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A reordering: to teach EU law or not?

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ABSTRACT

This article considers the place of EU law in the law curriculum. It explores and critically assesses the pre- and post-Brexit arguments which have been made for EU law as a distinct module on the law degree. A number of commentators have made the case for the desirability of keeping EU law as a core subject. This paper takes account of the Retained EU Law (Revocation and Reform) Act 2023 and the changes to the professional requirements for qualification. Three key arguments are made. The first is that Brexit is disordering in an unquantifiable way the legal systems of the UK and introducing new uncertainties. The second is that at the same time there is a disordering of legal education with consequential changes to the rules for qualification to practise. The third argument, which is premised on the first two, is that providers of law degrees must recognise the implications of these processes and other processes of change (which are identified in this article) and reappraise the purpose of EU law in the curriculum.

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KEYWORDS Brexit; law curriculum; EU law module

> . . .if you do not have a cut-off date . . . we will be 35 years down the line, and there will still be swathes of retained EU law. Law students will still be being taught EU law courses, judges will be practising it, and we will have all of those EU law principles still in our legal system.
>
> 2022: Evidence given to the House of Commons European Scrutiny Committee

Introduction

A survey of course websites four years after the UK's exit from the European Union – Brexit – shows that EU law remains typically a core module on law degrees in England and Wales, though at some institutions it is being offered as an option with the advice to take it for professional qualification. With the introduction in 2021 of the Solicitors Qualifying Exam (SQE), the SRA has all but eliminated the requirement to learn EU law for qualification as a solicitor. In 2022 the Bar Standards Board revised its requirement for EU law but kept it as a required academic subject for qualification as a barrister, whether through a law degree or a short-cut conversion course.

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These positions need to be re-evaluated in the light of the Retained EU Law (Revocation and Reform) Act 2023. Indeed, a policy aim of this Act envisages a change in the direction of legal education away from instruction in EU law.[1] The place of EU law in the curriculum could also be considered in need of re-evaluation through a more detached, less emotive (perhaps) assessment.

This article seeks to consider the status of EU law as a core module after2023 when key aims of the Act take effect. That said, a reappraisal of EU law in the law curriculum could be considered within a wider critique of the core set of law subjects, which for over 50 years have constituted the *foundations of legal knowledge*.[2] A wider critique encompassing this set of core subjects is valid not least because of the criticism from within the academic community that the insistence on the core by the professions has fettered academic freedom.[3] Given that professional regulation has been removed in recent years, it would now seem there is a freedom to make choices and to innovate and less reason to continue on the basis of a 50-year-old model. Whether law schools will abandon the core as a whole is one question; but given Brexit, the question is particularly pertinent for the future of EU law on the curriculum.[4]

Assuming the validity of the core or at least its de facto continuity, arguments have been made to justify the place of EU law within it after Brexit. One such argument is a "pragmatic" argument for keeping it as an essential subject because the UK–EU relationship continues to have significant political and economic importance. Another argument is that studying EU law serves to enhance a liberal education.[5]

Critical voices might claim vested interests in these arguments. The 50-year-old origins of the core subjects were not premised on political and economic considerations, or on promotion of a liberal legal education. Rather, then as now, the core allows the professions to design and cost their vocational courses assuming a certain minimum knowledge and acculturalisation in the law method. For law degrees, the core is neutral vis-à-vis an offer of a liberal education, or, perhaps not even this if the findings of a 2010 survey of the approaches to teaching EU law are typical and still valid.[6]

[1]Graeme Cowie, "Retained EU Law (Revocation and Reform) Bill 2022-23" (House of Commons Library Research Briefing, Number CBP-9638, 17 October 2022) 6 <https://researchbriefings.files.parliament.uk/documents/CBP-9638/CBP-9638.pdf> accessed 10 July 2023.

[2]Julian Webb and others, "Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales" (The Legal Education and Training Review (LETR) 2013) paras 2.12–2.13 <https://letr.org.uk/wp-content/uploads/LETR-Report.pdf> accessed 10 July 2023. The other foundation of legal studies subjects are contract law, tort law, land law, equity and trusts, criminal law and constitutional (public) law.

[3]William Twining, *Blackstone's Tower: The English Law School* (Sweet & Maxwell 1994) 162. All said, there was no regulatory or statutory reason for law degrees to be accredited by the professions. But a mix of tradition, student expectations and market credibility meant that providers of law courses sought it.

[4]This article is principally focusing on the legal system in England and Wales, but some of the comments apply equally to the UK as should be clear from the context.

[5]See Simon Boyes, "'Do We Still Have to Do This Now We're Leaving?' The Future of European Union Law in the Curriculum after Brexit" (2019) 53 The Law Teacher 378, 379; John Cotter and Elaine Dewhurst, "Lessons from Roman Law: EU Law in England and Wales after Brexit" (2019) 53 The Law Teacher 173, 174, 181–87; Charlotte O'Brien, "Bringing EU Law Back Down to Earth" (2022) 18 International Journal of Law in Context 450; Cherry James and John Koo, "The EU Law 'Core' Module: Surviving the Perfect Storm of Brexit and the SQE" (2018) 52 The Law Teacher 68; Elspeth Berry and others, *Complete EU Law* (5th edn, OUP 2022) preface v.

