

Brexit and the Law School: Re-imagining EU Law

Report of a one-day workshop on re-imagining the teaching of EU Law

Monday 27 November 2017

IEL & CEPLER, Birmingham Law School

Edited by Martin Trybus

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Lesley Griffiths, CEPLER Senior Administrator: l.griffiths.1@bham.ac.uk

The logo for CEPLER, featuring the word "cepler" in a lowercase, sans-serif font. Above the letter "i" is a stylized white icon of a quill pen.

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Introduction

EU law has been taught at British law schools for decades, at Birmingham Law School since 1973. After the ‘Leave’ vote in the 2016 referendum and the 2017 triggering of Article 50 the United Kingdom will leave the European Union by late March 2019. This significant development raises questions about the future of practicing and teaching EU law in this country. Is Brexit a game-changer that will completely transform EU law teaching at our law schools, push it to the periphery, or make it completely disappear from our curricula? Or is it possible that EU law will become more complicated and thus it’s teaching more important than before? If EU law teaching needed to change, how so?

A workshop at Birmingham Law School, funded by Centre for Professional Legal Education and Research (CEPLER) and co-organised by CEPLER and the Institute of European Law (IEL), aimed to explore these questions on the future of EU law teaching at British law schools. The workshop was divided into two parts. In Part I “Who are the teaching for?” three speakers explored questions regarding Brexit and the legal professions. In Part II “What will we be teaching?” three speakers discussed how Brexit will affect the curriculum and teaching of EU law at UK law schools.

Part I: Who are we teaching for? Brexit and the professions

Dr Steven Vaughan (University College London):¹

When does EU law stop being part of the Qualifying Law Degree?

According to the Joint Statement of the Solicitors’ Regulatory Authority (SRA) and the Bar Standards Board (BSB), which entered into force in September 2002,

¹ Summarised by Martin Trybus.

<http://www.sra.org.uk/students/academic-stage-joint-statement-bsb-law-society.page>

[accessed 9 January 2018] the “Foundations of Legal Knowledge” are the key elements and general principles of the following areas of legal study: (1) public Law, including constitutional law, administrative law and human rights; (2) law of the European Union; (3) criminal law; (4) obligations including contract, (5) restitution and tort; (6) property law; and (7) equity and the law of trusts. Thus, for the moment, the knowledge of EU law remains one of the core requirements for the practice of law in England and Wales.

As part of the proposed Solicitor’s Qualifying Examination (SQE), <https://sra.org.uk/sra/consultations/solicitors-qualifying-examination.page> [accessed 9 January 2018], which is to replace the current Qualifying Law Degree (QLD) for solicitors by 2020 but not for barristers (who will continue to require a QLD), EU law is envisaged to remain part of the requirements. The crucial SQE Stage 1 Functioning Legal Knowledge assessments will include an assessment of the ‘Principles of Professional Conduct, Public and Administrative Law, and the Legal System of England and Wales’. For this assessment, candidates “are expected to draw on and apply knowledge from the following areas of law and practice: [1] ethics, professional conduct and regulation, [2] legal services, [3] constitutional law and EU law, [3] public and administrative law, [4] sources of law, [5] the Human Rights Act 1998 and Equality Act 2010, [and 6] the legal system of England and Wales.” A closer look at the EU law parts of the *Draft SQE Assessment Specification* specifies a number of specific issues that candidates need to know about. These are subdivided into a list of issues regarding “The place of EU law in the British constitution” and “An outline of the role of the institutions of the EU”. *The place of EU law in the British Constitution* lists: the effect of the European Communities Act 1972, regulations, directives, decisions, recommendations, opinions, and the legal position following the UK's exit from the EU. *An outline of the role of the institutions of the EU* lists: the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, and the legal position following the UK's exit from the EU.

In the 2013 Legal Education and Training Review (LETR) <http://www.lettr.org.uk/the-report/> [accessed 9 January 2018], practicing lawyers ranked the importance of knowledge subjects. European law was ranked 6th by barristers, 8th by solicitors and 11th by CILEX members. In comparison all ranked contract law 3rd, tort law 4th, equity 6th or 7th, criminal law 11th or 12th

and differed on land law and public law. International law also featured on this list of 16 – but at the bottom.

