referendum should automatically over-ride the terms of the Ireland-wide referendums of 1998, and of the majority who voted to remain within the EU within Northern Ireland, is not acceptable. The same rejection would be sustained even if the Leave campaign had won a much larger majority in England and Wales: it is said that Good Friday should not be superseded by Bad Friday.
24. The Conservative UK Secretary of State for Northern Ireland, who campaigned for the UK to leave the European Union, almost immediately declared that the (legally reviewable) test was not met to have a border poll of the kind requested by the Deputy First Minister. We shall have to wait to assess whether this ruling was reasonably reached—if there is a legal review— but no one should assume that the test would not be met in future. In any case, it is within the political rights—whatever the legal circumstances may be—of the people of Northern Ireland and the Northern Ireland Assembly to demand a border poll to give them the option of remaining within the EU through Irish reunification—particularly if there is no alternative that respects the clear local majority preference to remain



within the EU in Northern Ireland. But there is such an alternative: the compromise that is outlined here.

25. The very same compromise may also weaken the pressure from the Spanish government for the UK to cede its sovereignty over Gibraltar.

### **The Multi-National Compromise for the Peoples of the United Kingdom Outlined**

26. The core idea behind the compromise is every simple. Each mandate in each territory expressed in the Referendum of 2016 should be respected, but without breaking up either of the two Unions of the United Kingdom, or Gibraltar's ties to the UK.<sup>2</sup>
27. Under this compromise, in due course England and Wales will leave the EU, in accordance with the preferences of their respective publics, while Scotland and Northern Ireland will remain. No break-up of either Union in the UK is envisaged or encouraged; and no fresh obstacle is proposed that would inhibit the secession of Scotland from the UK, or that would block the re-unification of Ireland.
28. The United Kingdom would remain within the European Union, but a much diminished portion of it, and it would therefore lose much of its representation and voting powers that flow from being part of a large populous state within the EU—because its most populous unit, England, along with Wales, would cease to be within the EU.
29. To work this compromise, and that is why it is appropriately called a compromise, requires continuing (albeit reduced) UK membership of the European Union. To work it therefore does not require Article 50 of the Treaty of European Union to be invoked. Though it is possible to imagine that this compromise, or something resembling it, might emerge from Article 50 negotiations, it is more likely to transpire if negotiations under Article 50 are not commenced.<sup>3</sup> What is being proposed here may be treated as an amendment to Article 52 of the Treaty of European Union, a redefinition of the scope of the territorial application of the Treaties in the current (and remaining) member state: a possible addition to Article 52 might read as follows, 'The United Kingdom will apply the provisions of the Treaties only in respect of Scotland and Northern Ireland.'<sup>4</sup>

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<sup>2</sup> The Dalriada Document takes no view on the future status of Gibraltar, though its author is sympathetic to the wishes of its people to remain within the European Union. The focus here is on the compromises necessary to preserve the UK as a multi-national and democratic state. In consequence Gibraltar is discussed here largely in passing — no exclusionary intent should be read into this fact.

<sup>3</sup> How Article 50 will apply if invoked is uncharted territory; however, it is clear, absent official notification to the European Council, that Article 50 has not yet been triggered (among other reasons because of the advisory nature of the referendum). There may be no impediment in the text of this article to a member-state changing its mind en route to exit; what it notifies to the European Council is its 'intention' to withdraw before the expiry of the 2-year period or the entry into force of the divorce agreement; what seems likeliest, if it did change its mind, is that the UK would have to give notice of its withdrawal from the process begun under Article 50 which would require the unanimous consent of the European Council.

<sup>4</sup> Article 52 (2) could be amended by adding, for instance, 'in relation to the territories mentioned therein after 'specified.'

30. The UK would give notice to its partners that it intended no longer to apply the primacy of European law over UK law in England and Wales, whereas EU law would continue to be upheld in Scotland and Northern Ireland, and that it intends to apply its treaty obligations accordingly. It would propose continuing UK participation in EU institutions—on behalf of Northern Ireland and Scotland (and perhaps Gibraltar)—in ways outlined below, proposals that the EU institutions would have to consider, but over which they would have no immediate veto because the UK would not be leaving the EU. For the compromise to work it would be very helpful, though not absolutely required, for the UK Government to seek externally associated status for England and Wales, and agreements with the European Union, which will make the UK function more harmoniously. (Perhaps Article 355 of the Treaty on the Functioning European Union would have to be amended to define the external association of England and Wales).