[6]Richard Ball and Christian Dadomo, "UKCLE Law Subject Survey: European Union Law" (Project Report, 2010 unpublished) <http://eprints.uwe.ac.uk/14747/> accessed 20 October 2023; based on the results of a survey of the teaching of EU law in English law schools, the authors conclude that the teaching was "highly traditional and surprisingly lacking in innovation" and given the increasing volume of law and material, there was an approach to teaching with a tendency to "scratch at the surface" (59, 106).

The argument advanced in this article is that in the light of the removal of a common academic stage for professional qualification, an ongoing assumption of the benefits and needs of a sector-wide fixed set of compulsory subjects is ripe for re-evaluation, and given the accelerating pace of changes to the Brexit settlement, is inevitable for EU law. On this analysis alone, there is a disordering of the foundations and assumptions upon which law degrees have been built since 1971. Providers of law degrees must now recognise and exercise a freedom to decide what should be learnt and how. From 2024 this will become a pressing question for the place of EU law in the curriculum.

The article is structured as follows. First, it reviews the timeline for the inclusion of EU law as a core subject and considers how this might relate to a decision on the sustainability of EU law in the curriculum post Brexit. Second, it summarises the Brexit settlement which it is argued is characterised as a process of disordering. Third, the article considers the Retained EU Law (Revocation and Reform) Act 2023 which it is argued accelerates this process. The final part takes account of the changes to professional qualifications, and alongside other factors which are identified, assesses the ramifications and options for EU law on law courses in the coming years.

An earlier transition period: adopting EU law into the core

It should be acknowledged that it took time for EU law to be accepted on to the law curriculum. A distinct EU legal order emerged with profound principles which were accepted and accommodated into the legal systems of the member states only over an extended period of time and because of increasing EU powers. By the time of the UK's accession in 1973 to what was at the time known as the European communities, the creation of a supranational legal order based upon the defining principles of direct effect and supremacy of EU law was in the process of being established and accepted in the member states. It is pertinent to point out, because this reflects too questions of legitimacy, method and acceptance, that these and other fundamental principles of the legal order were developed in case law by the EU's Court of Justice. There was understandably, some resistance in the member states and because of this, some uncertainties.[7]

Soon after the UK acceded, the Court of Appeal noted that domestic courts would have to follow the "European way" and the "European pattern".[8] While some members of the Court of Appeal may have foreseen (or feared) the significant impact of this body of law as "an incoming tide … [flowing] into the estuaries and up the rivers … [that could] not be held back", as in continental Europe, it took time for this to be widely understood and to be accepted systematically. It was not until the decision in the famous *Factortame* case,[9] nearly 20 years after accession, in which the UK House of Lords accepted the doctrine of supremacy of EU law, that, as Ward has put it, "the full jurisprudential implications of accession had finally come home to roost".[10] Table 1 below represents the position attained by EU law in the UK's legal systems.

[7]Tommaso Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022).
[8]*Bulmer (HP) Ltd v J Bollinger SA & ors* [1974] EWCA Civ 14, [1974] Ch 418.
[9]*R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.
[10]Ian Ward, *A Critical Introduction to European Law* (3rd edn, Cambridge University Press 2009) 101.

Table 1. Legal hierarchy during membership of the EU.

 Hierarchy	Parliamentary sovereignty/EU law UK law

Given this, perhaps then it is not surprising that it took time, more than 20 years following membership, for EU law to be incorporated as a core subject in England and Wales.[11] The professions took longer than many law schools to adopt it. The professions first proposed it as a core in 1994, and, following approval by the Lord Chancellor's Advisory Committee, it was adopted as a core from academic year 1995/96.[12] By then many, if not the vast majority of law schools had adopted it into their curriculum as either a mandatory or an optional subject.[13] While it is probably fair comment to point to academic caution and inertia as factors in the timeline for adoption of EU law,[14] it is to be acknowledged that it took time for the legal system to absorb its significance, and to accept that simply to insert it into the curriculum via a chapter in a constitutional or a legal system textbook or indeed to offer it as a niche subject area was an inadequate grounding. The fundamental point – the rationale for the inclusion of EU law as a distinct subject – was via a process of realisation and acceptance of the supranational authority of EU law, the *sui generis* content and the clear political impetus for the expansion of the EU and its law through increased integration (even if the UK opted out from certain policy areas).[15] One can take issue with the claim in *Factortame* that the impact of membership on parliamentary supremacy was "always clear".[16] Until that decision, we can consider that awareness of the implications of the authority, reach and potential of EU law in the UK was incomplete and that that decision was a key part of the process of acceptance and embedding of EU law into the UK's legal orders.[17]

1973–2020: understanding and accepting the supranational authority of EU law was a process

Cotter and Dewhurst have suggested that by the time of Brexit in 2020, a typical law degree student could encounter principles of EU law in subjects such as "public law (constitutional and administrative law), obligations (contract and tort), insurance law, public international law, medical law, commercial law, legal history, human rights, environmental law, company law, employment law, intellectual property law, criminal law, criminal evidence, immigration law, and sports law, even where the effects of EU

[11]EU law was at the time known as "EC law" (and before that "EEC law") reflecting changes to the competences and widening objectives of the organisation.