Overall, it is very (very) unlikely the QLD will change between now and 2020/the introduction of the SQE. The Bar is saying very little about the content of the QLD post 2020 vis-à-vis Brexit. The Bar Standards Board FBT March 2017 Policy Statement, [https://www.barstandardsboard.org.uk/media/1825162/032317_fbt -
_policy_statement_version_for_publication.pdf](https://www.barstandardsboard.org.uk/media/1825162/032317_fbt_-_policy_statement_version_for_publication.pdf) [accessed January 2018] merely states that “The law degree and GDL must cover the seven “Foundations of Legal Knowledge” as they currently stand, and the skills associated with graduate legal work such as legal research.” At the moment, SQE1 includes EU law and refers to Brexit. The crucial question of whether there will come a point in time at which the SQE does not include EU Law cannot be answered yet. “Our future relationship with the EU will shape what the lawyers of tomorrow need to learn”. For the moment, no dramatic changes are envisaged: “We are not proposing to remove EU Law from the curricula for the QLD/CPE at this time”. This is also due to the fact that in late 2017 the post-Brexit arrangements remain unclear: “Any future change would have to take into account the detail of our future relationship with the EU and consider the impact on the core skills and knowledge solicitors and barristers need”. While we are waiting for 2019 for this to become clearer: “[for the] near Future: EU Law remains core” However: “In the short to medium term: [...] Solicitors need to understand EU law and its impact on people, goods and services across EU and UK [, a]dvise people and businesses on their legal position[, and are n]eeded in government and private sector to prepare for the future”. Ultimately: “[o]ur future relationship with the EU will shape what the lawyers of tomorrow need to learn”.

Becket Bedford, Barrister (No. 5 Chambers):²

The EU Law expectations of the professions

The starting point of what a practicing barrister would expect from the teaching of EU law at British law schools in general and an undergraduate EU law module in particular is that, rather than covering highly specialised topics such as EU competition law, EU public

² Summarised by Martin Trybus.

procurement law, or the EU applying to State aids, the teaching should focus on the foundations of EU law, should follow a 'liberal arts approach' to EU law teaching. This would cover issues such as the EU institutions and the legislative process, how the EU interacts with the Member States, how the ECJ interacts with national courts, how EU law impacts on English law, and a basic understanding of the internal market regimes – to mention only my well-remembered lectures on the free movement of goods. This basic approach would in principle not be affected by Brexit. There are several reasons for this starting point. First, an undergraduate degree will normally not be sufficient to successfully establish oneself at the Bar, postgraduate degrees including a PhD and academic publications are often essential to build the necessary name in the field. Second, a great part of the necessary knowledge needs to be acquired through practice and intense research on the job. The 'liberal arts' approach of a focus on the foundations of EU law at the undergraduate level will ensure that further knowledge and degrees can be built on these foundations and the basic understanding will always further the understanding of the more specialised and detailed contexts needed later in practice. The teaching of these EU law foundations should be continued after Brexit because Brexit will make the law more complex and that will make the understanding of the foundations essential to understand the evolving legal context. Many colleagues who started their practice before me had to deal with cases severely affected by EU law without the benefit of having been taught these foundations and had to acquire this knowledge later.

Dr Julian Lonbay (University of Birmingham):

British lawyers and the EU: Free movement of legal services after Brexit?

There are just under half a million legal enterprises in Europe and well over 1 million lawyers. The legal sector represents 1.6% of the UK's GDP, employing over 370,000 people and earning a £3.4bn trade surplus (2015 figures). It is estimated that the UK's share of the global legal market is set at 7%, the second largest after the USA. There are 320 legal jurisdictions in the world and over 27% of them are based on common law. Roughly 40% of global arbitration agreements use English common law. The UK is by far the biggest legal market in the EU. According to the WTO 36.5% of global legal services revenue comes from Europe. The UK has had an open-door policy to overseas lawyers and

at least 200 foreign law firms are established here from over 40 jurisdictions. If one looks at the 100 largest law firms in the UK only 48% of their lawyers are based in the UK itself.

