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**Article:**

Guth, J. and Hervey, T.K. [orcid.org/0000-0002-8310-9022](https://orcid.org/0000-0002-8310-9022) (2018) Threats to internationalised legal education in the twenty-first century UK. *Law Teacher*, 52 (3). pp. 350-370. ISSN 0306-9400

<https://doi.org/10.1080/03069400.2018.1463035>

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## Threats to Internationalized Legal Education in the 21<sup>st</sup> century UK

### Introduction: why internationalize legal curricula?

What are the prospects for internationalized legal education in the contemporary UK? Our reflections on this question were prompted by three relatively recent publications dealing with a variety of aspects of the internationalization of legal education,<sup>1</sup> as well as discussions in and outputs from ‘Brexit and the Law School’ events in Liverpool Law School, Keele University, Strathclyde University, and Northumbria University during 2017.<sup>2</sup> We argue that, although law is often assumed to be state based and jurisdiction specific, there are significant reasons to internationalize legal education. Teaching of EU Law has ensured that at least basic elements of Europeanization (and thus at least a variant of internationalization) have had a relatively secure place in UK law schools. That place is now under threat. Our concern is that, over time, Brexit is likely to lead to EU law no longer being regarded as a ‘core subject’ in law degrees in England and Wales, and perhaps also in Scotland or Northern Ireland. This change to UK legal education will be strengthened by the forces of marketization in Higher Education more generally. In England and Wales, where such marketization has gone the furthest, its effects on internationalization of legal education will be exacerbated by changes to legal education and training mandated by the professional bodies regulating the legal professions, and the Solicitors Regulation Authority in particular. These changes to the broader landscape of legal education have a knock-on effect on the curriculum more generally, as well as to the make-up of our law schools, in terms of staff and students. Overall, these effects are likely to lead to a less international and internationalized legal education, when considering the UK as a whole. We expect there to be some exceptions to that general trend, which we expect to be particularly strong in the regions of England.

We first outline possible reasons for internationalizing legal education. We then consider the role of EU law teaching in contributing to that internationalization before examining the impact of Brexit and other factors, in particular changes brought in by the SRA, might have on the teaching of EU Law and internationalization more generally.

Law seems to be a parochial, state-based subject. Despite discussions of ‘law and globalization’ since at least the late 1990s, and arguably much earlier,<sup>3</sup> which continue to

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<sup>1</sup> William van Caenegem and Mary Hiscock, eds, *The Internationalisation of Legal Education: The Future Practice of Law*, Cheltenham, Edward Elgar, 2014, xvii + 316pp, ISBN 978-1-78347-453-0 Christophe Jamin and William van Caenegem, eds, *The Internationalisation of Legal Education*, Zurich, Springer International Publishing, 2016, viii + 346 pp, ISBN 978-3-319-29123-9 Christopher Gane and Robin Hui Huang, eds, ; *Legal Education in the Global Context: Opportunities and Challenges*, Abingdon, Routledge, 2016.

<sup>2</sup> See the presentations, discussions and outputs from the ‘Brexit and the Law School’ project (<http://www.legalscholars.ac.uk/brexit-law-school-seminars/>), funded by the Society of Legal Scholars, especially the workshop held in Liverpool Law School in June 2017. We are grateful to the SLS, and to all the participants at the workshops.

<sup>3</sup> We might think, for instance, of *lex mercatoria*; Roman Law; private (non-state) law dating from the 19<sup>th</sup> century, especially international commercial arbitration mechanisms; intergovernmental law-making organisations, like WIPO, International Maritime Organization, International Civil Aviation Organisation,

the present day,<sup>4</sup> in mainstream legal discussions, law's legitimacy and authority stem from the state. This is true also of public international law (at least in terms of its dominant discourses), which is understood as the law of states. Equally, private international law and comparative law are concerned with the interactions between different (implicitly state-based) legal systems, or the influences of one legal system, or aspects thereof, on another. Influences could be through legal transplants,<sup>5</sup> for instance transposing a civil or criminal code, or statute, from one system to another; or through the persuasive power of *rationes* across common law jurisdictions. These understandings of the state-grounded nature of law are reflected in the curricula of law schools across the world.

Nonetheless, many law schools have sought to 'internationalize' their curricula. Indeed there is a burgeoning literature on such internationalization of legal education.<sup>6</sup> Internationalized legal education is increasingly well represented particularly in the 'elective' side of legal education; though it remains extremely light in the core curriculum.<sup>7</sup> At least four interlocking and overlapping reasons<sup>8</sup> (which are both 'instrumental' and 'non-instrumental') may motivate such curriculum development: the economic, the academic, the political, and the humanistic or social, ethical and personal developmental.<sup>9</sup>

The most obvious instrumental reason is the economic. The world is inter-connected, and becoming increasingly so with technological developments particularly in communications both real and virtual. As Christophe Jamin and William van Caenegem put it, globalization

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UNCITRAL; or dispute resolution organisations like the ICJ; International Criminal Court, International Centre for Settlement of Investment Disputes. See Jürgen Basedow, 'Breeding lawyers for the global village: The internationalisation of law and legal education' in William van Caenegem and Mary Hiscock *The Internationalisation of Legal Education* (Edward Elgar, 2014). Of course, 'the state' is a relatively recent concept in its modern, post Westphalian form.

<sup>4</sup> See, for instance, Neil Walker, *Intimations of Global Law* (CUP 2015).

<sup>5</sup> Alan Watson, *Legal Transplants: An approach to comparative law* (Edinburgh University Press 1974); Otto Kahn Freund, 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* (1974) 1-27.

<sup>6</sup> See for example Jan Klabbers and Mortimer Sellers, eds, *The Internationalization of Law and Legal Education* (Springer, 2009); Jamin and van Caenegem, eds, 2014; Gane and Hui Huang, eds, 2016; van Caenegem and Hiscock, eds, 2016. Like the books reviewed here, we do not discern bright lines between Simon Chestermann's 'internationalization'; 'transnationalization' and 'globalization' of legal education, see Simon Chestermann, 'The Evolution of Legal Education: Internationalization, Transnationalization, Globalization' 10 *German Law Journal* (2009) 877-88.

<sup>7</sup> Christophe Jamin and William van Caenegem, eds, *The Internationalisation of Legal Education* (Springer, 2014, p 12; Gane and Hui Huang, eds, 2016, p 3.

<sup>8</sup> See, in addition to the three books that form the basis for this review, e.g., Tihomir Mijatov, 'Why and How to Internationalize Law Curriculum Content' 24 (1) *Legal Education Review* (2014) 141-155.

<sup>9</sup> Christopher Gane and Robin Hui Huang argue that law schools ought to at least present students with these different visions of legal education, see 'Introduction', in Christopher Gane and Robin Hui Huang, eds, 2016, *Legal Education in the Global Context: Opportunities and Challenges*, p 4-5.

'drives a universal need for people trained in international questions'.<sup>10</sup> Globalization processes cannot but include law and legal systems. Law students therefore need an education that goes beyond domestic law, and this is understood as a need that is set to continue. Law graduates who can solve problems in many locations and across locations in culturally sensitive ways are and will continue to be attractive to (at least some) future employers.<sup>11</sup> Curricula should be 'future proofed', not 'teaching to ossified professional contexts', and that means a future within which internationalization is valuable.<sup>12</sup> Law schools as economic actors therefore seek to situate themselves, and their students, within, rather than apart from, the rest of the world: in the sense of both the local *and* the global communities that their graduates will serve.<sup>13</sup>

Scholars such as Margaret Thornton and Lucinda Shannon<sup>14</sup> see a much darker instrumental side to the economic rationales behind recent internationalization of legal curricula. For them, internationalization in law schools is part of a marketing fiction, the idea that a law degree is a fulfilling experience,<sup>15</sup> replete with promise of interesting and engaging future careers. Actually, behind the marketing 'puff',<sup>16</sup> law schools all offer essentially standardized opportunities and service of legal education. These are very much based on national curricula, driven by Higher Education qualifications frameworks, but above all by professional statements of the 'foundations of legal knowledge'.<sup>17</sup> Instrumental legal

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<sup>10</sup> Christophe Jamin and William van Caenegem, 'Preface', p v, in Jamin and van Caenegem, eds, 2014.