[12]The Lord Chancellor's Advisory Committee on Legal Education and Conduct, *Annual Report for 1994–1995* (HCP 759, 1994/95); Ball and Dadomo (n 6).

[13]Francis Jacobs, "Preparing English Lawyers for Europe" (1992) European Law Review 232; Twining 17 (n 3) 47 at fn 53 and p 164; Phil Harris and Martin Jones, "A Survey of Law Schools in the United Kingdom, 1996" (1997) 31 The Law Teacher 38, 51.

[14]Bruno de Witte, "The European Dimension of Legal Education" in Peter Birks (ed), *Reviewing Legal Education* (OUP 1994) 71; cf Pavone (n 7) 60; Twining (n 3) 164.

[15]de Witte (n 14) 73–74.

[16]Cf Hugo Young, *This Blessed Plot: Britain and Europe from Churchill to Blair* (Macmillan 1999) 244–51.

[17]It should be noted that the subsequent case of *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) (the "Metric Martyrs" case) held that EU law had supremacy in the UK legal system because UK constitutional law had granted supremacy to EU law, and not because the Court of Justice of the European Union (CJEU) had so determined.

law may appear to be less obvious, for example in the contexts of family law and property law".[18]

A key point is that leaving the EU is also a process of change to the UK's legal orders and systems into which EU law had become embedded. As explained below, this change is difficult to characterise and quantify. It is better to characterise it as a rupture, not a reversal. It is a rupture, which, given Cotter and Dewhurst's subject list above may suggest wide implications, but, as explained below, has deep and uncertain ones.

The analysis of the jurist and politician, Miro Cerar, can shed some light on this perspective. As a citizen of central Europe, he has known and lived through fundamental changes to political order. His perspective observes the close but differentiated relationship of law and politics which the reception of EU law into the UK legal systems exemplifies, and which gives a basis to consider the ramifications of the UK's departure from the EU. A key insight is that notwithstanding the leadership of executive and legislative powers, there are (other) essential agents and dimensions that belong to and influence a legal system. This includes obviously the courts, but other elements too, notably lawyers and academia.[19] It means an assessment of a radical change to a legal system such as leaving the EU must take account of the totality of the elements of the legal system, its fundamentals, its institutions and the actors.[20] To put it another way, we are reminded that legal systems have cultures, memories and deep roots.[21]

As Cerar states, even a "revolution can never be so radical as to completely break all forms of continuity with the former legal order, practice, and thinking instantaneously. A part of the 'old history' is thus for at least some time still preserved in various legal customs and legal thinking. Furthermore, as a rule a part of this history is preserved within a renovated institutional order".[22]

As Brexit – a revolution – unfolds, it is suggested then that the effects and implications of EU law within the UK's legal systems will not count for nothing, and that it is inevitable that it must take time to comprehend and define the shape and full magnitude of the impacts and consequences of leaving the EU. The passage of time may also be understood as a process of accepting.

The blocks of law which are the conspicuous part of the post-Brexit settlement are considered next.

2020–2023: the Brexit settlement in four parts

While the end date of UK membership of the EU on 31 January 2020 was momentous, clear and certain, the settlement itself and, as noted above, the implications for the legal system are decidedly less clear.[23] Part of this is the complexity of the settlement. But a meta-assessment, following Cerar, will come only over time as the process plays out.

[18]Cotter and Dewhurst (n 5) 184.
[19]See also Pavone (n 7).
[20]Miro Cerar, "The Relationship Between Law and Politics" (2009) 15(1) Annual Survey of International & Comparative Law, Article 3.
[21]Cf John Henry Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (3rd edn, Stanford University Press 2007) 2, 18.
[22]Cerar (n 20) 28.
[23]Pavlos Eleftheriadis figures that the immediate post-Brexit situation has resulted in 11 types of "post-Brexit EU law" applicable in the UK. Pavlos Eleftheriadis, "Eleven Types of post-Brexit EU Law" (*Oxford Business Law Blog*, 8 January 2021) <www.law.ox.ac.uk/business-law-blog/blog/2021/01/eleven-types-post-brexit-eu-law> accessed 12 July 2023.

This section considers four main blocks of law which are in place and are already significant elements of this process. These have been created in the period 2020–2023. The next stage in the process, the coming into force in 2024 of key parts of the Retained EU law (Revocation and Reform) Act 2023, is considered after.

