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Teaching European Union Law after Brexit

Stuart MacLennan*

Abstract

European Union law has been an integral part of the legal order of the United Kingdom for over 40 years, and features in every qualifying law degree taught in the UK at the date of country's departure from the EU. The United Kingdom's decision to leave the European Union (Brexit) radically alters the nature and effects of EU law in the UK's legal jurisdictions. It is, consequently, necessary for those responsible for teaching EU law within UK law schools to reflect and, potentially, fundamentally redesign their EU law modules. This article commences with a consideration of what constitutes the 'typical' EU law module in order to determine those areas of EU law teaching most likely to be affected by Brexit. This article proceeds to consider both the new sources of law with which students will have to become familiar, as well as changes to existing content necessitated by Brexit. This article then seeks to 'reimagine' European Union law after Brexit through consideration of the teaching of EU law outside of the EU. While it may be possible to emulate the approach of certain non-EU law schools the uniqueness of the United Kingdom's position after Brexit means that a bespoke approach to the teaching of EU law after Brexit is necessary.

Keywords: EU law, curricula, Brexit, legal education

Introduction

The United Kingdom's exit from the European Union ('Brexit') poses a litany of challenges to UK law schools. In the context of increasing student numbers, increasing competition, and increasing student expectations, the additional challenges imposed by Brexit are a growing cause for concern. These challenges include recruiting EU students, recruiting and retaining EU-nationals as staff, access to EU research funding and collaborative research

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projects, as well as the broader reputation of the UK's academic community in light of the UK's decision to retreat from European integration.¹ In addition to these broad, sectoral challenges, however, there is a small group of academics with an acute Brexit-related problem: the professors and lecturers of European Union law.

EU law has been an integral part of the legal order of the UK since 1973, and features in every qualifying law degree taught in each of three jurisdictions – Scotland, England & Wales, and Northern Ireland – at the date of the UK's exit. It is, consequently, necessary for those responsible for teaching EU law within UK law schools to reflect and, potentially, fundamentally redesign their EU law modules and courses in light of the decision to leave the EU.

Of course, Brexit has an impact beyond the direct study of EU law. Brexit has a profound effect on the study of UK constitutional law, and competition law; as well as substantial marginal effects, at a minimum, on the study of contract and obligations, family law, taxation law, employment law, commercial law, and consumer protection, among others. The need for law schools to adapt to this new reality is clear.

This article commences with a consideration of the requirements of the professional bodies² with respect to the teaching of EU law in UK law schools, as well as the contents of 'typical' EU law modules. On the basis of those 'typical' EU law modules this article proceeds to consider the new knowledge and skills students will need to acquire in these modules, in particular with respect to the sources of EU law, the role of EU law in the courts, the free movement of goods, and the free movement of persons. This article concludes that while EU law will continue to be an important part of legal education in the UK it may be necessary to 'reimagine' both the contents and objectives of the study of EU law.

The 'typical' EU Law module

The teaching of EU law is not limited to European law schools. The Jean Monnet programme finances EU law modules, research centres, and chairs

¹ Ludovic Highman, 'Future EU-UK Research and Higher Education Cooperation at Risk: what is at stake?' (2019) 25(1) *Tertiary Education and Management* 45.

² The Solicitors Regulation Authority and Bar Standards Board in England and Wales, the Law Society and Faculty of Advocates in Scotland, and the Law Society and Bar of Northern Ireland.

around the world,³ while the European Union funds the China-EU School of Law in Beijing.⁴ Many of the leading scholars in EU law are affiliated with institutions beyond Europe, including Professors Weiler and de Búrca at New York University, and Professor Martínez Sierra at Harvard. The overwhelming focal point for the study of EU law, however, is Europe.

In the United Kingdom, the study of the law of the European Union is a compulsory element of legal qualification in each of the UK's three legal jurisdictions. In England and Wales, both the Bar Standards Board and Solicitors Regulation Authority require the study of EU law as one of the 'foundations of legal knowledge'.⁵ Likewise, the Law Society of Northern Ireland requires the study of 'European Law'.⁶ While the English and Welsh requirements are not particularly prescriptive, the Law Society of Scotland sets more detailed requirements in its Foundation Programme Learning Outcomes. In order to qualify as a solicitor, and, therefore, subsequently, an Advocate, a student must have studied

The constitutional structure and competence of the EU and allocation of competencies between the EU and Member States.

The sources of EU law, EU institutions and the legislative process.

The relationship of EU law and national law, including domestic and EU remedies.

³ European Commission, 'Jean Monnet Programme' <https://ec.europa.eu/programmes/erasmus-plus/opportunities/jean-monnet_en> accessed 15 January 2020.

⁴ China-EU School of Law, 'The School' <http://en.cesl.edu.cn/About_us/The_School.htm> accessed 15 January 2020.