<sup>11</sup> Jamin and van Caenegem, eds, 2014, p 10; Jurgen Basedow, 'Breeding lawyers for the global village: The internationalisation of law and legal education', in van Caenegem and Hiscock, eds, 2014, p 6-8; Simon Chestermann, 'Doctrine, perspectives and skills for global practice', in van Caenegem and Hiscock, eds, 2014; Mijatov, p 146.

<sup>12</sup> Dermot O'Donovan, 'Legal education in the era of glocalisation: What makes for market failure?' in van Caenegem and Hiscock, eds, 2014, p 123; Mijatov, p 147.

<sup>13</sup> O'Donovan, in van Caenegem and Hiscock, eds, 2014; Kate Galloway, 'Getting Back to our Roots: Global Law Schools in Local Context' in Gane and Hui Huang, eds, 2016, p 17-30; Mijatov, p 148.

<sup>14</sup> Margaret Thornton and Lucinda Shannon, "'Selling the Dream': Law School Branding and the Illusion of Choice 2013) 23(2) *Legal Education Review* 249-271.

<sup>15</sup> See, more generally on the 'marketization' or 'consumerization' of Higher Education, Stefan Collini, *Speaking of Universities* (Verso, 2017); Frank Furedi, *What's Happened to the University? A Sociological Exploration of its Infantilisation* (Routledge, 2017); David Goodhart, *The Road To Somewhere: The Populist Revolt and the Future of Politics* (Hurst, 2017), pp 154-167; Les Back, *Academic Diary: Or Why Higher Education Still Matters* (Goldsmiths Press 2016); and in the specific context of law, Margaret Thornton, *Privatising the Public University: the case of law* (Routledge, 2012).

<sup>16</sup> But, as Thornton and Shannon point out, on another level, law schools need to distinguish themselves from one another in order to compete. Their branding and marketing works to do this. 'Excellence' is a *sine qua non* in such law school branding (and in Higher Education generally). Beyond 'excellence', 'professional credentialing' matters, not just technically but also in the sense that graduates are actually able to access legal professional graduate (i.e., presented as interesting and fulfilling) employment.

<sup>17</sup> For instance, 'The Priestley 11' in the Australian context; the Japanese bar examination content; the New York Bar Examination; the 'Foundations of Legal Knowledge' in England & Wales at present; the 'day one competencies' to be tested by the Solicitors Regulation Authority in the future in England and Wales.

education (especially on an ‘apprentice’ model of professional training, but even on a ‘university’ model<sup>18</sup>) in this sense means *domestic* legal education.

Academic reasons for internationalizing legal education could be categorized as either instrumental or non-instrumental. Learning about what the law is represents only a very thin notion of legal education. A more substantial academic pursuit – which is at least arguably also more ‘useful’ – moves beyond the mere descriptive towards the explanatory and analytical.<sup>19</sup> If a law school seeks to help students to develop understandings of *why* the law is the way it is, an internationalized curriculum can help, by showing how legal systems are connected by histories (for instance, colonial histories, or legal transfers for the purposes of law reform, or borrowing of legal reasoning through the common law method). Further, comparative legal insights can help students to develop critical thinking, by demonstrating that there is more than one way to solve a particular legal problem or puzzle.

This latter reason shades into the political: internationalization can have the effect of shining a light on the ways in which a particular domestic legal system is implicitly presented as ‘the best’ through legal education. Where carried out adeptly, raising students’ awareness of ‘the vastness of approaches crafted by law across the globe’<sup>20</sup> prompts the kinds of critical thinking that expose such assumptions for what they are. Further, showing that ‘law means different things in different jurisdictions’ can prompt thinking about questions of legal legitimacy, authority and power.<sup>21</sup> But conversely, internationalizing the content of legal curricula may actually have *the opposite* effect. Relatively narrow, yet politically dominant, systems or approaches may be subtly presented as ‘the best’ among comparative material. Patterns of neo-colonialism play out in legal curricula as much as they do in Higher Education more generally.<sup>22</sup>

The least ‘instrumental’ reasons for internationalizing legal curricula could be described as humanistic,<sup>23</sup> social, ethical, or personal developmental. Developing skills of critical

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<sup>18</sup> These categories form a useful *model* but neither is represented in its pure form in contemporary legal education. See, eg, William Twining, ‘Pericles and the Plumber’ 83 *Law Quarterly Review* (1967) 396; Christophe Jamin and William van Caenegem, ‘The Internationalisation of Legal Education: General Report for the Vienna Congress of the International Academy of Comparative Law, 20-26 July 2014’ in Jamin and van Caenegem, eds, 2014; Avrom Sherr, ‘The Case of the Common Law in European Legal Education’ in Gane and Hui Huang, eds, 2016; Michael Coper, ‘Internationalisation and different national philosophies of legal education: convergence, divergence and contestability’ in van Caenegem and Hiscock, eds, 2014, p 21-47; John Flood, ‘Global Challenges to Legal Education’ in Gane and Hui Huang, eds, 2016, p 31.

<sup>19</sup> O’Donovan, in van Caenegem and Hiscock, eds, 2014, p 139-142; Mijatov, p 152.

<sup>20</sup> Mijatov, p 150.

<sup>21</sup> Mijatov, p 149.

<sup>22</sup> Jamin and van Caenegem, eds, 2014, p 18-19; Carolyn Evans, ‘Learning Opportunities in Multi-National Law School Classes: Potential and Pitfalls’, in Gane and Hui Huang, eds, 2016, p 61-76; Kate Galloway, ‘Getting Back to our Roots: Global Law Schools in Local Context’ in Gane and Hui Huang, eds, 2016, p 17-30; John Flood, ‘Global Challenges in Legal Education’ in Gane and Hui Huang, eds, 2016, p 39-41.

<sup>23</sup> Mijatov, p 150-151.

thinking, a sense that there is more than the local/national, ability to use legal reasoning and argument to achieve different ends, and awareness of relations of dominance, and the roles law plays to feed those relations, all do more than equip students for future careers. These kinds of educational experiences also provoke social and personal reflection, leading to development as a socially and ethically aware human being.<sup>24</sup>

Thornton and Shannon argue implicitly that the way that the consumerized marketing of contemporary legal education operates precludes this kind of deep experiential reflective and developmental (non-instrumental) learning. Such marketing does so through a kind of double-shift. First, law school marketing seeks to distance the law school 'experience' on offer from the kinds of individual development associated with education in its traditional Higher Education sense. Law schools both downplay the actual work, the intellectual, emotional or psychological discomfort involved in studying law, constructing a law degree within 'a neoliberal ... shift from engagement to passivity'<sup>25</sup> in Higher Education generally. And second, law school marketing and the development of legal curricula on offer seek to reconnect legal education with the domestic profession, the 'economic', and a strongly instrumental rationale for law degrees.<sup>26</sup> Legal education offers placements,<sup>27</sup> experiential learning, and problem solving/problem based learning, all designed to persuade students that they will graduate with skills and competencies ready for the profession they seek to join.

Historically, of course, across Europe, legal education has often been understood solely as professional training, and this was certainly so in England and Wales with its 'apprentice model'. The debate about whether legal science is a 'proper' subject for university study is one which echoes through the centuries. Each generation of law school academics and legal professionals plays out its own version of the discussion. In Thornton and Shannon's account, 'law school marketing is strongly correlated with the vocational aspects of legal education',<sup>28</sup> law schools are seen as a branch of the legal profession, with a commercial focus, and teaching applied 'real world' skills.<sup>29</sup> In Member States of the European Union, EU law *is* the 'law of the land', so instrumental rationales coincide with learning law that goes beyond that of the state. To a lesser extent this is also true of EEA law, and at least some of the law of the Council of Europe. For many law schools, including outside Europe,

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<sup>24</sup> Basedow, in van Caenegem and Hiscock, eds, 2014, p 10-11.