### **Is this compromise feasible?**

31. The United Kingdom already has parts of the territories under its jurisdiction within the European Union and others outside or without it as the Scots would put it. The compromise proposal suggested here would lead to a major reconfiguration of the UK's relations with the EU, to give effect to the wishes of the people of England and Wales. But it would not be unprecedented. Aside from Gibraltar, all UK Overseas Territories (the former Crown Colonies) are outside the European Union's *acquis communautaire* (the name for its accumulated body of law). They are either exempt, or enjoy various derogations, from the UK's obligations under EU law.<sup>5</sup> As this document is written, within the British Isles, three members of the British-Irish Council, Jersey, Guernsey and the Isle of Man, are not part of the European Union, but are obliged to conform to some aspects of EU law.<sup>6</sup> The status quo in the UK is therefore one in which parts of the territories under the Crown are in the EU, parts outside, and parts are in and out. So, it is already true that the UK has part of the territories subject to the sovereignty of the Crown—and therefore the advice of the Westminster government—within the European Union, and parts outside. Existing precedent does not require whole-state membership of the European Union.
32. Not only are there precedents within UK sovereign lands, precedents also exist among other EU member-states. Article 198 of Part IV of the Treaty on the Functioning of the European Union specifies that, 'the Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom.' The European *acquis* does not apply to these overseas countries and

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<sup>5</sup> Article 355 (2) of the Treaty on the Functioning of the European Union provides that, 'special arrangements for association' ... shall apply to a list of overseas countries and territories specified in an annex, and states in the same place that the 'Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

<sup>6</sup> Article 355 5 (c) of the Treaty on the Functioning of the European Union specifies that, 'the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

territories. Instead, detailed rules and procedures are spelled out in what is known as the Overseas Association Decision. So, in principle, several member-states of the EU have precedents for having parts of their states inside and others outside (at least some of the laws and institutions of) the European Union.

33. The Faroe Islands<sup>7</sup> and Greenland are part of the Kingdom of Denmark, but they are not within the EU. Greenland, a very large territory, is especially interesting because it seceded from the EEC, completing the process in 1985, while Denmark remained within the EEC. This change, of course, had few consequences for political power within the European Union because of Greenland's small population, and it had few implications for Denmark's power and representation within the European Union. Variations on the compromise proposed here are sometimes called 'the reverse Greenland' solution, perhaps especially among legal scholars in Scotland. I think this is an unhelpful metaphor for at least three reasons— because it makes some people think that the proposal somehow means bringing Greenland back within the institutions and laws of the EU; it makes others think that the conversation has somehow veered into a discussion of how to reverse the melting of the polar ice-caps; and lastly, because the analogy does not stand up: Denmark is the Member State, and it is still in the EU. Greenland is a useful precedent for the idea that part of a member-state, a very large part, the largest territorial part, has seceded from European institutions without affecting the member-state's membership of the EU.<sup>8</sup> It cannot provide a direct precedent for this compromise, however, because England and Wales, jointly, number far more people than those in Scotland, Northern Ireland and Gibraltar—a reality recognized in the preliminary proposals outlined below.

### **Is this compromise politically possible?**

34. There is, I suggest, no fundamental legal impediment to this proposed compromise, and it has many political merits, aside from those of holding the UK together, abiding by solemn international treaties, and respecting the distinct mandates in different parts of the UK. Negotiating a complete UKEXIT for a new Prime Minister without an electoral mandate of her own from the public is going to be a demanding mission, especially if there is a continuing currency crisis, capital flight, a recession, and internal party divisions. Calls for 'unity' can not disguise the fact that taking the entire UK out of the EU on a 52-48 referendum outcome would be deeply divisive, and could destabilize the governing party (a majority of whose MPs voted to remain in the EU).
35. Agreeing a common UK position for negotiations with soon-to-be ex-partners, in the absence of a coalition government, and without institutionalized consultations with the Northern Ireland Assembly and Executive or the Scottish Parliament and

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<sup>7</sup> Article 355 (5) of the Treaty on the Functioning of the European Union specifies that notwithstanding Article 52 of the Treaty on European Union and paragraphs 1 to 4 of Article 355, that 'the Treaties shall not apply to the Faroe Islands.'