⁵ General Council of the Bar and Law Society of England and Wales, 'Joint Statement on the completion of the initial or academic stage of training by obtaining an undergraduate degree' (1999) <<https://www.sra.org.uk/globalassets/documents/students/academic-stage/academic-stage-handbook.pdf>> accessed 5 November 2019. This statement has subsequently been adopted by the Bar Standards Board and Solicitors Regulation Authority.

⁶ Law Society of Northern Ireland, 'Solicitors Admission and Training Regulations 1988', Regulation 8(1) (1988) <<https://www.lawsoc-ni.org/DataEditorUploads/Solicitors%20Admission%20Training%20Regulations%201988.pdf>> accessed 5 November 2019.

The principles of the EU single market.⁷

The importance of studying EU law is recognised by the report of the Legal Education and Training Review (LETR). In a survey of the legal professions, the LETR found that, as a subject, European Law ranked highly among both barristers and solicitors as important knowledge for legal services providers.⁸

As an academic discipline European Union law has developed somewhat independently from broader legal scholarship. The academy of EU lawyers, much like those working in EU institutions, was originally drawn from various and previously somewhat disconnected disciplines.⁹ As EU law developed so did its scholarship, with a new generation of Community legal scholars emerging.¹⁰ Yet, despite European Union law increasingly pervading so many fields of legal scholarship, European Union law has always been regarded as something of an anomaly in legal education. It is extremely uncommon for EU law to simply be integrated into the study of domestic law.¹¹ Instead, EU law is overwhelmingly taught

within the confines of a national university system, in which the emphasis is clearly on learning about the national legal system first, and learning about European Union law (if at all) in the light of the categories and ways of argument of the national system.¹²

While UK law schools are fairly consistent in having a standalone EU law module in their qualifying law degree (QLD) programmes, there is a significant degree of divergence with respect to the size of these modules and their

⁷ Law Society of Scotland, 'Foundation Programme Learning Outcomes' <<https://www.lawscot.org.uk/media/359158/foundation-programme-outcomes.pdf>> accessed 5 November 2019.

⁸ Legal Education and Training Review, 'The Future of Legal Services Education and Training Regulation in England And Wales' (2013) <<http://www.lettr.org.uk/wp-content/uploads/LETR-Report.pdf>>, 34, accessed 7 November 2019.

⁹ Andreas M. Donner, 'The Court of Justice of the European Communities' (1961) 1 *International and Comparative Law Quarterly Supp.* 66.

¹⁰ Bruno de Witte, 'European Union law: a unified academic discipline?' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe: European law as a transnational social field* (Hart Publishing 2013) 101.

¹¹ Although this approach is being taken by the SRA for the new Solicitors Qualifying Examination, see Solicitors Regulation Authority, 'Solicitors Qualifying Examination' <<https://www.sra.org.uk/sra/policy/sqe/>> accessed 18 January 2020.

¹² *Supra* n. 10, 107.

contents. While Swansea University’s mandatory ‘European Union Law 1 & 2’ modules bear 15.0 ECTS credits between them, the University of Edinburgh’s sole mandatory module, ‘European Union Law (Ordinary) A’, carries a mere 5.0 credits. Typically, however, EU law modules in UK law schools carry 7.5-10.0 ECTS credits.

Table 1: Contents of EU Law modules in UK law schools based on published module descriptors

	EU Institutions & Law Making	Supremacy and Legal Effects	Judicial Action	Free Movement of Goods	Free Movement of Workers	EU Citizenship	Freedom of Establishment	Free Movement of Capital	Competition Law	Equalities & Fundamental Rights	Consumer Protection	EU Criminal Law	Internal Market (generally)
Abertay	✓	✓	✓	✓	✓	✓	✓	✓		✓			
Aberystwyth	✓	✓	✓	✓									
Birmingham	✓	✓	✓										✓
Bristol	✓	✓	✓							✓			
Coventry	✓	✓	✓	✓	✓	✓			✓				
Durham	✓	✓	✓										
Edinburgh	✓	✓	✓							✓			✓
Essex	✓	✓	✓	✓	✓		✓		✓		✓		
Glasgow Caledonian	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓			
Keele	✓	✓	✓			✓				✓			
Kent	✓	✓		✓	✓	✓	✓			✓			
Lancaster	✓	✓	✓	✓	✓	✓	✓		✓	✓			
Leeds	✓	✓	✓	✓	✓	✓	✓		✓				
Lincoln	✓	✓	✓	✓	✓	✓				✓		✓	
Liverpool	✓	✓	✓	✓	✓	✓							
Nottingham	✓	✓	✓										✓
Queens, Belfast	✓	✓	✓	✓	✓		✓	✓					
RGU	✓	✓		✓	✓	✓	✓						

Roehampton	✓	✓	✓										
Royal Holloway	✓	✓	✓	✓	✓		✓	✓					
Surrey	✓	✓	✓	✓	✓	✓	✓			✓		✓	
Swansea	✓	✓	✓	✓									
UCL	✓	✓		✓		✓				✓			
Warwick	✓	✓	✓	✓	✓	✓							