The EU's free movement of lawyers' regime is the most sophisticated and advanced system in the world for liberalising cross-border legal services. The nominate legal professions mentioned in Directives 77/249/EEC and 98/5/EC can freely provide legal services and establish under their home State title in other EEA Member States and in Switzerland. Under the Establishment Directive (98/5/EC) they can routinely join the host State's legal profession after three years regular and effective practice. Additionally, under the professional qualifications Directive 2005/36, they can use their existing legal professional membership to access, relatively easily, the host State legal profession. In these ways the numbers of dual-qualified lawyers is steadily increasing in Europe, and it is open for EU lawyers to practice elsewhere under their home State titles with ease. In addition to these legislative routes to cross-border legal practice, the case law of the Court of Justice of the EU, which facilitated the adoption of these Directives, also allows additional access routes through its interpretation of the Treaty provisions. For example, the *Morgenbesser* case opened up new trans-border routes for semi-qualified lawyers.

These open avenues to cross-border legal practice though are available only to EU nationals with the relevant qualifications. Should the UK leave the EU, then British lawyers, absent a trade deal, would lose their EU-based rights, though there may be some element of acquired rights, for those who have already utilised the EU trans-border regime. There could also be severe problems regarding the enforcement of judgments, which could affect the attractiveness of British conflict resolution.

EEA and Swiss lawyers in the UK, as well as British lawyers on the continent, will need to have their residence and social rights confirmed (or not). Assuming that this is achieved there are still problems to be overcome. Accessing the legal services market will depend, not on EU law, but on the scope of activities permitted in the 30+ countries individual national sets of legal rules covering access to their legal services markets and their GATS specific commitments. In some countries this will mean (assuming the lawyer gets through immigration and possible work permit regimes) that they can provide legal advice, for example in Belgium, where that is not a reserved activity to Belgian lawyers. In Germany (again assuming the lawyer gets through immigration and possible work permit regimes) British lawyers using British legal titles, would no longer be able to advise on German law or EU law, but only international law and British law. A British lawyer in Germany with, say, an Irish professional legal title, would be entitled to provide the full range of legal advice.

Overall the provision of temporary legal services (advice) (fly in/fly out) would be impossible in at least 12 Member States without a permanent presence. This will likely include English solicitors

giving legal advice on English law matters, to British citizens resident in that country (e.g. Spain). In other countries, such as Finland the giving of legal advice is not a reserved matter and so there would be no impediment (bar migration rights). Even in neighbouring Ireland, with its common law similarities, there could be difficulties. The title solicitor itself is protected in Ireland and Solicitors from the UK would have to distinguish themselves, and would be excluded for the Irish reserved areas of practice.

In four countries British lawyers would be unable to establish an office. Partnerships with local lawyers would be impossible in nine countries. An economic needs test would be applied in fourteen countries before work permits would be issued. There would be no right to re-qualify in thirteen Member States and a limited right to do so in a further eight Member States. Drawing up contracts would be prohibited in fifteen Member States.

Rights to representation in court would be severely curtailed and there would be no rights to appear in the Court of Justice of the EU. Rights of legal privilege would also be lost in EEA antitrust cases.

In the absence of a trade arrangement with the EEA post Brexit the UK legal services access to the EEA would be based on national law and on WTO and GATS law which essentially means relying on specific commitments made by EEA Member States. UK legal services with the rest of the world would not be affected massively as currently only one EU trade agreement in force cover legal services (the agreement with South Korea). However the legal services market in many jurisdictions is not generally easily accessible. The UK (and EU) have been knocking on Indian, Chinese, Brazilian, ASEAN and Japanese doors for years and little if any access has resulted. This contrasts starkly with the UK legal services actors access and success within the EEA States, a very wealthy legal market we may be foregoing. France and the Netherlands are in the process of setting up English language commercial courts, Germany has already English language dispute resolution using German law – do they scent the decline and descent of British lawyers?