<sup>25</sup> Thornton and Shannon, p 257. See also Margaret Thornton *Privatising the Public University: The Case of Law* (Routledge 2012).

<sup>26</sup> Rowan Russell tracks the changes in legal practice in Australia from the 1970s alongside legal education, to determine the extent to which the latter 'kept up' with the former, see Rowan Russell, 'If only I knew then what I need to know now: Lessons from the future', in van Caenegem and Hiscock, eds, 2014.

<sup>27</sup> See, e.g., Andrew Francis, 'Legal Education, Social Mobility, and Employability: Possible selves, curriculum intervention and the role of legal work experience' 42 *Journal of Law and Society* (2015) 173-201.

<sup>28</sup> Thornton and Shannon, p 259.

<sup>29</sup> Jamin and van Caenegem, eds, 2014, p 22-23.

these ‘real world’ skills include a focus on internationalized lawyering, particularly having in mind elite global law firms and emerging markets, especially in Asia.

The phrase ‘real world skills’ when used in this context reinforces a particular notion of the university, and of its staff and students. Far from being significant contributors to economic,<sup>30</sup> political or social life, universities and the law schools within them are constructed as a fantasy place (an ‘ivory tower’) where ‘normal life’ is suspended.<sup>31</sup> Their only use is to grant degree certificates showing examination requirements have been satisfied; they are not *per se* places of *learning*.<sup>32</sup> The place of internationalization in the law curriculum thus rests *only* on instrumental justifications: international legal education is secure only as long as (at least some of) the legal profession seeks it. Or to put it another way, the logical consequence of this line of reasoning is that – outside of the context of the European Union – international legal education is *only* for those in demand as future elite ‘global lawyers’.<sup>33</sup>

### **EU Law as a vector for internationalization of legal education**

Once a jurisdiction accepts the varied reasons for internationalizing legal education, there are basically three ways of achieving it.<sup>34</sup> These are not mutually exclusive.

First, law curricula can provide separate education on comparative law, international law, and transnational law. These can be either elective or compulsory components. A law curriculum could require a compulsory element of its ‘legal method and reasoning’ teaching to include examples of legal reasoning from different jurisdictions. It could offer opportunities to develop skills of ‘civic entrepreneurship’, engaging students in EU law projects with third sector or private organisations with a transnational element.<sup>35</sup> It could

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<sup>30</sup> For instance, this study [https://www.sheffield.ac.uk/polopoly\\_fs/1.259052!/file/sheffield-international-students-report.pdf](https://www.sheffield.ac.uk/polopoly_fs/1.259052!/file/sheffield-international-students-report.pdf) found that international students alone made a net total contribution to Sheffield’s GDP in 2012/13 of £120.3 million.

<sup>31</sup> Thornton and Shannon, p 263.

<sup>32</sup> This presents a particularly bleak notion of the university which is, perhaps obviously, not how we think about universities. A full critique is beyond the scope of this paper but readers may like to consider Margaret Thornton’s work in this area as a starting point. Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge 2012).

<sup>33</sup> Basedow, in van Caenegem and Hiscock, eds, 2014, p 10-11.

<sup>34</sup> Mary Hiscock and William van Caenegem, ‘Conclusions’, in van Caenegem and Hiscock, eds, 2014, p 290; see also Vai lo Lo, ‘The Internationalisation of Legal Education: A Road Increasingly Travelled’ in Mary Hiscock and William van Caenegem, eds, *The Internationalization of Law: Legislating, Decision-making, Practice and Education* (Edward Elgar, 2010), p 117.

<sup>35</sup> See Francesca Strumia’s contribution to the workshop ‘Brexit and the (Northern) Law School’, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017, referring also to Alberto Alemanno’s *The Good Lobby* project <http://www.thegoodlobby.eu/> and Alberto Alemanno, *Lobbying for Change: find your voice to create a better society* (Icon Books, 2017).

require study of, say, public international law as part of a programme. It could offer electives in transnational law, such as the law of the WTO, or in international commercial transactions or arbitration law. In some countries, such as Canada, South Africa,<sup>36</sup> or Scotland ('mixed' civil and common law systems); Malaysia (common law and Islamic law); or New Zealand (customary law and common law), the domestic jurisdiction is inherently comparative in nature.<sup>37</sup> Obviously if the 'international' components of a curriculum are core, their position is much more secure in terms of attracting staffing resources: core elements of the curriculum must be taught. This approach is thus more likely to involve recruitment of academic staff whose qualifications are from outside the jurisdiction.

Second, law schools may integrate internationalism in each aspect of their (otherwise or previously domestic) curricula. Substantive legal topics can be taught not from a uni-jurisdictional point of view, but with an eye on different legal approaches adopted in other jurisdictions. Within the common law world, the possibilities of persuasive precedent from other jurisdictions mean that this approach is relatively common. Some legal subjects are inherently international,<sup>38</sup> in the sense that domestic law is not only influenced, but also constrained by public international law: environmental law or international trade and finance law spring to mind. Curricula that include these subjects are inherently internationalized. In general, however, as noted above, these subjects tend to be optional. The core of legal curricula tends to be light in terms of internationalized content.

Thirdly, a curriculum may offer space to send the student abroad to experience studying law in another jurisdiction, either as part of a domestic programme, or as a stand-alone programme (common for LL.Ms). Perhaps associated with post colonialism, the past patterns of students from less developed countries seeking legal education in more developed countries<sup>39</sup> are being inverted, at least in some cases.<sup>40</sup> Here the student not only experiences studying the substantive law of another jurisdiction, but also 'foreign' methods of and approaches to legal education. Typically, the student will encounter other visiting students, whose jurisdictional perspectives add to the overall educational experience: a visiting student learns about more than two legal systems. The immersive quality of the educational experience takes it far from 'instrumental' legal education, and may foster deep

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<sup>36</sup> Laurence Boule, 'Isolationism, democratization, and globalization: Legal education in a developing country' in van Caenegem and Hiscock, eds, 2014, pp 48-69.

<sup>37</sup> Jamin and van Caenegem, eds, 2014, p 20; William van Caenegem, 'Ignoring the civil law/common law divide in an integrated legal world', in van Caenegem and Hiscock, eds, 2014, p 145-172.

<sup>38</sup> Jamin and van Caenegem, eds, 2014, p 11.

<sup>39</sup> John Flood, 'Global Challenges to Legal Education' in Gane and Hui Huang, eds, 2016, p 32, citing an OECD study which shows that 1.3 million students were studying outside their home countries in 1990, and 4.3 million in 2011, and illustrates this pattern of global movement.

<sup>40</sup> Chang-fa Lo, 'Legal education in a globalized world: Micro/macro reforms and international outsourcing for developing countries' in van Caenegem and Hiscock, eds, 2014, p 207.



learning in terms of intercultural awareness, and a securing, or even awakening, of an identity as a 'global lawyer'.<sup>41</sup>

With membership of the EU, the UK has enjoyed a 45-year privilege, making all three of those modes of internationalization of legal education significantly easier than they will be outside of the EU. This means that, over time, leaving the EU will involve important changes for the practicalities of internationalization of legal education in the UK.

EU law is the candidate or 'archetype' of transnational law. Hans Micklitz has argued that the effective teaching of EU law (such as exemplified in the European University Institute's *European Private Law* seminar) entails inculcating the profound legal understandings associated with internationalization of legal education at its best.<sup>42</sup> EU law embodies many aspects of comparative law. Indeed, it is impossible to make sense of the jurisprudence of the CJEU in a wide range of areas without approaching matters with an understanding of comparative law. EU administrative law, human rights law, competition law, even procedural law, for instance, all involve the 'borrowing' or 'blending' of legal concepts and approaches from civil and common law jurisdictions. Whether these phenomena are made explicit in UK legal education depends on the context in which that teaching takes place, and who is doing it. But given the staffing profile of UK law schools, and the identities and backgrounds of those who teach EU law in particular, in many contexts they are made more or less explicit. Further, of course, although EU law is often taught in UK law schools as if it were the law of a state, when done well, that teaching does not lose sight of the fact that EU law is a creation of treaties, the building blocks of international law. Because EU law is currently a compulsory part of UK undergraduate law curricula, and other 'qualifying law degrees', all UK law students on such programmes have been exposed, at least indirectly, to these aspects of internationalized legal education.