Similarly, with respect to content, while some topics appear extremely consistently, others are more sporadic. Every single standalone module surveyed teaches EU institutions and law making as well as the legal effects of EU law, while most modules also cover the Court of Justice/judicial action. This is, perhaps, unsurprising given that these can be seen as the foundational knowledge necessary to understand how the domestic legal system interacts with the EU's legal order. The overwhelming majority of modules surveyed also cover some elements of substantive EU law, in particular the free movement of goods, while aspects of free movement of persons are also covered in a majority of modules. While competition law was previously commonplace in EU law modules it is now something of a rarity. The free movement of capital, EU equalities law, and consumer protection, and EU criminal law are similarly rare. The 'typical' EU law module can, therefore, be said to include EU institutions and law-making, the legal effects of EU law, judicial action, the free movement of goods and the free movement of persons.

New sources of EU Law

The first significant change to the teaching of EU law necessitated by Brexit is a need for students to appreciate the new sources of law that will exist in the legal system of the United Kingdom. First, the Withdrawal Agreement between the UK and EU & Euratom constitutes a new EU treaty.¹³ Second, while the European Communities Act 1972 is (notionally) repealed on exit day the European Union (Withdrawal) Act 2018, as amended, preserves the effects of the 1972 Act while transforming what we now know as EU law into a new source of law which has come to be known as retained EU law.

¹³ Department for Exiting the European Union, 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (HMSO 2019a) ('Withdrawal Agreement').

Withdrawal Agreement

The Withdrawal Agreement is a new EU treaty which ranks alongside the TEU, the TFEU, and the Charter of Fundamental Rights. Article 4 of the Withdrawal Agreement provides that

[t]he provisions of [the] Agreement and the provisions of Union law made applicable by [the] Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Accordingly, legal or natural persons shall be able to rely directly upon the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.¹⁴

The Withdrawal Agreement, therefore, has direct effect both vertically and horizontally provided it meets the criteria set out in the case law of the Court of Justice, in particular in *van Gend en Loos*.¹⁵ The Withdrawal Agreement has extensive legal effects, institutional and substantive, both during the transition period and afterwards. Substantive provisions that might be of particular relevance to undergraduate law students include residence rights for UK and EU workers and Citizens, recognition of professional qualifications, circulation of goods placed on the market prior to exit day, and co-operation on judicial, criminal, and commercial matters. The agreement also makes provision for continued access to the Court of Justice during the transition period as well as the continuance of the preliminary ruling procedure with respect to the Withdrawal Agreement for a period of eight years from the end of the transition.¹⁶

In particular, part four of the withdrawal agreement provides for a transition period running until 31 December 2020 which is extendable until 31 December 2022, however, the European Union (Withdrawal Agreement) Act 2020 provides that the implementation period ‘completion day’ means 31 December 2020 at 11.00pm. Under s1 of the European Union (Withdrawal) Act 2018 (the 2018 Act) the European Communities Act 1972 (the 1972 Act) is repealed on

¹⁴ Article 4, Withdrawal Agreement.

¹⁵ Case 26/62, *van Gend en Loos* [1963] ECR 1.

¹⁶ Article 158, Withdrawal Agreement.

exit day. s1A of the 2018 Act, however, introduces a rather convoluted workaround to maintain much the effect of the 1972 Act during the transition period notwithstanding the 1972 Act's repeal. Under s1A, the 1972 Act continues to have effect during the transition period insofar as is necessary to give effect to the Withdrawal Agreement. Furthermore, as a legally binding treaty the United Kingdom will continue to be bound by the contents of the Withdrawal Agreement long after the end of the transition period, albeit without the direct effect that EU treaties enjoy at present. Consequently, it will be important for students to be familiar with the Withdrawal Agreement for many years to come.

Retained EU law

The 2018 Act contains a number of provisions which have the effect of 'freezing' EU law on exit day and incorporating the *acquis communautaire* of EU law, with limited exceptions, into domestic law. s2(1) of the 2018 Act provides that 'EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.' s2(2) defines such legislation as any enactment 'made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972' or anything made or operating for the purpose of implementing any EU law obligation. This will include a number of pieces of EU-derived domestic legislation of relevance to undergraduate students, such as the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which implements Directive 2011/83/EU (the Consumer Rights Directive).

Section 3 of the 2018 Act provides for the incorporation of direct EU legislation including any EU regulations, EU decisions, and EU tertiary legislation. s3(2)(a) excludes from this saving the measures specified in schedule 6, decisions addressed to Member States other than the United Kingdom, and measures the effects of which have been reproduced in domestic law. Such legislation is only retained in its English language form and is not retained where no English language version exists.¹⁷ A question therefore arises with respect to direct EU legislation, for example a decision, which has been reproduced in regulations made under s2(2) of the 1972 Act but whose reproduction is imperfect or incomplete. It is arguable that measures which, on

¹⁷ s3(4).

their face, appear to be excluded by virtue of s3(2)(a) are, in fact, directly incorporated in such circumstances.