Transition period 2020

The least complicated period of the UK's departure from the EU has turned out to be the so-called "transition period" which continued the EU's legal order in UK law until the end of 2020. This period extended the binding effects of EU law in the UK for 11 months after the UK had formally and legally withdrawn from the EU in January 2020. The transition period had significance by extending until the end of that year the time for EU citizens to enter and settle indefinitely in the UK and by extending the pool of laws brought under the umbrella of "retained EU law". Both of these are considered below.

Citizens' rights

The 2019 Withdrawal Agreement (WA) agreed between the EU and the UK provides in treaty law a life-time right to EU citizens to settle in the UK and to be treated equally. This applies to persons who exercised rights of free movement before the end of the transition period. There have been over six million applications for settlement with over five million citizens granted it.[24] While settlement in the UK is classified within UK immigration law, the WA requires that key elements of the EU legal order be implanted into the UK's legal system to secure and protect the rights. These are or mirror fundamental EU law doctrines, namely that the rights are recognised and enforced (direct applicability and direct effect) and primacy of the WA over conflicting UK law *whenever* made (supremacy of EU law), and that the Charter of Fundamental Rights can have effect to protect these rights.[25] Further, until 2028, questions concerning the interpretation and effects of these rights can be brought to the Court of Justice by means equivalent to the EU's preliminary reference process.[26] Securing this protection through the WA raises a question whether it is itself a regular part of the EU law order which remains applicable in the UK or is essentially an ordinary instrument of international law with particular legal obligations underpinned by EU doctrines.[27] This is yet to be authoritatively determined, but either way, these rights are premised by their historical connexion with fundamental EU doctrines.

Northern Ireland Protocol

The WA contains the Northern Ireland Protocol. This provides for the continuing effects in Northern Ireland of EU law in relation to, principally, free movement of goods. The

[24]UK Government, "UK Secures the Rights of Millions of EU Citizens" (2 July 2021) <www.gov.uk/government/news/uk-secures-the-rights-of-millions-of-eu-citizens> accessed 12 July 2023; Jay Lindop, "Are There Really 6m EU Citizens Living in the UK?" (*National Statistical*, 2 July 2021) <https://blog.ons.gov.uk/2021/07/02/are-there-really-6m-eu-citizens-living-in-the-uk/> accessed 12 July 2023.

[25]Article 4, given effect by European Union (Withdrawal) Act 2018, ss 7A and 7B.

[26]Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement), Article 158(1).

[27]Eg see Eleftheriadis (n 23) who suggests that the Withdrawal Agreement "is not, therefore, a standard treaty of public international law international treaty between the EU and the UK (although it could also be seen as one)".

application of the law in this area is highly complex, with EU or UK law applicable depending on the particular type of goods.[28] Key elements of the EU legal order are maintained to ensure the application of EU law. Unlike the provisions in the WA concerning citizens' rights, these are uncontrovertibly, if controversially, conceived as EU law applicable in the territory of Northern Ireland.

Trade and Cooperation Agreement

The UK's future relationship with the EU was secured in the Trade and Cooperation Agreement 2020 (TCA). Categorically this does not extend or implant the EU's legal order into the UK. The TCA is explicitly an instrument of (ordinary) international law. The Court of Justice does not have jurisdiction. This is an agreement situated within international trade law and the World Trade Organization structures and rules. The TCA is significantly narrower in its aims than membership of the EU. There are no single market (free movement) rights. The aims relate to trade in goods, some services, commitments to data protection, commitments to labour and environmental standards and there are provisions relating to cooperation in security measures such as data transfers and cooperation with EU agencies such as Europol and Eurojust.

Retained EU law

The fourth piece of the 2020–2023 Brexit settlement is the body of law known currently as "retained EU law". This covers rights and obligations originating from the UK's membership of the EU which applied in the UK until the end of 2020, and which, following the end of the transition period, have been adopted and converted into UK law.

Retained EU law covers the most extensive and least quantifiable body of rights and obligations. No one, including the government, has satisfactorily identified it all or quantified it.[29] Claims have been made that 13% to over 60% of all UK law has been the result of EU membership.[30] An academic study of the quantity of law in Germany in the early 2000s identified that 40% of it was related to EU obligations. But this study came with major caveats noting that, like other studies, it was based upon limited methodologies.[31] These studies tend to gauge the amount of codified law and fail to take account of the full range of types of EU law, notably case law (rights and principles) and national law mixed with EU obligations.[32] What can be said is that following Brexit the vast majority of EU law was kept and converted to retained EU law. Indeed, the

[28]A revised agreement, the Windsor Framework, which modifies some of the more contentious aspects of the Protocol, was adopted in March 2023: see UK Government website, "Placing Manufactured Goods on the Market in Northern Ireland" <www.gov.uk/guidance/placing-manufactured-goods-on-the-market-in-northern-ireland> accessed 12 July 2023.