Secondly, EU law is now deeply embedded into virtually every substantive legal subject taught in undergraduate curricula, and in many postgraduate curricula, in UK law schools. This is not only the case for the more obvious subjects, such as consumer contracts, employment, environmental, financial services, intellectual property law, and so on. It also applies to some previous preserves of 'domestic' law, such as criminal or family law. Even some elements of the professional stages of UK legal education, such as company law, cannot be understood without understanding EU law. This is the case even where the EU provenance of the relevant law is not made explicit in the relevant legal education.

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<sup>41</sup> See for example Cherry James, 'Enhancing the QLD: internationalisation and employability: the benefits of Erasmus Intensive Programmes' 2013 47(1) *The Law Teacher* 64; Victoria Jacobone, 'Evaluating the impact of the Erasmus programme: skills and European identity' 2015 40(2) *Assessment and Evaluation in Higher Education* 309 and more generally William Twining, 'A cosmopolitan discipline? Some implications of "globalisation" for legal education' 2001 8(1) *International Journal of the Legal Profession* 23; W Wesley Pue, 'Globalisation and legal education: Views from the outside-in' 01 8(1) *International Journal of the Legal Profession* 87;

<sup>42</sup> The pedagogical and practical aspects of the seminar are described in Hans Micklitz, 'The Bifurcation of Legal Education – National vs Transnational' in Gane and Hui Huang, eds, 2016, p 43-60.

Thirdly of course the Erasmus programme has made the opportunity of visiting a law school in another jurisdiction open to many UK law students who in the past would probably not have considered it. The political agenda of Erasmus mobility is undoubtedly one of the EU's greatest success stories: in legal education it has greatly eased opportunities for cooperative learning across law schools all over Europe.<sup>43</sup> The normalisation of Erasmus within the UK Higher Education experience more generally, the availability of many courses taught in English, and the Erasmus funding available, coupled with the exchange rate with newer Member States in Central or Eastern Europe, means that access to a year abroad is within the reach of many UK law students, however modest their backgrounds or parochial their viewpoints or aspirations. In addition the Erasmus scheme opens opportunities for students from other Member States to study in the UK, thus enriching the discussions and approaches taking place in Law Schools across the country. Reducing these opportunities will diminish the student experience.<sup>44</sup>

All of these aspects of contemporary UK legal education have combined to secure at least Europeanization, as a variant of internationalization, if not internationalization more generally, within law schools, relying on the place of EU law in the UK's legal systems. Admittedly, they have not required all of the underpinning reasons for internationalization that we outlined above. Compulsory teaching of EU law does not, for instance, require exposure to non-Western legal systems or approaches, or to the neo-colonial 'dark side' of national, transnational, or international law. But, as a minimum, it requires the integration into the core of legal curricula of the jurisdictional 'other', which is the bedrock of internationalization of legal education.

### **What now?: the effects of the Brexit vote**

How can we make sense of all of the above in the context of the UK's referendum vote in June 2016 to leave the EU? What trajectories can we imagine? Here, we consider a very simple matrix: the short term; a transitional period; and the longer term, post-transition.

In the short term, the EU Referendum of June 2016 and the prospect of Brexit, or at least the entry into a 'transitional' or 'implementation' period, in March 2019 in themselves change little for UK law schools.<sup>45</sup> For now, EU law remains among the 'foundations of legal knowledge' that characterize Qualifying Law Degrees in England and Wales; Scotland; and

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<sup>43</sup> Basedow, in van Caenegem and Hiscock, eds, 2014, p 8-9; 12-16.

<sup>44</sup> The benefit of EU students joining UK universities is explored in the NUS evidence submitted to the Education Select Committee for the Inquiry on the impact of exiting the European Union on higher education November 2016. Available at <https://www.nus.org.uk/PageFiles/2161132/NUS%20written%20evidence%20-%20Education%20Committee%20-%20Brexit%20and%20HE%20inquiry%20-%20November%202016.pdf>. Details on numbers of outgoing students from the UK, and incoming students to the UK, under Erasmus are available here: <https://www.erasmusplus.org.uk/statistics>.

<sup>45</sup> See Articles 121 and 168 of the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, agreed in principle between the EU and the UK in March 2018 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691366/20180319\\_DRAFT\\_WITHDRAWAL\\_AGREEMENT.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf).

Northern Ireland. EU law is still a formal source of UK law until we leave the EU, and much of it will remain so during the transitional ‘implementation period’.<sup>46</sup> Moreover, a great deal of EU law will be retained as UK law after Exit day.<sup>47</sup> There is no evidence that law schools have made any short-term changes, other than to integrate teaching of the law of the Brexit process into their existing curricula,<sup>48</sup> and – in the case of at least one law school – to offer an optional module on ‘The Law of Leaving the EU’. Some new resources have been developed, to support such teaching and learning, for instance by the major publishers of EU Law textbooks, which all have ‘Brexit supplements’,<sup>49</sup> often hosted online, and by legal education networks such as *SULNE*.<sup>50</sup>

But after this short term we can expect a transitional period for international or transnational legal education in the UK. How long that transitional period may last depends to a great extent on the political and legal arrangements for EU-UK relationships following Exit Day. Given that – at the time of writing – the Withdrawal Agreement under Article 50 TFEU has been agreed only in principle, we can conjecture only at the level of generalities here. A ‘crash out Brexit’ with no Withdrawal Agreement may have devastating effects on law school staffing, depending on what provisions are made in domestic UK immigration law for EU-27 nationals who are working in the UK, and their families. A five-year transition during which the UK remains within the structures of EU law while EU-UK trade and other arrangements are negotiated in detail would provide significant stability and certainty. Neither of those two extremes seem very likely politically speaking, though either is possible. In any event, during transition, law schools, along with the rest of the UK economy, will operate in an environment of uncertainty. But despite that uncertainty, and in the context of other changes to the external environments in which UK law schools operate (see below), those law schools will perforce begin to make decisions that will determine the place of EU Law, and therefore indirectly internationalization, in UK legal education in the longer term post-Brexit.

In the longer term, we argue here that the idea of internationalized legal education *for all* is likely to be the biggest casualty of Brexit for UK legal education. This lack of inclusion in internationalized UK legal education will, we believe, take place through changes to three overlapping phenomena: student bodies; academic staffing of law schools; and what we might call as a short-hand ‘values’ or ‘identities’, in the sense of what law schools ‘stand for’

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<sup>46</sup> Draft Withdrawal Agreement, Article 122. See also, e.g., Kenneth Armstrong, *Implementing Transition: Legal and Political Limits* (November 1, 2017). University of Cambridge Faculty of Law Research Paper No. 50/2017. Available at SSRN: <https://ssrn.com/abstract=3066703>.

<sup>47</sup> European Union (Withdrawal) Bill 2017-19, clauses 2 and 3.

<sup>48</sup> Paul James Cardwell, ‘Career advice: how to teach Brexit’, *Times Higher Education* 6 November 2017 <https://www.timeshighereducation.com/news/career-advice-how-teach-brexit>.

<sup>49</sup> For example, C Barnard and S Peers, *EU Law* (OUP 2017), now has a new chapter 27 on Brexit.