Section 4(1) of the 2018 Act provides for a broad general saving of EU rights:

Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly

continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

Exactly what constitutes recognition and availability in domestic law is open to question. It is not at all clear if recognition by a court or tribunal is necessary in order for an EU law right to be relied upon after Brexit. For example, the principle of subsidiarity is a widely recognised general principle of EU law, yet one which has never actually been successfully relied upon in the Court of Justice.¹⁸ It is unclear whether or not the principle is one that can be relied upon in a domestic court after Brexit given that it has never been ‘enforced’ prior to exit day. The contrast between the broad saving for rights under s4(1) and the more limited saving for directives under s4(2) is significant.

Notably, the saving in s3 of the 2018 Act does not extend to directives. Directives do not automatically have direct effect, however, a directive may have vertical direct effect only¹⁹ where the criteria set out in *Van Duyn* has been

¹⁸ In cases such as Case C-84/94, *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755 and Case C-491/01, *British American Tobacco* [2002] ECR I-11453 the Court avoided relying upon the principle of subsidiarity as advocated by the claimants and instead relied upon the principle of proportionality.

¹⁹ Case 152/84, *Marshall v. Southampton and SW Hampshire Area Health Authority* [1986] ECR 723.

fulfilled.²⁰ In effect, a directive can only produce legal effects against a public body where that directive has not been adequately implemented by the Member State concerned and the directive creates a clearly identifiable and justiciable right that ought to be capable of being relied upon against that state. Evaluating the legal effectiveness of a directive therefore requires students to understand the process for implementation of directives, to be able to identify justiciable rights, and to appreciate the distinction identified in cases such as *Foster*²¹ between the state and non-state actors.

Section 4(2) poses arguably the greatest intellectual challenge to the post-Brexit undergraduate student. Under s4(2) rights derived from directives are not retained in UK law unless the right arising under a directive is

of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case).²²

It will therefore be necessary for students to perform an additional step and determine whether or not any right that might be available under a directive has previously been recognised by a court or tribunal prior to exit day. Further questions arise with respect to what constitutes ‘recognition’ by a court. As with the broad saving provided for by s4(1) it is likely that a body of jurisprudence will develop as to what constitutes ‘recognition’ with which future law students will need to be familiar.

Institutional provisions

The study of EU institutions is a common component of most EU law modules. The inclusion of EU institutions makes logical sense insofar as the study of domestic law invariably includes the study of constitutional law. Furthermore, an understanding of the decision-making and legislative processes in the EU is necessary in order to properly understand, *inter alia*, the operation of Article

²⁰ Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337. For an extensive disquisition on the legal effects of directives see Paul Craig, 'The Legal Effect of Directives: policy, rules and exceptions' (2009) 34(3) *European Law Review* 349; Michael Dougan, 'The "Disguised" Vertical Direct Effect of Directives?' (2000) 59(3) *Cambridge Law Journal* 586.

²¹ Case C-188/89, *Foster v British Gas* [1990] ECR I-3313.

²² s4(2)(b).

263 TFEU. Critiques of the democratic (or otherwise) nature of EU institutions are equally commonplace in EU law modules,²³ although their relevance to the prospective legal practitioner is highly questionable.

The most immediate consequence of Brexit is the United Kingdom's exclusion from participation in EU institutions. From the moment the Prime Minister notified the European Council of the UK's intention to leave under Article 50 TEU the UK has been (logically) excluded from participation in the European Council with respect to Brexit negotiations. Immediately upon the UK's exit from the EU the UK no longer participates in

the nomination, appointment or election of members of the institutions, bodies, offices and agencies of the Union, as well as the participation in the decision-making and the attendance in the meetings of the institutions.²⁴

This exclusion takes effect immediately upon exit day, and not at the conclusion of the transition period. Furthermore, during the transition period 'provisions of the Treaties which grant institutional rights to Member States enabling them to submit proposals, initiatives or requests to the institutions' no longer apply to the UK. It is arguable, therefore, that the need to devote substantial attention to the institutional provisions of the EU is greatly diminished. Oslo University, situated outside of the EU but within the European Economic Area, offers two modules – EU Substantive Law and EU Competition Law – which are concerned, principally, with the law of the EU internal market, including the external dimension of the internal market, the Common Commercial Policy. These modules offer little consideration of the institutional legal frameworks of the EU.²⁵

The Withdrawal Agreement, however, establishes new institutional structures which may be of relevance to law students. Article 164 establishes a Joint Committee to oversee the implementation of the EU withdrawal agreement, while Article 165 establishes a number of specialised committees, including a committee on citizens' rights, a committee on issues related to the

²³ See, for example, Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, OUP Oxford 2015) ch. 5 and Tony Storey and Alexandra Pimor, *Unlocking EU Law* (5th edn, Routledge 2018) ch. 2.

²⁴ Article 7(1), Withdrawal Agreement.