[29]Under Retained EU law (Revocation and Reform) Act 2023, s 17 the government has a duty to maintain and update a dashboard of the reform and revocation of retained EU law: as of November 2023, 5020 pieces of retained EU law are identified <www.gov.uk/government/publications/retained-eu-law-dashboard> accessed 12 November 2023.

[30]Mentioned in Cotter and Dewhurst (n 5) 183.

[31]Annette Töller, "Measuring and Comparing the Europeanization of National Legislation: A Research Note" (2010) 48 JCMS 417.

[32]Cf Nicola Newson, "Retained EU Law (Revocation and Reform) Bill: HL Bill 89 of 2022–23" (UK House of Lords Library Briefing, 27 January 2023) 6 <https://researchbriefings.files.parliament.uk/documents/LLN-2023-0007/LLN-2023-0007.pdf> accessed 12 July 2023.

Table 2. Legal hierarchy in the UK after Brexit.

 Hierarchy	Parliamentary sovereignty Withdrawal Agreement/TCA Retained EU law UK law in operation before the end of 2020

Charter of Fundamental Rights was the only substantive law which was not retained.[33] But since 2021 over 400 retained EU laws have been amended, replaced or repealed.[34]

The term, or the category of, "retained EU law" was created by UK law as *UK law* under the European Union (Withdrawal) Act 2018. The purpose of this Act was to ensure as far as possible legal certainty and economic stability by avoiding multiple gaps in the law and unintended consequences which otherwise would or could have resulted from the UK's withdrawal from the EU.[35] That the 2018 Act gives priority to retained EU law through the continuing application of the "principle of the supremacy of EU law" confirmed the need and priority of legal and economic certainty. Further, relevant case law including the European Court decisions remains *binding* on the lower courts applying retained EU law, and only senior courts, notably the Court of Appeal and Supreme Court, can depart from these past decisions, and then only within certain parameters. Through these mechanisms a high level of legal certainty has been assured and attained.

2020–2023: the effects of the Brexit settlement

The totality of this settlement, the two Brexit treaties and retained EU law, add new layers of complexity to the legal systems of the UK as represented in Table 2.

The application of any pre-2021 UK law must be considered against (i) obligations under the Withdrawal Agreement; (ii) the implementation of the TCA; and (iii) the relation to retained EU law. Any law enacted from 2021 which revokes or amends retained EU law should still be subject to obligations under the Withdrawal Agreement and the TCA.

This complex scheme will be altered from 2024 following the enactment of the Retained EU Law (Revocation and Reform) Act which is considered next.

Retained EU Law (Revocation and Reform) Act 2023

The Retained EU Law (Revocation and Reform) Act was enacted in June 2023. It is intended to *accelerate* the pace of Brexit through revocation or alteration to retained EU law.[36] This extract from the long title suggests the complexities around the reform:

[33]Two points to note by way of clarification: (i) the Charter does apply under the Withdrawal Agreement 2019 (see *SSWP v AT (Aire Centre and IMA intervening)* [2022] UKUT 330 (AAC); appeal to Court of Appeal pending); (ii) a number of laws that were converted to "retained EU law" were repealed or modified at the moment of the end of the transition period or thereafter.

[34]Newson (n 32) 6.

[35]Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446, 2017) paras 1.12 and 1.13 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf> accessed 12 July 23.

[36]Cf Newson (n 32) 3.

> An Act to revoke certain retained EU law; to make provision relating to the interpretation of retained EU law and to its relationship with other law; to make provision relating to powers to modify retained EU law; to enable the restatement, replacement or updating of certain retained EU law; to enable the updating of restatements and replacement provision …

Broadly, the changes coming under this Act can be divided into three blocks, representing three gears of acceleration away from EU membership.

The first block is retained EU law that will be removed from the statute book at the end of 2023. This relates to around 580 pieces of retained EU law listed in Schedule 1 to the Act. The Act also removes retained EU law which exists because of s 4 of the European Union (Withdrawal) Act 2018. Section 4 retained EU law broadly includes an unspecified quantity of uncodified principles and rights which are typically found in case law.

The removal of these laws, while substantial and significant, represents a climb-down by the government which had initially planned, when introducing the bill into Parliament, to remove the majority of retained EU law from the UK statute book by the end of 2023. During the passage of the bill the government was persuaded that this approach would undermine the continuing need for certainty, which was the whole basis for retained EU law. This change of approach means that by the end of 2023, it seems reasonable to consider that most retained EU law will not have been revoked.[37]

That said, there are fundamental changes to the characteristics of retained EU law after 2023. This can be considered in terms of the second and third blocks of laws addressed in the Act which are further distanced from their EU origins.

The second block is retained EU law that will be "restated" or "reproduced" (ss 12–13). It will no longer be considered to be retained EU law after 2023.[38] If the law in this block was formerly an EU regulation or decision, it will by default be subordinate to other forms of UK law. It is intended that no EU court precedent associated with its origins or interpretation will apply. It seems to be intended that its status will be as though it is new law with no prior legal history.