<sup>50</sup> <https://sulne.ac.uk/open-access-resources/>.

and what is regarded as a ‘bare minimum’ of acceptable legal education by every UK law school.<sup>51</sup>

Already there is some anecdotal evidence that applications from EU and international students to some UK law schools are dropping because of the EU referendum. Over the course of the UK’s EU membership, UK law schools have come to be seen as an excellent place to learn EU law, and to equip oneself for a career as a ‘European’ or ‘internationalized’ lawyer. Many UK-based LLM programmes support this desire to learn (EU) law (and especially its more commercially-focused aspects) in an English-language speaking jurisdiction. Post-Brexit, and depending upon the eventual EU-UK trade (and other) agreement(s), English law may yet remain the law of choice for much international trade. As John Flood points out, ‘it is not difficult to overestimate the importance of New York State law and English law, as these are the basic normative systems that drive the work of the two main global capital markets: London and New York. Globalization in the legal sphere is represented by the export of those trained in them’.<sup>52</sup> It is too soon for conjecture as to the extent to which London will remain one of the two main global capital markets post-Brexit: certainly Frankfurt is keen to replace it.

But the UK as a place to learn EU law – especially its less commercially-focused dimensions – is likely to be diminished. At least some of the UK’s current market share in (EU) legal education will be captured by those EU Member States, such as the Netherlands, Denmark, Sweden, Finland and above all Ireland, where English language teaching of EU law, particularly at LLM level, has been on offer for decades. Unless the future EU-UK relationship secures continued recognition of legal qualifications from the UK, or that is secured in domestic law in each of the Member States, obtaining a legal qualification in Ireland will give English-speaking law graduates access to more markets for their legal services than graduates from a UK jurisdiction. Indeed some UK students may choose Ireland for their legal education for this very reason. Irish universities are also cheaper places to study than UK universities,<sup>53</sup> although whether they remain so, given the UK post-Brexit economy, is almost impossible to guess.

So, overall, the number of European (and possibly international) students studying in UK law schools, particularly on LLM programmes, is likely to decrease in the longer term.<sup>54</sup> This

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<sup>51</sup> As Jessica Guth pointed out at the workshop ‘Brexit and the (Northern) Law School’, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017, the three phenomena – who we are (staff and students) and what we value – are intertwined.

<sup>52</sup> John Flood, ‘Global Challenges to Legal Education’ in Gane and Hui Huang, eds, 2016, p 33.

<sup>53</sup> See Jane Ching’s presentation to the SLS-funded ‘Brexit and the Law School’ event held at Keele, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>.

<sup>54</sup> See Jessica Guth’s comments to the SLS-funded ‘Brexit and the Law School’ events held at Liverpool and Northumbria, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>. The anecdotal information from colleagues involved in recruitment is not, so far at least, being proven by the applications to universities to study law at undergraduate level. While the 2017 applications through UCAS from EU and overseas applications were down by 2% compared with 2016, the numbers remain very much in line with previous years

decrease means that the experience of being in a law school inhabited by students from different jurisdictions will be diminished for UK students who stay in their home jurisdiction to study. Even just the number of languages other than English spoken among one's peers will make a difference to the current sense of legal education as international within UK law schools.

Furthermore Brexit will significantly affect the availability of international student experiences for UK students. Even if the UK negotiates a hoped-for continued inclusion in the Erasmus programme, the current normalization of study abroad, field trips, placements in other European countries and the knowledge of other languages will undoubtedly be challenged. There are of course different possible solutions available, such as double *maîtrise* degrees, or international campuses.<sup>55</sup> Some UK law schools will be in institutions that embrace these approaches; others will not. Only those students in law schools embracing these models, and/or continuing to attract incoming students from diverse jurisdictions will experience learning in an internationalized law school. Internationalized legal learning will no longer be a commonplace experience for all UK law students.

There is little evidence so far of a staffing exodus from UK law schools following the EU referendum vote.<sup>56</sup> Across the Higher Education sector, staffing concerns have related mainly to access to EU funding through Horizon 2020. Law schools' research income (of which EU funding accounts for about one quarter) is less than 5% of their budgets (and in many cases significantly less): law school income comes from student fees, not research. So any future changes to demographics of law school staff will come from what is being taught, not what is being researched.

Given the many other external pressures faced by law schools, which we discuss below, it would be astonishing if EU law remained as a compulsory undergraduate module in all UK law schools.<sup>57</sup> The current legal education reforms suggest that the Bar Standards Board continues to require EU law as a core subject in the foreseeable future but that the Solicitors Regulation Authority does not include any significant knowledge of EU Law in its requirements. We return to this below. For sure, 'retained EU law' will remain a source of

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and no obvious dip in numbers can be observed. See UCAS, '2017 cycle applicant figures – June deadline', available at <https://www.ucas.com/corporate/data-and-analysis/ucas-undergraduate-releases/2017-cycle-applicant-figures-june-deadline-0>.

<sup>55</sup> See Jane Ching's presentation to the SLS-funded 'Brexit and the Law School' event held at Keele, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>.

<sup>56</sup> Reports such as this one <http://www.independent.co.uk/news/uk/politics/brexit-latest-news-uk-university-eu-academics-resign-immigration-brexodus-citizens-europe-a8143796.html>, accessed 8 January 2018, merely show staff 'churn' rather than exit per se.

<sup>57</sup> Although when thinking about the timeline here, it is worth bearing in mind that EU law did not become a compulsory 'foundation of legal knowledge' in England and Wales until 1994, some 20 years after the UK joined the EEC. We might imagine a similar – or longer – timeline in reverse. See Richard Taylor's contribution to the workshop 'Brexit and the (Northern) Law School', <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017.

UK law,<sup>58</sup> so some study of EU law will remain in teaching of ‘legal systems’ and probably in constitutional law. But in the longer term there will no longer be a need to employ staff who are able to teach EU law as a free-standing compulsory subject, rather than teaching about ‘retained EU law’ as a source of UK law and thus as part of other specialist subjects.

Furthermore, the UK will cease to be the appealing place to build a career as an EU legal scholar that it has become, attracting many graduates of the best EU law schools for PhD education, especially the European University Institute. Depending on what happens to the UK economy, the UK may also become a significantly less attractive place for law scholars from Eurozone countries escaping recession there. UK law schools will have fewer staff members from other European jurisdictions, fewer who speak European languages other than English. For those law schools that seek to offer ‘research-led teaching and learning’, fewer teachers of EU law also means less EU law research.

In the longer-term, how will EU law scholars currently in UK law schools respond to this changing environment for their teaching and research? For now, many EU law scholars are experiencing an unprecedented interest in their expertise.<sup>59</sup> But that short-term position will not last. In the longer run, four broad options are available for staff who currently teach and research EU law. Some will position themselves as scholars of EU law from the outside: after all the USA, Canada and other jurisdictions include scholars of EU law, so why not the UK? Relatedly, some may develop understandings of EU law as modelling transnational, multilevel or comparative legal methods or orders, themselves worthy subjects of study. But instrumental economic or even academic notions of legal education see little value or need for such knowledge: as now, probably only a minority of UK law schools will offer teaching in transnational, multilevel, or comparative law. If the USA is a good comparator, only a few elite law schools will be a place for teaching and research of EU law ‘from the outside’. Just as Roman law – once a bedrock of undergraduate legal education in the UK’s ancient universities (Oxbridge, Edinburgh, Glasgow) – has virtually disappeared from UK legal education, so might we expect EU law to come to be seen as a ‘luxury’ rather than a necessity. After all, both EU law and Roman law map a complete legal system, with cultural significance and their own language and methods. But the usefulness of that to legal education, either in terms of academic skills, or in terms of political contexts, is insufficient in itself to secure a place in law curricula in the way that the ‘bedrock’ of ‘qualifying law degree’ subjects has been able to do.<sup>60</sup>

Some UK-based EU legal scholars will specialise in the unfolding legal relationships between the UK and EU post-Brexit. This is likely to be a reasonably long-term need in terms of legal

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<sup>58</sup> The European Union (Withdrawal) Bill 2017-19, clauses 2 and 3, proposes that EU law will become a new source of UK law, ‘retained EU law’.

<sup>59</sup> As Thomas Horsley and Charlotte O’Brien put it, in their contributions to the workshop ‘Brexit and the (Northern) Law School’, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017, the discipline of EU (constitutional) law is ‘suddenly strategically important’ and ‘EU law academics have a currency we’ve never had before’.