<sup>8</sup> Greenland has a comprehensive partnership with the EU, which is complementary to the Overseas Countries and Territories arrangements under the Overseas Association Decision, and which is based on a Council decision on relations between the European Community on the one hand, and Greenland and the Kingdom of Denmark on the other and, the Fisheries Partnership Agreement between the European Community, the Government of Denmark, and the Home Rule Government of Greenland.

the Scottish Government, is likely to be very difficult, and may increase rather than reduce political antagonisms. Imposing the withdrawal of Scotland from the European Union against its will, can only recall bitter memories of the imposition of the poll tax by a Westminster government without a mandate in Scotland. Breaking a treaty with Ireland, and damaging the Good Friday Agreement, will bring back well-known adages about ‘perfidious Albion’ —a phrase that does not generally derive from foreigners’ historical confusions.

36. This compromise would offer the new Prime Minister a chance to work creatively to craft the details of a compromise that would be genuinely consensual—allowing each unit of the Union to follow its most preferred path with regard to the European Union. If it was satisfactorily negotiated and accomplished in the UK it would have the considerable attraction for a new Prime Minister and Cabinet of avoiding the difficulties of negotiating a wholesale secession of the UK under Article 50—in which, as we shall see, every member-state as well as the EU institutions may have a practical veto over any agreements between the EU and the UK. Recall that these difficulties may occur while the governing party in the UK might be campaigning to keep Scotland in the Union, while also renegotiating the Good Friday Agreement. This compromise proposal would, however, require keeping the UK (minus England Wales) within the European Union and would require the Prime Minister to acknowledge this fact.

#### **How might the Compromise Work for Scotland and Northern Ireland within the EU?**

37. The Westminster Parliament would have to give effect to the advisory referendum, and it would therefore have to make provision for different parts of the Union to have different relations with the EU. EU law would retain its legislative primacy over UK and devolved law in Scotland and Northern Ireland, whereas the European Communities Accession Act would be amended in the relevant ways so that it did not apply in England and Wales. England and Wales ‘would take back control,’ Northern Ireland and Scotland would keep their relationships with the European Union. How that might work requires some brief thought experiments—the author is not wedded to these details, and would welcome proposed improvements.
38. The European Union is not just a free trade or single market with four freedoms. It is also an international organization with confederal characteristics, in which each member-state currently appoints one commissioner, appoints ministers with voting rights in the functional Council of Ministers, elects Members of the European Parliament, nominates one judge to the European Court of Justice, and sends its head of government or state to the European Council. Membership of the Union is open only to states as defined in international law and EU law is relayed through Member States (e.g., though directives which are ‘binding ... upon each Member State’; and only courts ‘of a Member State’ may refer questions to the Court of Justice for a preliminary ruling). So, how might UK representation in EU institutions and voting rights work according to the compromise proposed? Let us build from the easiest to the most difficult questions, ensuring that Scotland and Northern Ireland through the UK, have a fair, legitimate and proportionate share in EU agenda-setting, EU law-making, and EU judicial review.

39. Northern Ireland and Scotland would retain their existing MEPs, elected according to their respective versions of proportional representation, and would have their respective number increased or reduced according to the apportionment rules of the European Parliament. England and Wales would have no MEPs. Gibraltar currently is part of South-West England for European Parliament elections so special arrangements would have to apply to facilitate its representation.
40. The United Kingdom is currently entitled to nominate one Commissioner. In the past the major political parties informally rotated the two posts that the UK used to enjoy, a convention that ceased when the number was reduced to one. The Scottish Government and the Northern Ireland Executive, perhaps meeting under the auspices of the British-Irish Council, could alternate in having the right to nominate the UK's commissioner. Reflecting the differences in population size the sequence of nominations could work as follows: the first nomination would be by the Scottish First Minister on behalf of the Scottish Government after consultation with the Northern Ireland executive; the second nomination would occur in the same way; while the third nomination would be by the Northern Ireland First and Deputy First Ministers on behalf of the Northern Ireland Executive, after consultation with the Scottish Government.<sup>9</sup> The nomination sequence would then be repeated. This ratio of 2:1 could be modified if population ratios shifted significantly.
41. The UK's nomination of a judge to the Court of Justice of the European Union would work in the same way, except that Northern Ireland would have first place in the nomination sequence, to balance its last place in the nomination sequence for a commissioner.
42. The role of Ministers would be simple in one way, and slightly less simple in another. Scotland and Northern Ireland could use the British-Irish Council to deliberate and if necessary to instruct ministers on UK policy (for Scotland and Northern Ireland). Scotland and Northern Ireland could allocate the UK's portfolios in the Council of Ministers among themselves, either apportioning by population, with one country serving with the other providing an alternate, or, better, by appointing in sequence to each portfolio, so that, for example, in Agriculture, the Northern Irish Minister would serve for thirty months, followed by the Scots Minister for thirty months, with arrangements for regular consultation and coordination. Legal and political arrangements and precedents already exist: Belgian regions may represent Belgium, and there are provisions for German Länder to represent Germany in the Council of Ministers, on matters within their domestic powers.<sup>10</sup> The voting powers of these ministers would be equal to the entitlement of the reduced UK, depending on the voting rule agreed