The third block, which will be less removed from its EU origins, consists of all remaining forms of retained EU law which will continue to apply. These laws are converted into a new form of UK law to be termed "assimilated law". There are three changes to this body of law which weaken its status and EU antecedents. First, given that s 3 of the 2023 Act will abolish "supremacy of EU law" – a defining characteristic of retained EU law under the 2018 Act, "assimilated law" will be subject to other UK enactments whenever made, unless specific exceptions provide otherwise. Second, the status of general principles of EU law, which are currently rules of interpretation under the 2018 Act, will be abolished. Third, the force of the case law (precedents) relating to retained EU law will be weakened in that the senior courts can more easily depart from it, and indeed will have a new duty to consider if following the Court of Justice case law "restricts the proper development of domestic law" (amended s 6(5) of the 2018 Act).

2024 and onwards

Under the 2023 Act, executive authorities have delegated power until 23 June 2026 – (the 10th anniversary of the referendum vote to leave the EU) – to shuffle rights and

[37]Retained EU law dashboard (n 29).
[38]It will not be "assimilated law" under the 2023 Act.

obligations between the blocks, and there is a power to revive rights and obligations from retained EU law which have been removed – though the revived law (from the first block) will not be "assimilated law" (third block), s 12(3).[39] Further, the executive has, in effect, discretionary power in relation to any of these laws to give them "equivalent" effects to key EU principles including supremacy over other laws and the protection/force of general principles of EU law. (It should be noted that as "retained EU law", both the *principle of supremacy of EU law* and *general principles of EU law* are removed by the 2023 Act and cannot be "assimilated law" or revived as UK law by executive authority, s 13(5).)

The changes made during the 2023–2026 period can be indefinite.

This scheme for these new bodies of UK law with the wide powers given to executive agencies will be a period of further reordering of legal rights, further complexity and a period of new uncertainty.[40] Table 3 below represents the re-ordering of rights which originated from EU membership.

The core of the matter: how law schools should respond

The particular focus of this paper is the ongoing relevance and importance of EU law to legal education, particularly within the law degree. The rationale for an implanted supranational legal order, epitomised by free movement and powered by the supreme authority of the EU's court, changed after 2020, at the end of the Brexit transition period.

It has been necessary to give an account of the fundamental changes that have been taking place since Brexit and to consider the norms and the legal order since 2020.

The 2023 Act provides a process of acceleration away from the EU origins of rights, obligations and fundamental doctrines and principles. This is represented in the ideological and significant name change from "retained EU" law to "assimilated" law. It is also evident in the changes to detach the UK courts further from EU case law.

On the other hand, there is no clean cleavage from EU law. EU law remains applicable per se or with the same effects in relation to obligations and rights under the Withdrawal Agreement. Further, the argument made in this article is that despite the

Table 3. The period 2024–2026

Parliamentary sovereignty		
	Withdrawal Agreement/TCA	
UK legislation Assimilated law (previously retained EU law) (UK law specified to be subordinate to assimilated law)		Executive authority may determine that specified law should be interpreted or have effects equivalent to fundamental EU doctrines including supremacy over other UK laws

[39]Changes to primary law will require the approval of both Houses of Parliament under Schedule 5.

[40]See also Joelle Grogan and Catherine Barnard, "The Retained EU Law (Revocation and Reform) Bill" (*UK in a Changing Europe*, 5 January 2023), "far from a mere (and another) change in nomenclature, the Bill will have sweeping impact on the legal system, and introduce a number of significant risks for the certainty and stability of UK law" <https://ukandeu.ac.uk/the-retained-eu-law-revocation-and-reform-bill/> accessed 12 July 2023. This comment is valid for the reasons given in this article even though the government has stepped back from wholesale removal of retained EU law.

revocation of a considerable amount of retained EU law, the majority of rights and obligations which have had the form of retained EU law will continue as part of UK law under the 2023 Act. The 2023 Act also enables legal order principles based on EU ones, notably supremacy of EU law and general principles to apply as UK law. Cerar's observations that the "old history" is for some time preserved and that part of the history is "preserved within a renovated institutional order" resonates here.

For law schools the question, then, is where, if at all, should this body of law be taught within a law degree? Has the case then been made for the necessity of a distinct module post Brexit focusing on EU law or the legacy of EU membership?

Until now the guarantor for EU law in the law degree curriculum in England and Wales has been the coordinated academic regulations of the two main professional bodies, which together, de facto, standardised law courses around a set core of subjects.

However, this position is no longer sustainable for law schools. For a number of reasons the rationale of singular deference to the requirements of the professional bodies is gone.

The professions have diverged on their requirements and in relation to EU law in particular. The reformed route to qualify as a solicitor through the Solicitors Qualifying Exam – SQE – excludes EU law and includes very little on retained EU law.[41] Perhaps this may be as much to do with the method of assessment, which, for SQE1, consists of huge multiple-choice papers; but, the fact that this position is taken does speak to the significance and gives a perspective of the enormity of the change brought by Brexit.