²⁵ University of Oslo, 'Courses in Law' (*University of Oslo*)

<<https://www.uio.no/english/studies/courses/law/>> accessed 26 February 2020.

implementation of the Protocol on Ireland/Northern Ireland, and a committee on financial provisions. These committees have the power to make decisions which produce legal effects, as well as recommendations.²⁶ The Withdrawal Agreement also provides for an arbitration procedure rather than recourse to the Court of Justice.²⁷

Consequently, while it will likely be necessary for students of EU law to be familiar with EU institutions and legislative processes in the future, its direct relevance to the UK legal order will be greatly diminished. For several years after Brexit the Joint Committee will play an important role in the disintegration of the UK from the EU, although it is unlikely that the Committee will continue to exist in the 2030s. It is appropriate, therefore, for the role of EU institutions in EU law modules in the UK in the future to be reviewed.

EU Law in the Courts after Brexit

During the transition period the Court of Justice will continue to have jurisdiction in actions brought against the United Kingdom.²⁸ Furthermore, it will continue to be possible to refer matters to the Court of Justice for a preliminary ruling until the end of the transition period.²⁹ The jurisdiction of the Court of Justice over the UK is not, however, completely extinguished at the end of the transition period.

Under Article 87 of the Withdrawal Agreement the European Commission can initiate enforcement proceedings against the UK in the Court of Justice for a period of up to four years after the end of the transition period. Such an action can concern not only breaches of the Withdrawal Agreement but the EU Treaties more broadly.

The European Commission will continue to have jurisdiction over competition and state aid matters for a period of four years after the transition period.³⁰ If the United Kingdom fails to give adequate effect to decisions of the

²⁶ Article 166, *ibid.*

²⁷ Article 170, *ibid.*

²⁸ Article 86(1), *ibid.*

²⁹ Article 86(2), *ibid.*

³⁰ Articles 92 & 93, *ibid.*

Commission during this period then the Commission can initiate enforcement proceedings against the UK in the Court of Justice.

While the preliminary ruling procedure will come to an end following the transition period³¹ there is no nationality requirement with respect to direct actions before the Court of Justice. It is not unusual for third-country nationals or undertakings to bring actions for annulment before the Court of Justice where they have direct and individual concern – in particular within the field of competition law.³² It is likely, therefore, that Article 263 TFEU will continue to be of considerable relevance to undergraduate law students.

Furthermore, the jurisprudence of the Court of Justice will continue to have salience within the UK's domestic legal order. The incorporation of direct EU legislation and the broad saving for rights under ss3 & 4 of the 2018 Act brings with it the jurisprudence of the Court that interprets it.³³ Under s6 of the 2018 Act domestic courts and tribunals are 'not bound by any principles laid down, or any decisions made, on or after [the end of the transition period] by the European Court'.³⁴ A court or tribunal, however, 'may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal'.³⁵ This means that it will not only be necessary for students of EU law to learn pre-Brexit case law; post-Brexit case law is likely to be of salience for years to come. It is also likely that, in future, domestic courts will develop jurisprudence for determining whether or not post-Brexit case law is 'relevant' to any matter under consideration.

Trade in goods after Brexit

The form of Brexit being pursued by the British Government means that there will be significant changes to the rules surrounding trade in goods between the UK and the EU. This is particularly the case following the failure of the former Prime Minister Theresa May's Withdrawal Agreement and Political Declaration.

³¹ s6(1)(b) European Union (Withdrawal) Act 2018.

³² For a recent example see Case C-590/18 P, *Fujikura v Commission* [2019] ECLI:EU:C:2019:1135.

³³ s6(3) European Union (Withdrawal) Act 2018.

³⁴ s6(1)(a) European Union (Withdrawal) Act 2018.

³⁵ s6(2) European Union (Withdrawal) Act 2018.

The original political declaration envisaged a relationship that involved

no tariffs, fees, charges or quantitative restrictions across all sectors, with ambitious customs arrangements that, in line with the Parties' objectives and principles above, build and improve on the single customs territory provided for in the Withdrawal Agreement which obviates the need for checks on rules of origin.³⁶

The political declaration also indicated that the UK would 'consider aligning with Union rules in relevant areas.'³⁷ Such an arrangement was, understandably, described as a 'customs union in all but name'³⁸ and would likely have necessitated almost-unmodified study of the EU's rules on free movement of goods.

Boris Johnson's accession to the Premiership is arguably a direct result of Mrs May's agreement. To the surprise of many Mr Johnson succeeded in negotiating a revised Withdrawal Agreement and Political Declaration with a much looser future relationship at its core. The new Political Declaration envisages 'an ambitious trading relationship on goods on the basis of a Free Trade Agreement, with a view to facilitating the ease of legitimate trade.'³⁹ The declaration concedes that rules of origin will be required, thus underlining the looseness of the relationship.

It, therefore, seems likely that the future UK-EU trading relationship will have to be read in the context of the General Agreement on Tariffs and Trade.⁴⁰ Students may need to become familiar with key domestic legislation on imports and exports, including the Customs and Excise Management Act 1979 and the

³⁶ Department for Exiting the European Union, 'Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' (HMSO 2018).