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<sup>9</sup> To avoid deadlock between the Northern Ireland First and Deputy First Ministers they could agree to alternate in nominating a Commissioner from Northern Ireland. The same would apply for nominations to the Court of Justice.

<sup>10</sup> Article 16(2) of the TEU, refers to a 'representative ... at ministerial level', allowing, e.g., the German Länder governments to take turns to sit in the Council dealing with, say, cultural matters.

under EU law. More complex roles for Ministers would arise in zones of EU decision-making that are not typically devolved powers.

43. Membership of Scotland and Northern Ireland in other EU organizations—such as the Committee of the Regions—should present no institutional or constitutional obstacles to this compromise.
44. The UK Prime Minister, whose mandate derives from the whole of the UK, but principally from electors in England and Wales, could not comfortably represent the UK in the European Council of Heads of State and Government. It can be no part of this proposal to request or demand the formation of an English Parliament and Government, which would ease the institutional difficulties attached to this proposal. The obvious solution is for the Scottish and Northern Irish First and Deputy Ministers either to alternate in representing the UK in the EU or to appoint a High Representative who would play the role of trustee for both governments, and who could consult with the Westminster government so that friction with the rest of the UK would be avoided.
45. The future role of the Westminster parliament under this compromise would be to ratify and appropriately implement EU law that applies to Northern Ireland and Scotland, ensuring that Scotland and Northern Ireland have the same EU law. This would be best accomplished by a legislative committee of the Commons and Lords, advised by seconded officials from Scotland and Northern Ireland. MPs from England and Wales could not vote on such laws. The principle of having MPs who are in for some matters that require voting and out for others has already been accepted by the Conservative party—and implemented in provisions that are called English Votes for English Laws. It would be up to the Westminster Parliament to decide which components of EU law they voluntarily wished to apply to English and Welsh law to make the possible external association of England and Wales work—a convenience that may be helpful.
46. The currency is a reserved Crown power. The proposed compromise would not lock Scotland and Northern Ireland into the Eurozone, because as part of the UK, Scotland and Northern Ireland should inherit the entire UK's position under the Maastricht treaty (namely, they would stay with sterling, unless they wanted, and unless Westminster wanted to allow them to join the Euro—which are not likely scenarios). However, Scotland and Northern Ireland would not be able to apply the new terms that Prime Minister Cameron recently negotiated on the supposition that all of the UK would remain in the European Union.

### **Within the UK**

47. Under this proposal complex issues would arise regarding UK-Scottish and UK-Northern Irish relations, but before these are briefly addressed it is important to emphasize that these relations are already complex, and that permanent damage could be done to the texture of these relations by a constitutionally reckless UKEXIT.