Part II: What will we be teaching? Brexit and the law school

Professor Anthony Arnull (University of Birmingham):

The place of EU law in the law school curriculum after Brexit

I once heard someone say that EEC law was the only subject that law students needed to study. He was joking, but only partly. What he meant was that EEC law offered a complete lesson in how law, legal systems and courts worked and what law's relationship was with cognate disciplines, such as economics, history and politics. At that time – the mid 1980s -

EEC law was not a core subject. However, both the university where I worked then (Leicester) and the one where I work now (Birmingham) had decided to make it a compulsory part of their LLB programmes. It could be a hard sell. The passions aroused by UK accession had died down and many students found the subject dull and technical despite (or perhaps because of) the best efforts of enthusiasts. It was not until 1995, 22 years after UK accession, that EU law (as we now call it) became a core subject. There was smug satisfaction among specialists that the professions had at last woken up to the importance of the subject. At the same time there was concern that there would not be enough staff qualified to teach it. The demand for staff was in part met by an influx of highly qualified scholars from continental Europe who have in recent decades so enriched the climate in UK universities. Some of them are now leaving and we will be much the poorer for it. If anything, the argument for studying EU law has grown stronger over the years. EU law has acquired the scope and complexity of a national system. It underpins important areas of national law, such as discrimination law, environmental protection, asylum, intellectual property, consumer law, private international law, competition law, financial services, insurance. Like other subjects, it is studied from a range of different perspectives, from the doctrinal and the theoretical to the contextual and interdisciplinary. It is the focus of the scholarly activity for many who work in law schools across Europe and beyond. Ironically, Brexit has caused an explosion of interest in the subject among academics, students, politicians, publishers and the media. Is all this now at risk? I do not think so, although the way we present the subject to students may need to be rethought. The government has so far resembled the Keystone Kops in the way it has managed the withdrawal process.

- It called the referendum without any idea of what would be done in the event of a leave vote.
- It set an arbitrary deadline for triggering Article 50 which took no account of whether it would be prepared for detailed engagement with the EU.
- Its intransigence meant that it lost an entirely unnecessary legal challenge.
- It decided to hold a general election after instead of before triggering Article 50.
- It failed to make an early unilateral offer on citizens' rights and then found it had been trumped by a more generous offer by the EU.

- Its proposals for avoiding a hard border with Ireland were dismissed by the EU as ‘magical thinking.’
- Its allegedly improved offer on the divorce bill could have been made months ago and might have enabled the talks to move on to our future relationship with the EU by now.

There remains a great deal to do before the expiry of the two-year deadline laid down in the Treaty. The talks could break down at any point. This would confront us with the famous ‘no deal’ scenario. ‘No deal is better than a bad deal’, announced the PM in her Lancaster House speech. That seemed to assume that there would actually be a deal that could be rejected as worse than no deal. If the talks break down prematurely, we would not have the luxury of choice and would inevitably be unprepared for the consequences. However, the PM admitted during the election campaign that the consequences for the UK of leaving without a deal would be ‘dire’ and she did not mention the ‘no deal’ scenario in her Florence speech. So we can at least be reasonably confident that the government will do its best to reach an agreement that it is prepared to defend in parliament.

- That agreement may well involve a transitional period of around two years, during which life may (or may not) carry on much as it did before.
- It may involve a continuing role for the ECJ in resolving disputes pending at the withdrawal date or over the application of the withdrawal agreement.

If a withdrawal agreement is concluded, it will set out the framework for the UK’s future relationship with the EU. It won’t be possible to conclude an agreement on this until the UK has become a third country. This means that there may have to be further negotiations to flesh out the framework agreed in the withdrawal agreement. Those negotiations will cover substantive issues, eg

- the movement of goods and services,
- police and security cooperation
- procedural issues like dispute resolution.

Most observers think they could take years to complete (though the government continues to think that they can be completed before 29 March 2019). Domestically, parliament faces

a packed legislative agenda. The Withdrawal Bill, described by Dominic Grieve as a 'monstrosity', is currently at the committee stage in the HoC and has attracted nearly 400 proposed amendments. There are seven additional Brexit bills: customs, trade, immigration, fisheries, agriculture, nuclear safeguards, international sanctions. They are likely to consume vast amounts of parliamentary time. Assuming an agreement is reached, perhaps involving a transitional period of two years or so, what would the implications be for the UK law school curriculum? Students are likely to be interested in the many legal questions Brexit will raise, questions of both domestic law and EU law. The very process of Brexit offers an excellent case study in the issues and trade-offs that EU membership raises and how effective the EU can be. Much legal business is likely to be generated as businesses and individuals who have arranged their affairs on the basis of continued UK membership seek advice on how best to protect their position. Those who give such advice will require an understanding of the system in the EU27 as well as the emerging EU/UK relationship. Law schools will therefore want to ensure that their students are equipped to function in this fluid environment, which will be more complex than previously. A premium may be placed on the ability to speak European languages, since there is doubt about the extent to which English will be used by the EU after the departure of the UK. It is possible to envisage a range of models.