³⁷ *Ibid.*

³⁸ 'May 'on verge of caving in to Labour' Ministers fear PM is preparing to sign off on 'customs union in all but name' to seal Brexit deal; Hopes for Brexit deal' *Daily Telegraph (London, England)* (1 May 2019) 1 <<https://www.telegraph.co.uk/politics/2019/04/30/theresa-may-preparing-cave-labour-demands-brexiteuroseptic/>> accessed 14 May 2020.

³⁹ Department for Exiting the European Union, 'Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom' (HMSO 2019), para. 19.

⁴⁰ General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 U.N.T.S. 194.

Import, Export and Customs Powers (Defence) Act 1939. Similarly, it will likely become necessary for students to study the Common Commercial Policy and the common rules for imports.⁴¹

Free movement of persons after Brexit

There is little denying that ending the free movement of persons under EU law has been a major objective of the UK Government throughout the Brexit process. In December 2018 the Home Office published its white paper on the UK's post-Brexit immigration policy which proposes, *inter alia*, to roll-up EU and non-EU migration into a single policy.⁴² Despite this, however, under the Withdrawal Agreement the free movement provisions of EU law look set to remain an important part of UK immigration law.

Part 2 of the Withdrawal Agreement provides for continued residence rights both for Union citizens residing in the UK and for UK nationals resident in the EU ('continuing residents'). Residence rights continue on the basis of Article 21, 45, and 49 TFEU as well as Directive 2004/38/EC.⁴³ Article 12 of the Withdrawal Agreement effectively imports Article 18 TFEU thereby prohibiting any discrimination on grounds of nationality against continuing residents. Similarly, the rights of workers under Article 45 TFEU and Regulation (EU) No 492/2011 continue to apply,⁴⁴ as do the rights of self-employed persons under Articles 49 and 55 TFEU.⁴⁵ Article 39 provides that continuing residents shall continue to enjoy the rights contained in part 2 of the Withdrawal Agreement for their lifetime. Given that part 2 also applies to persons born to, or legally adopted by, continuing residents it seems likely that the free movement of persons provisions of EU law will be of continuing relevance to UK law students for generations to come.

The provisions of part 2 of the Withdrawal Agreement are enforceable in domestic courts. Furthermore, Article 158 of the Withdrawal Agreement permits domestic courts to make references for a preliminary ruling on matters relating to free movement of persons for a period of eight years following the

⁴¹ Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports [2015] OJ L83/16.

⁴² Home Office, The UK's future skills-based immigration system (White Paper, Cm 9722, 2018).

⁴³ Article 13.

⁴⁴ Article 24.

⁴⁵ Article 25.

conclusion of the transition period. Article 159 of the Withdrawal Agreement mandates the establishment of an independent authority, with powers equivalent to those of the European Commission, to monitor, investigate, and, if necessary, take legal action to enforce the provisions of part 2 of the Withdrawal Agreement.

‘Reimagining’ EU Law after Brexit

It is clear, therefore, that almost all aspects of EU law as it is currently taught in UK law schools will continue to be of relevance both during the Brexit transition period and afterwards. It will be necessary, however, to review both the weighting and content of these topics as the UK’s relationship with the EU loosens. Both the institutional and substantive aspects of EU law produce legal effects *vis-à-vis* third countries, but these effects are rather different to those produced within the Union. It will be necessary for teachers of EU law to adapt their modules to reflect the new reality in which the UK finds itself.

One obvious solution is to look to how EU law is currently taught in non-EU states. It is worth noting from the outset, however, the different educational environment in which EU law is primarily taught outside of the EU. In contrast to British and European legal study, outside of the European Union the study of EU law is primarily a postgraduate level subject.⁴⁶ This will, naturally, have a considerable impact upon the teaching and delivery methods employed outside of the EU. Nevertheless, with respect to module content, there are a number of examples outside of the EU that are worthy of consideration.

Non-EU law schools have three options for designing the study EU law outside of the EU. The first is to design a module as a somewhat abstract exercise in observational legal study. This approach can be seen in the modules offered by the University of Auckland or the University of California at Los Angeles. These modules bear a striking similarity to those typically offered within EU law modules in UK universities, examining the EU institutions, the nature and legal effect EU law, and judicial action; as well as the free movement of goods and workers. Crucially, such modules appear to provide little of direct practical

⁴⁶ All-but-one of the EU law modules surveyed are offered at masters’ level. The sole exception is Oslo, whose two EU law modules are offered at both bachelors’ and masters’ level.

relevance to domestic law students. In many respects, therefore, such modules resemble a study in comparative law.