48. What will be done if an EU law affects a ‘reserved power,’ i.e., an issue upon which the UK government (and not Scotland or Northern Ireland) has the relevant power? Several resolutions are possible. In one, the UK, recalling its participation in EU representation and law-making institutions, legislates to apply such laws to Scotland and Northern Ireland, only. Perhaps the UK will negotiate a treaty with the EU in specific domains, which do not touch upon the single market and the four freedoms, which may place restraints on the application of EU law to Scotland and Northern Ireland— e.g., inhibiting their membership of the common currency of the EU, inhibiting their participation in security, intelligence and defense arrangements inconsistent with the UK’s membership of NATO, or (trickier still) preventing Scotland or Northern Ireland from damaging a vital interest of the UK as a whole.
49. In another resolution, the powers devolved to Scotland and Northern Ireland could be expanded to cover the full domains of EU law making; and in yet another, one resolution of these matters would apply to Scotland, whereas another would apply to Northern Ireland. Several permutations of these ideas can be imagined. The United Kingdom is already used to internal asymmetrical relationships in the distribution of powers.
50. Consequences would flow for the courts from what has been elaborated about how this compromise proposal would work. The UK Supreme Court would be required, as at present, to disapply Westminster law in Scotland and Northern Ireland if it violates EU law, while such law would be continue to be valid in England and Wales.

### **The difficulties and benefits of this compromise**

51. All of Ireland, North and South, Scotland, England and Wales could remain, as at present, an internal passport free zone. Neither the UK nor Ireland is obliged to be part of the Schengen Agreement.
52. However, one negative consequence of this compromise would be a hard customs border in the Irish Sea if England and Wales do not negotiate a customs union with the EU.
53. Another effect would be a hard customs border between Scotland and England, again if England and Wales decide not to be part of a customs union with the EU. If all of Ireland and Scotland remain in the EU there cannot be a single market in the UK, as defined by the EU, and therefore a customs barrier will have to exist. But a hard customs border will materialize if a referendum led to Scotland’s independence, and it will materialize across the border of Ireland and Northern Ireland if the entire UK leaves the European Union without an agreement on a customs union.
54. Ireland, North and South, and Scotland could not join the Schengen agreement because that would mean that England and Wales would lose control over immigration— the Leave side in the referendum campaign demanded such control. But no part of the Isles is part of Schengen at present, and there is no evidence that a majority in any of the places in the Isles wants to be.

55. One clear benefit of this proposal is that enterprises currently located in England and Wales could re-locate to EU zones within the UK, which would soften the negative consequences of an entire UKEXIT. The UK as a whole would continue to enjoy the tax-revenues and employment benefits from those organizations that require their headquarters to be within the EU.
56. These arrangements would leave England and Wales to experiment with whatever policy freedoms they preferred and which they believe they have been blocked from developing by membership of the European Union. Careful evidence could then emerge about the impacts, negative or positive, about such policy variation within the UK. Scotland, Northern Ireland and Gibraltar would, of course, have to pay their appropriate dues as well as receiving appropriate benefits from the UK's reduced membership of the EU.

### **Citizenship and Migration**

57. Citizenship and migration-law would have to be reconsidered, but the ensuing difficulties could be negotiated. These matters will be on the table anyway. The UK and Ireland already grant one another's citizens full citizenship rights (including voting rights) after a brief period of residence, and there are no proposals to change this situation, and both Ireland and the UK will want to keep the common travel area within the Isles.
58. What will be trickier are the rights of EU citizens in different parts of the UK under this proposal. In negotiations with the EU, Article 45 of the Treaty on the Functioning of the European Union will be at issue. It reads,
- '1. Freedom of movement for workers shall be secured within the Union.
  2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
  3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
    - (a) to accept offers of employment actually made;
    - (b) to move freely within the territory of Member States for this purpose;
    - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
    - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
  4. The provisions of this Article shall not apply to employment in the public service.'



59. In addition to other EU law, the Dalriada Document would require that England and Wales be excluded from the purview of Article 45 and associated regulations and directives.<sup>11</sup>
60. Normally, EU citizens are entitled to rights on par with UK citizens regarding access to (a) employment; (b) conditions of work and employment; (c) social and tax advantages; (d) membership of trade unions and eligibility for workers' representative bodies; (e) training; (f) housing; (g) education, apprenticeship and vocational training for the children of Union workers; (h) and assistance afforded by the employment offices. To work the Dalriada Document, or proposals like it, would require that EU citizens residing in Scotland and Northern Ireland could not move to access comparable entitlements in England and Wales, and, perhaps more importantly, that EU citizens living in England and Wales do not take advantage of EU rights by establishing notional residence in NI or Scotland. Administrative mechanisms would be required to police this situation, but would involve no great leap in regulatory burdens. Article 3 of Directive 2014/54/EU already requires that member states establish bodies for the purposes of monitoring and enforcing Article 45 rights.
61. Some constitutional and legislative reconstruction of the UK would therefore be necessary. The starting question to be posed to Conservative and Labour leaders, and to the UK Parliament, is whether the Welsh and the English publics, elected politicians from England and Wales, and members of the Lords of English and Welsh origin, believe that the first cost of taking back control of their own affairs should be the imposition of control over Scotland and Northern Ireland?