<sup>60</sup> See Elaine Dewhurst’s presentation to the SLS-funded ‘Brexit and the Law School’ event held at Keele, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>.

expertise, both in education and in practice: after all, the UK's legal systems have been entwining with EU law for over 40 years: it will probably be a case of '40 years in, 40 years out'. There is a pragmatic reason to retain some EU law teaching and this is based on the fact that, whatever the future relationship between the UK and the EU, UK lawyers need to know something about the EU legal system, its institutions, its principles and concepts, and especially about single market law, free movement and competition law. If the UK adopts 'regulatory alignment' with the EU, legal knowledge of EU regulatory structures will be essential for advising even those whose trade is domestic. Areas of UK law, such as consumer protection law, or employment law, will be impossible to understand without seeing their EU law influences and background.<sup>61</sup> Even if the UK departs from the EU in regulatory approach, the 'law of gravity' tells us that a significant proportion of the UK's trade will be with the EU, and legal advice on the legality of that trade will remain in demand. For those scholars of EU law working in law schools that focus on instrumental, practice-focused legal education, outside of the elite group of law schools, whose graduates do not go on to employment as 'global lawyers', this is one option for the longer-term future.

The fourth option for those who currently teach and research EU law in UK law schools is to refocus teaching and research efforts onto the substantive areas that interest them the most, including 'retained EU law' as a source of UK law. Substantive legal areas including consumer law, private international law, employment law, environmental law, financial services law, and company law may all be subject to significant continuing influence from EU law, depending on what models of regulatory alignment the UK chooses post-Brexit. While none forms part of the 'bedrock' of 'qualifying law degree subjects', all are well-recognised central optional aspects of UK legal education and are likely to continue to be so.

So if we consider a version of internationalized legal education that is driven by an instrumental notion of legal education, justified by serving a national or even local market for law graduates, the changes implied by EU law no longer being part of the 'core' of UK legal education are significant. The very notion of who UK law schools are (in terms of the students and staff who inhabit them) will change, and many UK law schools which currently include a significant cohort of EU-27 nationals will include fewer. By contrast, internationalized legal education as an elite 'add-on' for students and staff within law schools serving the market for global lawyers is significantly less likely to change.

In other words, Brexit represents a challenge to the values and identities that we express as law schools across the board in the UK: what we believe to be important about legal education, at least as a minimum level of agreement; and what that means for both what we do and who we are. What we do includes both the very mundane sense of how we teach on a day-to-day basis, but also the less mundane sense of our curriculum designs. Who we are again includes both a very mundane and practical sense of how the staff and students

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<sup>61</sup> For instance, as Richard Taylor explained at the workshop 'Brexit and the (Northern) Law School', <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017, the UK Supreme Court's jurisprudence on the Consumer Rights Act 2015 draws heavily on the jurisprudence of the European Court of Justice, which itself draws on both civil and common law notions of obligations law.

within each of our law schools understand their identities, but also the less mundane question of how we understand ourselves as communities of legal learners, scholars, and teachers. Brexit, over time, will force a greater diversification among legal education in the UK, where an internationalized curriculum (at least in the weaker sense of Europeanized legal education) is no longer part of what we *all* do, and who we *all* are.

We have differentiated here between likely effects on legal education in ‘elite’ and ‘other’ law schools. Of course, while we might all recognise that LSE and Oxbridge offer ‘elite’ legal education, it is hard to define with precision ‘elite’ and ‘other’ at the boundary between the two. But there is also an important geographical dimension at play here. The place of London in global trade (assuming that the UK retains such a place post-Brexit) is likely to secure a continued influx of students from other countries, and thus the experience of the vast majority of London-based law students<sup>62</sup> is likely to continue to enjoy an international flavour, both in terms of students and of staffing.

Further, law schools in the national capitals (Belfast, Edinburgh, and although perhaps to a lesser extent Cardiff) have already done a great deal to internationalize their students, staff and curricula. The future relationships of their national executives and parliaments/assemblies with the EU (particularly in Belfast where the Withdrawal Agreement will, if agreed, involve some kind of *lex specialis* for the island of Ireland, and where the Common Travel Area will continue to provide important legal context) are likely to give continued support to securing the place of EU law within the legal education on offer in those localities. Scotland’s future relations with the EU are sufficiently uncertain that we might expect all Scottish law schools to continue to keep EU law as a central part of their curricula.<sup>63</sup> Where an institution is offering ‘elite’ legal education, it may be easier to continue to secure the place of international/global legal education even if that does not include EU law. Institutions that are both elite and in London/Belfast/Edinburgh/(and perhaps) Cardiff are to be expected to continue to offer EU legal education as part of their international offering.

But this leaves the rest of the country, particularly the English regions, in a significantly more precarious position in terms of offering international legal education. Especially in the longer term, Brexit’s indirect effects on matters such as international recruitment of non-EU and EU-27 students and staff are likely to be more important than its direct effects. How can we situate ourselves as internationally engaged places of legal learning if the localities in which we are based tangibly express anti-foreigner feeling in the form of the EU referendum vote, and general reactions to non-British people (or other ‘others’) within those local communities? What happens if market share of students is to be squeezed, if fewer international staff will seek to make a career in the UK, and if our sense of what is the bare minimum underpinning for legal education shifts so that EU law is no longer a ‘core

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<sup>62</sup> Although of course some London-based law schools essentially serve local communities, at least on some of their programmes, if not reflected among their staff.

<sup>63</sup> EU law was a core part of Scottish legal education *before* the UK joined the EU, see Kirsty Hood ‘The Future Place of EU Law in Admission to the Faculty of Advocates’ <https://sulne.files.wordpress.com/2017/11/studying-eu-law-during-and-after-brexit-1st-edition.pdf>.



curricular’ offering, essential for everyone who intends to enter legal practice in a jurisdiction of the UK? Which English law schools outside of London will remain sufficiently ‘elite’ to continue to offer internationalized legal education of the depth and scale currently on offer in the longer term post-Brexit? Our best guess in April 2018: fewer than half a dozen will ‘make the cut’.

### **What now? The broader contexts of changes to legal education**

It is important to see Brexit in its broader contexts. Brexit is far from the only external factor that is having and will continue to have profound effects on legal education in the four nations that make up the UK, and its legal systems. Structural factors both in Higher Education and in the regulation of the legal profession; the impact of pedagogical technologies;<sup>64</sup> consumerism in Higher Education; novel models and ‘alternative business structures’ for provision of legal services;<sup>65</sup> extra-legal models of dispute settlement<sup>66</sup> ... all have important, overlapping and difficult-to-predict effects. The effects of REF, TEF, and other performance metrics deployed in Higher Education in the UK have had effects on legal education and will continue to do so. The removal of the caps on undergraduate student numbers, combined with law as one of a number of ‘cash cow’ subjects,<sup>67</sup> as well as being seen as a desirable subject of university study for many who are first in their family to university, has already led to both an increase in the number of universities offering law programmes, and in the scale of law schools in terms of student cohort size.

Here, we focus on one important imminent change to legal education in England and Wales<sup>68</sup> that may present a more profound challenge than Brexit to the place of EU law (and hence to at least an element of internationalized legal education as a common experience in *all* UK law schools): the Solicitors Regulation Authority’s new approach to measuring and assessing legal competencies.<sup>69</sup> We have chosen this example as both totemic in terms of

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<sup>64</sup> See, eg, Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (Ashgate, 2007).

<sup>65</sup> Enabled by the UK’s Legal Services Act 2007. For further discussion see, for instance, Richard Susskind *Tomorrow’s Lawyers: an introduction to your future* (OUP, 2013); Larry E Ribstein, ‘The Death of Big Law’ 3 *Wisconsin Law Review* (2010) 749.

<sup>66</sup> O’Donovan; James Douglas, ‘Does cross-examination translate?’; Lawrence Boo, ‘Advocacy before an international arbitral tribunal’, all in in van Caenegem and Hiscock, eds, 2014; John Flood, in Cane and Hui Huang, eds, 2016, p 33.