Comparative legal study need not necessarily involve the study of the comparative merits and demerits of one legal system or set of laws relative to another – what Wigmore terms ‘comparative nomogenetics’.⁴⁷ Comparative legal scholarship can involve what Lambert describes as ‘Descriptive Comparative Law’⁴⁸ – that is to say, simply knowing what the laws of another jurisdiction are. According to Gutteridge, ‘[t]he comparative method is sufficiently elastic to embrace all activities which, in some form or other, may be concerned with the study of foreign law’.⁴⁹ The value of comparative legal study is more widely recognised today than it was in the era of Gutteridge.⁵⁰ Certainly, by the 1970s the value of comparative legal study was widely recognised, even if lacking a consistent and coherent theoretical framework.⁵¹ It is arguable, however, that such an approach to the study of EU law provides neither the value provided by comparative studies of other legal systems, nor does it provide that value delivered by alternative approaches to external study of the EU legal order.

With respect to the former argument while there is, of course, value in knowing the jurisprudence of the EU even outwith the Union there is, undeniably, greater value in comparative nomogenetics. It is arguable, however, that such studies are not possible with respect to EU law, principally because there is no other legal system in the world to which a direct comparison with the European Union is possible. In certain domestic contexts – for example, the USA, Canada, and Australia – an appreciation of the EU provides a useful comparator in studies of federalism. Alternatively, in an international context the EU provides a useful comparator to both global and regional approaches to trade integration – for example through the GATT, MERCOSUR, or the African

⁴⁷ J. H. Wigmore, 'A New Way of Teaching Comparative Law' (1926) *Journal of the Society of Public Teachers of Law* 6.

⁴⁸ See Walther Hug, 'The History of Comparative Law' (1932) 45(6) *Harvard Law Review* 1027.

⁴⁹ H. C. Gutteridge, *Comparative Law: an introduction to the comparative method of legal study & research* (Cambridge University Press 1946), 7.

⁵⁰ Gutteridge describes the comparative study as often being ‘carried out in an atmosphere of hostility or, at best, in a chilly environment of indifference.’ *Ibid*, 23.

⁵¹ Walter Joseph Kamba, 'Comparative Law: a theoretical framework' (1974) 23(3) *International & Comparative Law Quarterly* 485.

Union. None of these comparators, however, share the objectives and characteristics of the European Union.

With respect to the latter argument – that alternative approaches to the teaching of EU law outside of the EU provides greater value than a purely comparative approach – it is certainly arguable that as legal education shifts away from Socratic, or even didactic, teaching methods towards ‘authentic’ legal education – to ‘think like lawyers’⁵² – it is necessary to consider the study of EU law in its teleological context. This can be seen in the approaches of those law schools which consider EU law from an external perspective.

Table 2: Contents of EU Law modules in non-EU law schools based on published module descriptors

	EU Institutions & Law Making	Supremacy and Legal Effects	Judicial Action	Free Movement of Goods	Free Movement of Workers	EU Citizenship	Freedom of Establishment	Free Movement of Capital	Competition Law	Equalities & Fundamental Rights	Consumer Protection	EU Criminal Law	Internal Market (generally)	External Relations	Contemporary Issues
Auckland (NZ)	✓	✓	✓	✓	✓	✓									
ANU (AUS)	✓	✓	✓										✓	✓	
British Columbia (CA)	✓	✓	✓	✓	✓	✓	✓	✓						✓	
Cape Town (RSA)	✓	✓	✓						✓	✓			✓		
CESL (CN)	✓	✓	✓	✓	✓	✓	✓	✓	✓			✓		✓	
Columbia (USA)	✓	✓	✓						✓	✓			✓	✓	✓
Dalhousie (CA)	✓	✓							✓				✓		
Harvard (USA)	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓			✓	
HSE (RUS)	✓	✓	✓	✓	✓	✓	✓	✓	✓						✓

⁵² David T. ButleRitchie, 'Situating Thinking like a Lawyer within Legal Pedagogy' (2002) 50(1) *Cleveland State Law Review* 29.

Monash (AUS)	✓	✓	✓	✓	✓									✓	
New York (USA)	✓	✓	✓						✓					✓	✓
Oslo (NOR)				✓	✓	✓	✓		✓					✓	
Queensland (AUS)	✓	✓	✓	✓	✓	✓	✓	✓							
NUS (SIN)	✓	✓	✓	✓	✓	✓	✓								
Stanford (USA)	✓	✓	✓	✓	✓		✓	✓	✓						
Wellington (NZ)	✓	✓	✓	✓	✓	✓	✓	✓							
UCLA (USA)	✓	✓	✓	✓	✓				✓	✓					

Arguably the simplest approach to teaching EU law from an outside perspective is to include consideration of the EU’s external relations. This can be seen in a number of external EU law modules, such as at the University of British Columbia and the China-EU School of Law. Stanford in California gives special attention ‘to the question how companies established outside the EU can efficiently use EU business law to pursue their interests in the EU.’⁵³ Similarly, the National University of Singapore’s EU law module ‘looks at those elements of EU law which particularly affect non-EU citizens, both those living within the Union and those living beyond its borders.’⁵⁴ In many instances this approach appears to be something of an addendum to an otherwise fairly standard EU law module.