The Bar Standards Board requires an academic "component" for barrister training based upon the seven foundations for legal studies embedded either in a law degree or as part of a conversion course.[42] In 2022 it modified the requirement for studying "EU law". The requirement is that the study is now "EU law in context". An explanation is provided:

> The UK has now left the European Union, but EU Law still has significant relevance to the laws of England and Wales and therefore practise [*sic*] as a barrister. Knowledge of current and developing EU Law may be used to assist in the interpretation and evolution of retained EU Law and as a result, for the purposes of the academic component of Bar training, the Law of the European Union will continue to be a required academic element of a barrister's training.[43]

Notwithstanding this, the BSB's position that it would expect passing the SQE to be sufficient for the academic component suggests how little EU law is considered necessary.[44]

Following the enactment of the 2023 Act, both professions will need to review and revise their requirements. The direction is clear. In evidence to the European Scrutiny Committee, the Bar Council stated that it could see a future when there would be no need to continue with the concept of "retained EU law" on account of its

[41]This is true despite the fact that retained EU law is currently grouped under the umbrella heading of "Constitutional and Administrative law and EU Law" with the SQE curriculum: SRA, SQE1 Assessment Specification (updated January 2024) <https://sqe.sra.org.uk/exam-arrangements/assessment-information/sqe1-assessment-specification> accessed 19 March 2024.

[42]The full set of requirements for the Academic component are listed in Part 2 of the Bar Standards Board's Bar Qualification Manual <www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual-new.html?part=CC6E51DC-0FF4-45C8-A0CE31EA825C4692&q=> accessed 12 July 2023.

[43]Bar Qualification Manual (n 42).

[44]Bar Qualification Manual (n 42) Part 2 E: Academic Component of Bar Training <www.barstandardsboard.org.uk/training-qualification/bar-qualification-manual-new.html?part=CC6E51DC-0FF4-45C8-A0CE31EA825C4692&q=> accessed 12 July 2023.

comprehensive domestication.[45] The 2023 Act is intended for this. It seems clear that the BSB will follow the SRA and remove the requirement to study "EU law". Both will remove the requirement to study "retained EU law" as it ceases to exist and is replaced by a (smaller) body of "assimilated law".[46]

For law schools the direction is clear – it points to a decision that each law school must make itself.

The case for "EU law"

Notwithstanding any other consideration, the EU legal order is a valid, important and enriching subject of study. It is not necessary to be situated in a member state to study its legal system. Studying it can serve the aims of various conceptions of a liberal legal education. EU law per se will continue to relate to areas of law stemming from the Withdrawal Agreement; understanding EU law will add critical perspectives in many subject areas especially to the growing list of subjects that have cross-border dimensions.

The case for Brexit law

There is a clear rationale for a law degree to include study through the lens of Brexit. This would be a study of UK legal systems which are in their own transition. This could well serve a liberal education, as such a study would need to engage with much which is new, undetermined and uncertain. It could well serve a wider purpose to enable and facilitate the practice of critical skills and analysis of a period of executive authority, 2024–2026, with powers over a wide-ranging body of law and legal principles as well as the untested new duties and powers of the courts in relation to this body of law. Such studies would, *qua* Cerar, be acknowledgement that the impacts and dynamics of Brexit on the law and the systems will continue to evolve. Academia and students could serve the UK's legal systems well if they are engaged in and critiquing EU law and the Brexit legal reordering. This would be a subject of some complexity given the need to ground it in an understanding of key principles of EU law as well as the ideology, the methods and path that have led to the Brexit settlement. The challenge of teaching this would influence decisions to offer such a subject and where in the curriculum to do so.

The table in the Appendix maps a range of course objectives for EU law and post-Brexit EU law.

Writings on the wall

All said and done, what is being acknowledged is that the grounding for "EU law" in the curriculum has changed. Soon, this will no longer include reliance on the BSB's core

[45]Evidence given to the European Scrutiny Committee in April 2022 at para 20 <https://committees.parliament.uk/writtenevidence/107768/html> accessed 12 July 2023.

[46]Cotter and Dewhurst (n 5) at 177–78 point out how the decline of Roman law on law degrees was related to the professions downgrading its importance: "The resurgence of Roman law appears to have been assisted also by the fact that the Roman Institutes of Justinian became a required subject for admission to the English Bar." . . . but "Within four years of the changes introduced by the 1922 [Solicitors] Act, Roman law had lost its compulsory status in most academic law curricula with the exceptions of Oxford, Cambridge, and Manchester. It was still retained as an optional course in many institutions, but the study of Roman law at universities was increasingly considered 'high among the unrealities' and 'ornamental rather than indispensable'."

requirements. While Cotter and Dewhurst point to the wide expanse of EU law into numerous subject areas, Brexit does not fundamentally change these subjects and their *raison d'être*. On the other hand, their observations about the impact of the removal of a subject (Roman law) from the professional law exam, combined with the findings from Ball and Dadomo's survey, indicate the strong influence of professional regulations on decisions taken by law schools around the content of their curriculum.[47] The divergent SQE requirements can be expected to further influence greater diversification in approaches to and content of law degrees. Indeed, counter factors could tip the balance towards a quicker pace of change.