### **Negotiating Matters**

62. The interests of states in making bargains and treaties are rarely based on profound generosity. The divorce agreement that the Leave side emphasized that it wished to negotiate with the EU has to be acceptable to the existing member-states of the EU—or else there will be a chaotic UK departure without agreement.
63. We must, however, distinguish between a withdrawal agreement and trade agreements. Most EU free trade agreements have been what lawyers call ‘mixed agreements,’ that is, they require the consent of the EU institutions and ratification by all of the Member States—because such agreements usually contain rules going outside the scope of trade policy. Will the UK’s withdrawal agreement include or postpone the negotiation of a trade agreement? The Leave side has always assumed that a ‘divorce agreement’ would deal with EU-UK trading conditions, and would be negotiated under qualified majority voting by EU member-states. But in practice, it is possible that each member-state may have a veto in agreeing a negotiated withdrawal, however narrow its terms, though this possibility is debated. The question is: does each member-state still have the ability to invoke a vital national interest, and could a member-state claim a vital national interest in some arrangement through which the UK is seeking to withdraw from the EU? If so, there might be no withdrawal agreement, and the

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<sup>11</sup> Regulations No 492/2011 and Directives 2004/38/EC and 2014/54/E

Treaties would simply cease to apply to the UK in, say, mid-October 2018 (Article 50(3) TEU), creating a legal mess. The content of the Luxembourg Compromise of January 1966—when General de Gaulle forced the recognition of member-state veto rights—has according to some jurists been superseded. But politicians will create the mess that may unfold. For Irish politicians the question may become: can the UK withdraw from its international obligations with Ireland simply by leaving an international organization, without Ireland's consent?

64. Considering these matters suggests that the next UK Prime Minister will have to address carefully the question of whether to trigger Article 50, or instead give notice that only parts of the UK, England and Wales, will be leaving the EU. The new Prime Minister and cabinet that will negotiate with their European counterparts will soon realize that the Irish and Spanish states have voting power over the divorce agreement—and may enjoy *de facto* veto powers over any subsequent agreements that encompass trade agreements. Spain and Ireland are not alone. There will be many states with an interest in protecting their stranded 'diasporas' (their citizens living and working within the UK), not just the flow of capital, goods and services.
65. The 'EEA minus' proposal is the suggestion that the UK will join the European Economic Area, while retaining control over immigration from the EU. In the full EEA—currently inhabited by Iceland, Norway and Liechtenstein—the non-EU members pay a hefty membership fee to the EU, accept but do not make the rules over the single market *and* accept the freedom of movement to work. Exactly why key EU leaders and member-states would grant the UK better terms than Iceland, Norway and Liechtenstein, has never been explained—and that is to leave aside the question of whether to do so would be consistent with the ethos of the EU's treaties.
66. Simply put, why should the EU member-states accept a deal that would encourage other member states to exit their obligations, in order to achieve the UK's new status? If the UK rejects the full EEA deal—which would violate pledges made during the referendum on controlling EU immigration—there are only two remaining exit options for the entire UK, namely, a free-trade agreement with the EU, negotiated over a long period with full veto-rights retained by each member-state, or no deal at all.
67. The constitutional compromise suggested here, by contrast, provides the UK with a negotiating pause, a moment to calm the UK's territorial politics, and it would give the EU a continuing stake in some of the UK, while enabling Northern Ireland and Scotland to remain within the EU.
68. There is one key lesson from the political science of multi-national states, such as the UK has been portrayed by its defenders. They are usually not destroyed by secessionists alone. Rather, the key trigger that leads to the break-up of such states is the unilateral adjustment of the terms of the union by the centre, without the consent of its multi-national components.<sup>12</sup> This is precisely the path upon

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<sup>12</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.

which a Conservative government with a parliamentary mandate confined to England, and a referendum mandate confined to England and Wales, seems now to be embarked upon. It should be encouraged to pause and think.