- A reshaped core module, with or without elements of Brexit-related material inserted into other modules too.
- The replacement of the core module with optional bespoke Brexit-related modules aimed at potentially large numbers of students (cf Company Law, Family Law).
- The preservation of a core module and specialized optional modules on Brexit-related topics.
- The disappearance of the core module, with greater reliance on other modules for the delivery of Brexit-related material where relevant. This would probably be the least satisfactory approach, because it would make it more difficult to see the Brexit process in the round and to use Brexit to illuminate other aspects of EU law.

The model chosen by individual universities may reflect local contexts, such as the interests and availability of staff. Some law schools, particularly if they have up till now made EU law a priority, may wish to retain its compulsory status. Where this is not done, it will revert to

optional status, the position before 1995. However, we configure our individual responses to the new reality, much of what we currently do will need to be preserved, such as the law of the institutions, the nature of EU law and the jurisdiction and approach of the ECJ. It will be helpful if this can be covered in the 1st or 2nd year, so that it can be taken as read in more advanced final year modules.

What if there is no withdrawal agreement? In that event, the situation would be very messy and replete with legal and political problems, the proverbial lawyers' paradise. Many of these will involve sorting out the issues that should have been addressed in the withdrawal agreement. We already have a rough idea of what our future trading arrangements with the EU27 would look like in the absence of a free trade agreement (WTO). From a teaching and research point of view, there would be a great deal to work out and clarify. In these circumstances, there is likely to be greater need for collaboration with specialists in other areas of the law, eg public law, contract, tort.

[EU law is not at present one of the 6 'Functioning Legal Knowledge Assessments' that will make up stage 1 of the new SQE. I understand that the Bar is not following the SQE route of a centralized super-exam. Few law schools will wish to turn their backs on applicants who are interested in a career at the Bar, so the curriculum will need to continue to cater for the needs of those hoping to enter either branch of the profession.]

This all points to continued coverage in universities of EU law and the relationship between the EU and the UK for the foreseeable future.

Dr Joëlle Grogan (Middlesex University)

Breaking down Brexit: Adapting the EU Law module to a changed legal landscape

Brexit has created a situation of uncertainty for legal practice and academia. For law lecturers, the current approach to teaching EU law is to continue with the status quo, with additional references to Brexit where relevant. This is likely to continue to at least the end of the 2018/2019 academic year. The significant amount of legal work which will be created as a consequence of Brexit, will mean that competence in EU legal skills will be a significant asset to law graduates, and in-demand among legal professionals. Adapting a future module

for EU law, post-Brexit, will necessarily need to take into account the range of skills and expertise needed to navigate a complicated and changed legal landscape. To prepare students and practitioners for such a post-Brexit landscape, I outline a tripartite framework for teaching an EU law course which reflects the changed demands and expectations of practice in this area. It breaks down the course into three driving themes:

1. a contextual understanding of the EU and its relationship with the UK;
2. a focus on the practical mechanics of the UK/EU relationship post-Brexit (the so-called 'external dimension' of Brexit, incorporating analysis of the UK's relationship with(in) the Single market); and
3. critical engagement with the interpretation of EU-derived UK law post-Brexit (the 'internal dimension' of Brexit, critically engaging with incorporated and EU-derived British law).

Echoing a key theme of the day, a primary learning goal of the course focused on the development of problem-solving skills in law students. This course proposed a shift in focus to adapt to a new relationship and new framework of EU legal study, but without a significant shift in the narrative of EU law, emphasising the need to teach and incorporate values which underpin the subject.

Professor Martin Trybus (University of Birmingham):

From EU law to International Trade Law?