To contemplate the future status of EU law in the curriculum requires an acknowledgement that there are other and diverse factors in play beyond the subjects of the curriculum, fixed notions of a liberal legal education and, as argued in this article, the historically strong influence of the professions. To name but a few obvious ones: employability is a significant determiner of the design and attraction of courses; the widening and pressing impact of technology and much more recently AI only enhances this; the changing balancing of powers towards the student-consumer points to less rigidity and more choice. Decolonisation is gathering momentum and has the potential to leverage significant and consequential changes. There are other pressing and local factors no doubt. The fact that some law schools are making some core including EU law optional is evidence of change.

On balance, the obvious implication is that the case for EU law as a mandatory subject is weaker. The case, the liberal case, for an optional module on or related to EU law is a sound one, and even stronger when aligned with student choice. On this matter, it must be remembered that most students starting their legal studies at university now were just starting secondary school at the time of the Brexit referendum in 2016. Although the majority of the young in the UK regret Brexit and the loss of opportunities to work abroad,[48] their perspective as young adults is of the EU law in the UK as historical, and academics teaching EU law need to be aware of this, not to challenge (though the thrust of this article is that this view could legitimately be challenged) but to engage, understand and adapt: EU law as context, a strand in the continuum, one of the lenses needed to bring "the law" into clearer focus.

Conclusion

There would be no need for a consideration of the place of EU law in the law curriculum if liberal educative aims were the basis and remained the basis for offering EU law, or indeed, even for mandating it. However, this justification does explain the position of EU law as a core module for the last 23 years.

The understanding and acceptance of the supranational authority of EU law and the reach of its authority was the rationale for teaching EU law on law courses as a core module. Brexit has ended the supranational force of EU law completely in relation to the English and Welsh jurisdiction, subject to the limited area of citizens' rights.

[47]Ball and Dadomo (n 6) and Cotter and Dewhurst (n 5 and n 46).

[48]D Clark, "In Hindsight, Do You Think Britain Was Right or Wrong to Vote to Leave the European Union?" (*Statista.com*, 24 February 2024) <www.statista.com/statistics/1393682/brexit-opinion-poll-by-age/> accessed 19 March 2024.

The main legal professions are at different places in recognising this changed position. The SRA has adopted retained EU law but cut EU law from the requirements to qualify as a solicitor: this can be said to reflect the perspective of the reality that EU law is, parts of the Withdrawal Agreement excepted, no longer supranational. This unsophisticated approach with no acknowledgement of the complexity of the Brexit settlement may be seen from the lens of an expediency related to the limited aims of the SQE assessment format. The BSB has been more cautious with an approach which reflects the legacy effects of EU law and a period of newness and some uncertainty; however, given the 2023 Act and the transformation of retained EU law, the BSB will review and revise its requirements: it is very likely to follow the SRA with an end to EU law within its academic requirements for qualification.

The analysis in this article is not purposed to support a polemic against EU law in the curriculum. It is about analysing the circumstances for the adoption of EU law and a sober assessment of the circumstances which point to change. On the contrary, its authors commend the pedagogic, practical and critical benefits of studying EU law. They also acknowledge the diverse points of departure and approach from what was taught before Brexit. Teaching EU law offers an antidote to what might otherwise be an inward-looking curriculum. Exploring with students EU law and Brexit law would be to pick up the baton from a generation of lawyers who learned that there are key benefits to the practice of law in reasoning beyond the confines of the common law and national politics.

A true liberal education would be one in which the benefits of studying in and around EU law are articulated and it would be one which offers inspiration for and meets the aspirations of students.

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Appendix. EU law in the curriculum post Brexit

Course aims	To study EU law	Comments
Immigration law: citizens' rights	✓	Withdrawal Agreement requires understanding of key EU principles. There is a need to appreciate the underlying doctrines of EU law which apply to protect these rights.
To learn about another legal system and a basis to critique the common law	✓	
Studying Brexit and its impact	✓	Understanding of EU legal doctrines, EU law and interpretation prior to and after Brexit will be necessary to understanding the Brexit settlements.
Preparation for the Bar	?	The place of EU law in the Bar's academic requirements will be subject to review and revision from 2024 when key effects of the 2023 Act take effect.
To learn about the EU's supranational legal system as implanted on to UK legal systems	Limited	Relates to citizens' rights across the UK and free movement of goods in Northern Ireland (though it is untested whether EU law per se operates in the UK to protect EU citizens' rights).
Specialist areas, eg environmental standards, competition, data protection, cross-border crime.	Added value	As far as they align with TCA obligations or future collaborations between the EU and the UK. Understanding the equivalent EU policy and law will give context to understanding and critiquing the UK's laws and policies.