A number of institutions, however, seek to tailor their EU law modules through consideration of those substantive aspects of EU law that are particularly relevant to the local economy. For example, the Higher School of Economics in Moscow, in addition to its extensive consideration of the topics typically covered by EU law modules, also teaches EU energy and environmental law.⁵⁵ Harvard’s EU law module ‘looks at how EU regulation in diverse areas such as antitrust, data protection, the environment and food safety influences US

⁵³ Stanford Law School, ‘European Union Law’ <<https://law.stanford.edu/courses/european-union-law/>> accessed 26 February 2020.

⁵⁴ National University of Singapore, ‘Course Listing: European Union Law’ <https://law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LL4069V&Sem=1> accessed 26 February 2020.

⁵⁵ National Research University: Higher School of Economics, ‘European Union Law: course syllabus’ <<https://pravo.hse.ru/mirror/pubs/share/229390249>> accessed 26 February 2020.

firms and citizens, and non-EU residents more generally.’⁵⁶ The Australian National University’s EU law module ‘is intended to provide students with a deep insight into the internal structure and functioning of the EU together with its role as a global actor, particularly in the Asia Pacific Region.’⁵⁷

Situating EU law in a domestic legal context in post-Brexit UK law schools, however, is unlikely to be such a straightforward exercise. The level of extant legal integration, as well as the substantive EU law that will remain in the UK’s legal order for decades to come, will require a somewhat bespoke approach.

The United Kingdom’s new position as the first former EU Member State is without precedent. EU law will continue to exist within the domestic legal system through the incorporation of the *acquis communautaire* as retained EU law. Domestic courts will continue to be bound by pre-Brexit jurisprudence of the Court of Justice and may have regard to post-Brexit case law where relevant.⁵⁸ The Withdrawal Agreement produces new and unique legal effects with respect to the United Kingdom. As EU law evolves within the UK legal system to bear greater resemblance to public international law it may, therefore, be necessary to include consideration of the Vienna Convention on the Law of Treaties.⁵⁹ As the UK Government also intends to leave the EEA and EFTA⁶⁰ it is likely that the future UK-EU trading relationship will be a bespoke one. It will therefore be necessary to ‘reimagine’ EU law as part of the legal curriculum in the UK.

EU law modules in future will need to focus upon, *inter alia*, retained EU law as a species of domestic law, the ongoing juridical links between domestic courts and EU law, the rights of individuals provided for by the Withdrawal Agreement and their legal effects, the role of third country nationals and

⁵⁶ Harvard Law School, ‘European Union Law and Policy’ <<https://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=73829>> accessed 26 February 2020.

⁵⁷ Australian National University, ‘The European Union’ <<https://programsandcourses.anu.edu.au/2020/course/LAWS8239>> accessed 26 February 2020.

⁵⁸ *Supra* n. 35.

⁵⁹ (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁶⁰ Department for Exiting the European Union, ‘Agreement on arrangements between Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland following the withdrawal of the United Kingdom from the European Union, the EEA Agreement and other agreements applicable between the United Kingdom and the EEA EFTA States by virtue of the United Kingdom’s membership of the European Union’ (HMSO 2018b).

undertakings in the EU legal order, and the future rules governing trade in goods.

It may be, however, that the way in which European Union law is taught is not, in fact, the problem. There is, arguably, a much broader need to re-orient the study of law more generally to reflect a more globalised legal environment.⁶¹ The failure to integrate the study of EU law into the study of domestic law in UK law schools, as noted above, reflects a broader failure of law schools and curricula to consider the foreign, supranational, and international influences on the legal system and legal practice. Should law degrees reflect the increasing globalisation of both legal scholarship and practice the study of EU law, despite the UK's departure from the European Union, might not look quite so anomalous.

Conclusion

While the United Kingdom's departure from the European Union fundamentally changes the effects of EU law in the domestic legal systems, the salience of EU law remains. The change in the legal effects of EU law within the UK necessitates substantial revision to the institutional and procedural elements of EU law modules, in particular. This might include a substantial reduction in the attention devoted to the democratic structures of the EU although, as noted above, some knowledge and understanding of the legislative and decision-making process remains essential. It will also be necessary to understand the legal effects of the various sources of EU law, as well as new sources of EU law, with an additional layer of understanding of the operation of retained EU law as well. While some aspects of the work of the Court of Justice – preliminary rulings, in particular – will have more limited salience to UK EU law students, third-country nationals frequently bring direct actions before the Court.

Furthermore, it is also necessary to reorient the study of substantive EU law: taking into account both the retained elements of EU law while also considering the external effects of the external EU legal order. While many law schools outwith the European Union teach EU law the extent to which such modules might serve as a template for post-Brexit EU law in the UK is limited. Developing bespoke new EU law modules will be, undoubtedly, challenging

⁶¹ Rosa Kim, 'Globalizing the Law Curriculum for Twenty-First-Century Lawyering' (2017) 67(4) *Journal of Legal Education* 905.

however today's EU law teachers have an opportunity to shape what will likely become a distinct new discipline of legal study. These substantial changes to the way that EU law will be taught and studied in the future means pedagogical research in the field of EU law will be more important than ever.