A compulsory undergraduate module on EU law, called 'Legal Foundations of the European Union' (LFEU) at Birmingham Law School, was originally introduced into the curricula of many law schools because the United Kingdom joined the EU. The country participates in legislation as a full Member State of the EU, citizenship and the free movement of workers affect the lives of many UK residents and of UK citizens in other Member States, the Internal Market regimes affect UK business, direct effect makes EU law enforceable in UK courts, a growing body of EU regulations is directly applicable in the UK, and ECJ case law is essential for the understanding of UK and English law, many sources of UK law originated in EU law or are influenced by it. In this 2nd year LFEU module we currently cover the free movement of goods (as an example for the Internal Market regimes); the EU institutions, legal bases,

secondary legislation, and law making; the EU's constitutional mechanisms, such as supremacy, direct effect, indirect effect, and State liability; the relationship of the ECJ with national courts through preliminary references; actions for annulment in the ECJ; and the enforcement of EU law in the ECJ. Additionally, in a 3rd year optional module 'Advanced Law of the European' Union (ALEU) we cover EU competition law, State aids, the free movement of workers and services, and EU citizenship.

Despite the fact that the future arrangements with the EU remain unclear, the following seven broad possible scenarios can be identified: (1) the UK remains in the EU; (2) the UK leaves the EU but joins the European Economic Area (Norway option); (3) the UK leaves the EU but stays in the Internal Market (Switzerland option); (4) the UK leaves the EU but enters a comprehensive trade deal with EU (Canada option); the (5) UK leaves the EU with a limited trade agreement with EU (Ukraine option); (6) the UK leaves the EU without a trade agreement (WTO option); or the (7) the UK leaves the EU and the WTO (North Korea option). Despite some necessary changes, a compulsory undergraduate EU law module would remain viable for: (1) the remain option; (2) the Norway option, (3) and the Switzerland option. A new module in 'International Trade Law' is suggested to be necessary for: (4) the Canada option; (5) the Ukraine option; and (6) the WTO option. Neither an EU nor an International Trade Law course would be required should the UK opt for the (7) North Korea option. In that case EU law would simply be removed from the curriculum. In case of (1) remain, the insertion of the history of the Brexit process into the course would suffice (and this already happened for LFEU at Birmingham). In case of (2) Norway, we should insert the foundations of the EEA, the EFTA Court, and the differences to EU membership. Moreover, we should amend the section on the role of the ECJ, and the EU institutions and law making. Finally, we should probably delete the sections on preliminary rulings, enforcement actions, annulment, (in)direct effect, and State liability. In case the UK opts for (3) a Switzerland approach, we would insert a section on replicating EEA membership through international law, amend the sections on the role of the CJEU, the EU institutions and law making, and delete the sections on preliminary rulings, enforcement actions, annulment, (in)direct effect, and State liability. In case the UK decides to follow (4) the Canada option, (5) the Ukraine option, or (6) the WTO option, EU law would only be a part of a wider 'the law of the UK and European trade' subject. This would probably lead to the

insertion of topics such as foundations of international law, international trade law, the specific arrangements of the new deal (this would no longer be EU law), and dispute settlement. Moreover, the sections on the free movement of goods (and services), the EU institutions and law making, and (in)direct effect would have to be amended. Finally, the current sections on preliminary references, annulment, enforcement, and democracy would have to be moved to the third year optional ALEU module. The main question would have to be to what extent English students still need to know about features of a legal order in which they no longer directly participate. Thus, while in the current LFEU module there are for example seven seminars: on the free movement of goods; EU institutions, law making, and democracy; primacy, direct effect, and State liability (2 seminars); annulment and preliminary rulings; infringement actions; and Brexit – a possible future International Trade Law module would rather offer seminars on the free movement of goods & services; sources of international law; principles of the new UK/EU trade agreement; dispute settlement; principles of EU law; and Brexit.

Conclusions

There was no momentum for dramatic changes to the teaching of EU law at British law schools, neither from the professions, the government, or the schools themselves, neither at the time of the workshop in November 2017 nor at the time of writing these conclusions in March 2018. This is not that surprising, since even a year before Brexit the future relationship of the UK with the EU remains unclear and a transition period of two years is possible. Thus, there is a strong argument to carry on as before for the time being. Minor changes, especially concerning Brexit itself, have already been inserted into the EU law modules of most law schools. More significant changes can only be made once the future relationship becomes clear and that might well be only after March 2019. Overall, it is possible that Brexit will not lead to the disappearance of EU law from the curricula of British law schools but rather make the subject more complicated, relevant, and therefore necessary to be taught as part of a UK law degree programme.