<sup>67</sup> Data shared by Stuart Bell, based on a comparison of 8 diverse law schools, at the workshop ‘Brexit and the (Northern) Law School’, <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017 showed law schools typically have a 50-60% gross margin when direct income-expenditure costs are taken into account. University averages are 40% and many disciplines have significant negative net margins.

<sup>68</sup> Of course, Scotland and Northern Ireland are not directly affected by the Solicitors Regulation Authority for England and Wales.

<sup>69</sup> See the SRA’s press announcement about its new approach here <http://www.sra.org.uk/sra/news/press/sra-board-announces-new-approach-to-ensure-solicitors-remain-competent.page>. At present, EU law is represented among the list in the ‘statement of legal knowledge’

the balance between more or less instrumental approaches to legal education, and the implications of that balance for internationalized legal education; and as current and pressing in terms of the upheaval and uncertainty it means for law schools in England and Wales. We have already explained why, into the longer term post-Brexit, law schools in Scotland and Northern Ireland are more likely to be able to maintain internationalized curricula than those in the regions of England and Wales.

The Solicitors Qualifying Examination (SQE) is being introduced by the Solicitors Regulation Authority (SRA) as the sole method of assessing legal competencies and hence the gateway to determining access to the solicitors' profession. The SQE will entirely replace the different stages in the current pathways to qualification as a solicitor and thus, at least formally speaking, will render the Qualifying Law Degree (QLD) obsolete in that context.<sup>70</sup> In practice, however, the QLD is likely to continue to attract students who seek employment in 'elite' law firms, which seek to employ people with the analytical and critical skills associated with 'thicker' notions of legal education (explanatory, evaluative or analytical learning) than bodies of knowledge learning about 'what the law is'. A full examination of the SQE is obviously beyond the scope of this paper. But there are in our view three main issues arising from SQE which impact directly or indirectly on the possibility of internationalized law schools and curricula.<sup>71</sup> Two of these are about *what* is taught and learned in law schools, and the consequent effects on the student body. The third is about *who* is employed in those law schools.

In terms of the curriculum content, SQE will remove any requirement for aspiring solicitors in England and Wales to learn anything about EU or international law or to study law in any comparative contexts. The SQE is underpinned by the Statement of Legal Knowledge which sets out what it is solicitors need to 'know' at the point of qualification. The statement includes 'Constitutional law and EU law (including Human Rights)'.<sup>72</sup> However, the

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(<http://www.sra.org.uk/solicitors/competence-statement/statement-legal-knowledge.page> point 11(g)). The SRA stresses that EU law remains a core requirement of legal education in England and Wales, see the contributions of Debra Malpass at the workshop 'Brexit and the (Northern) Law School', <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>, funded by the Society of Legal Scholars, held in Liverpool Law School in June 2017. Similarly both the Law Society of Scotland and the Faculty of Advocates have stressed that EU law remains part of practice in Scotland, see Rob Mars 'The Position of EU Law on the Route to Qualification as a Solicitor Post-Brexit' and Kirsty Hood 'The Future Place of EU Law in Admission to the Faculty of Advocates' <https://sulne.files.wordpress.com/2017/11/studying-eu-law-during-and-after-brexit-1st-edition.pdf>. European Law remains one of the eight core subjects for qualifying as a solicitor in Northern Ireland <https://www.lawsoc-ni.org/becoming-a-solicitor>.

<sup>70</sup> For more information see: <https://www.sra.org.uk/sra/consultations/solicitors-qualifying-examination.page>. The Bar Standards Board has, however, indicated that it will continue to require QAA-compliant law degrees for professional access to the bar. *Consultation on Future Bar Training: Shaping the education and training requirements for prospective barristers* (October 2017) para 36 [https://www.barstandardsboard.org.uk/media/1852877/consultation\\_on\\_future\\_bar\\_training\\_shaping\\_the\\_education\\_and\\_training\\_requirements\\_for\\_prospective\\_barristers.pdf](https://www.barstandardsboard.org.uk/media/1852877/consultation_on_future_bar_training_shaping_the_education_and_training_requirements_for_prospective_barristers.pdf).

<sup>71</sup> See also James, Cherry and Koo, John, 'The EU Law "core" module: surviving the perfect storm of Brexit and the SQE.' 2017 *The Law Teacher* published online <https://doi.org/10.1080/03069400.2017.1394144>

<sup>72</sup> See <http://www.sra.org.uk/solicitors/competence-statement/statement-legal-knowledge.page> at 11.

requirement for EU law knowledge is limited to ‘11g. The place of EU law in the constitution’.<sup>73</sup> In other words, the SQE does not require any knowledge of substantive EU law, such as internal market law, or EU citizenship law, at all. ‘The place of EU law in the constitution’ will change, so what will be required here partly depends on the constitutional landscape post-Brexit. At present, the intention is to encapsulate the place of EU law in the UK constitution in the EU (Withdrawal) Act 2018. What the details will be, particularly about the status and control of devolved nations/regions over powers repatriated from the EU, is as yet unclear. For our purposes though, the SQE simply follows Brexit rather than safeguarding against some of its effects on internationalized (or at least Europeanized) legal education in England and Wales.

Second, the nature of the SQE and its instrumental approach to legal education will have important impacts on the curricular content in some law schools. Assessment of the required knowledge takes place through a centralized examination involving multiple choice questions (MCQs). MCQs are fit for testing knowledge of ‘what the law is’. Some studies suggest that modified versions of MCQs (‘case based MCQs’; ‘multiple choice item development assignment’) may be associated with assessing the application of law to factual matrices; and that MCQs, used adeptly, may contribute fostering *learning* beyond ‘what the law is’.<sup>74</sup> But in their standard form, MCQs are totally unsuited as a means of assessment in explanatory, evaluative, or analytical legal learning: learning about *why* the law is the way it is; about whether the law meets certain externally or internally set standards; or about the *effects* of the law on society, the economy, particular groups, and so on.

The impacts of the SQE, and its MCQs, are likely to be felt differently in elite institutions and others. Elite institutions, catering for those who are future employees of global law firms, are likely to continue their educational approaches without making SQE-inspired changes to their programmes. If internationalization within their curricula is affected, it will be because of Brexit and other factors, not because of changes to solicitors’ qualification routes.

Other institutions though, and particularly those whose student bodies and values or identities focus on a more practical and vocational (instrumental) legal education, may well seek to provide SQE-ready degrees to a greater or lesser extent. Even if this only means ‘re-badging’ current content to highlight how this can help students prepare for the SQE, it will still mean a squeezing of the international, which finds no place on the SQE: any substantive EU, international or comparative components of a ‘re-badged’ programme will find themselves without a ‘badge’, with the consequent precariousness associated with aspects of a curriculum that do not obviously serve student or employer ‘needs’. But for some institutions, SQE may mean a significant shift towards learning and teaching methods which

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<sup>73</sup> Ibid.

<sup>74</sup> For examples of how MCQs can be used effectively see Donnelly, C, ‘The Use of Case Based Multiple Choice Questions for Assessing Large Group Teaching: Implications on Student’s Learning.’ 2014 *Irish Journal of Academic Practice* 3(1) Article 12. Draper, S, ‘Catalytic assessment: understanding how MCQs and EVS can foster deep learning.’ 2009 *British Journal of Educational Technology* 40(2), 285-294. Fellenz, M.R, ‘Using Assessment to support higher level learning: the multiple choice item development assignment’. 2004 *Assessment and Evaluation in Higher Education* 29(6), 703 – 719.

seek to only prepare students for an extensive MCQ examination. Where this occurs there will be no space in the curriculum to include learning about law (explanatory, evaluative or analytical learning), including its contingent and fluid nature, as opposed to learning what the (settled) law is.<sup>75</sup> There will be no, or only very limited, scope for critical exploration of ideas and academic enquiry. There will be even less space for optional modules which do not in some way help students work towards achieving an SQE pass.

This move would have a profound effect on internationalization. Its narrow and instrumental approach would certainly reduce the attractiveness and value of an English (and Welsh) Law degree, making it harder to recruit non-UK students. UK students would no longer experience at least some elements of an internationalized legal education, irrespective of the type of institution in which they are learning. The approach would also leave underdeveloped a significant variety of skills associated with the qualities of graduates. This would mean that UK law students would be less likely to consider postgraduate study on non-instrumentally-based programmes, such as LLMs, not least because they would be ill-equipped to deal with the demands of such programmes. Without a domestic market, such programmes would be threatened, and if the expected effects of Brexit on recruitment of European students take place, many will become unviable. So, for non-elite law schools in England and Wales, all of these effects, taken together, will have a significant impact on how international their student base is.

Third, it is not only the student body and the focus of learning and teaching that will change. Longer term, SQE will have an impact on who staffs English (and Welsh) law schools – and, taking this further – whether those law schools even belong in universities. We have outlined the expected longer term effects of Brexit on non-elite law school staffing. But SQE will accelerate those changes. For those law schools wanting to offer SQE-ready programmes, additional changes to staffing competencies will be needed. Although the SRA is likely to continue to require lawyers to have a degree or equivalent, the SQE merges the academic and vocational elements of education and training. Staff expertise in both will be needed, and staff who can offer only the academic elements will be less in demand. This will be particularly the case for those who do not have a law degree from England and Wales, or at least another English-speaking common law country. The current situation, where the majority of law schools in England and Wales include staff from outside the jurisdiction, at least from other EU countries, will alter significantly. Law schools, taken as a whole, will be less international.

Taking this line of thought further, the SQE has the potential to shift the balance of how legal education is understood in the 21<sup>st</sup> century UK further towards the instrumental or vocational, at the expense of the academic and liberal elements which, arguably at least, make the study of law an intellectual pursuit.<sup>76</sup> Taken to its logical conclusion, the place of

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<sup>75</sup> See the letter from SLS, SLSA, ALT, and CHULS to the Legal Services Board, February 2018 available at <http://www.lawteacher.ac.uk/alt-activities.asp>

<sup>76</sup> Some of these concerns as well as the importance of a liberal legal education are outlined in Jessica Guth and Chris Ashford, 'The Legal Education and Training Review: regulating socio-legal and liberal legal education?' 2014 48(1) *The Law Teacher* 5

law in universities *at all* becomes more difficult to defend, except in the case of those elite law schools which are still offering a law degree. A SQE-preparation programme need not come with the associated expense of a degree at all: it could be offered by any provider which is able to attract students.<sup>77</sup>

The example upon which we chose to focus here, the SRA reforms and in particular the SQE, applies in England and Wales only. The routes to qualification for Scottish or Northern Irish lawyers are not set to change. Although we do not have space to develop these arguments here, it strikes us that factors such as the continuing marketization of higher education, with the pressures to provide students with an experience, employability skills and good honours (to name but a few indicators of increasing marketization), have similar effects to those of the SQE. These effects apply across the whole of the UK. Because it is more difficult to defend and justify an internationalized legal education for all, where legal education is conceptualised as instrumental and vocational, only those being equipped for a future within global lawyering 'need' to experience internationalized legal curricula. For the rest, the domestic is ample: internationalized is 'nice to have', domestic is 'need to have'.<sup>78</sup> The SQE simply amplifies these phenomena and renders them more visible.

## Conclusions

The literature that inspired the above reflections on prospects for international legal education in the UK in the next decade or so comes from a very wide range of jurisdictions, across the globe. Jamin and van Caenegem's collection of the national reports to the Vienna Congress of the International Academy of Comparative Law, covers legal education in countries in the Americas,<sup>79</sup> Asia,<sup>80</sup> and Africa,<sup>81</sup> as well as Europe.<sup>82</sup> Likewise, although the majority of contributors to van Caenegem and Hiscock's collection are from Australia, their analysis also includes views from South Africa,<sup>83</sup> Vietnam,<sup>84</sup> Singapore,<sup>85</sup> Taiwan<sup>86</sup> and

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<sup>77</sup> Although the SQE does of course require a degree or equivalent level qualification, that degree need not be in law.

<sup>78</sup> Alexander H E Morawa and Julia Ruth-Maria Wetzel, 'The Globalisation of Legal Education in Switzerland: Possibilities and Challenges' in Jamin and van Caenegem, eds, 2014.

<sup>79</sup> Mónica Pinto, 'Internationalisation, Globalisation and the Effect on Legal Education in Argentina'; Aline Grenon, H Patrick Glenn, and Helge Dedek, 'The Global Challenge in Common and Civil Law Contexts: A Canadian Perspective'; Nicolas Etcheverry, 'Taking the Middle Road to IOLE in Uruguay'; Frank K Upham, 'IOLE in the United States: the relationship between a country's legal system and its legal education', all in Jamin and van Caenegem, eds, 2014.

<sup>80</sup> F Lin 'Legal Education at a Turning Point: a case study of Hong Kong'; N Kanayama, 'The Effects of Globalisation on Legal Education in Japan: the reforms of 2004'; G F Bell, 'Global Lawyers for a Global City: Legal education in Singapore', all in Jamin and van Caenegem, eds, 2014.

<sup>81</sup> Pierrette Essama Mekongo and Maurice K Kamga, 'The Natural Trend Towards Internationalisation in Cameroon' in Jamin and van Caenegem, eds, 2014.

<sup>82</sup> Jamin and van Caenegem, eds, 2014 includes chapters on legal education in Belgium, Finland, Germany, Ireland, Italy, Luxembourg, Netherlands, Spain, Sweden, Switzerland and UK.

Japan.<sup>87</sup> Gane and Hui Huang dedicate the third section of their collection to 'International Experiences', encompassing views not only from Germany<sup>88</sup> and the UK,<sup>89</sup> but also Australia,<sup>90</sup> China,<sup>91</sup> Taiwan<sup>92</sup> and Hong Kong.<sup>93</sup> Internationalization of legal education is emphatically not only a European phenomenon. So learning from internationalization of legal curricula in countries outside of the European Union can provide models for the futures of internationalization of legal education in a post-Brexit UK.

One of the key themes emerging from the literature on internationalization of legal education is that commonalities matter more than differences.<sup>94</sup> Crucially, the more a legal system concerns itself with cross-border transactions, and the more it recognises the qualifications of foreign lawyers, the more legal education is internationalized.<sup>95</sup> There are many more internationalized law curricula within the EU than outside it, even though global lawyering is associated with US-based law firms. On leaving the EU, the direction of travel of

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<sup>83</sup> Laurence Boule, 'Isolationism, democratization and globalization: Legal education in a developing country' in van Caenegem and Hiscock, eds, 2014.

<sup>84</sup> Dang Xuan Hop, 'Preparing law students for an international legal practice through law school tutorials' in van Caenegem and Hiscock, eds, 2014.

<sup>85</sup> Simon Chesterman, 'Doctrine, perspectives and skills for international legal practice', and Lawrence Boo, 'Advocacy before an international arbitral tribunal', both in van Caenegem and Hiscock, eds, 2014.

<sup>86</sup> Chang-fa Lo, 'Legal Education in a Globalised World', in van Caenegem and Hiscock, eds, 2014.

<sup>87</sup> Stacey Steele and Anesti Petridis, 'Japanese legal education reform: a lost opportunity to end the cult(ure) of the national bar examination and internationalise curricula?' in van Caenegem and Hiscock, eds, 2014.

<sup>88</sup> Rainer Wernsmann, 'The Structure, Purposes and Methods of German Legal Education', in Gane and Hui Huang, eds, 2016.

<sup>89</sup> Avrom Sherr, 'The Case of the Common Law in European Legal Education', in Gane and Hui Huang, eds, 2016.

<sup>90</sup> Joellen Riley, 'The Challenge of Massive Open Online Courses (MOOCs) to Traditional Legal Education: the Australian experience', in Gane and Hui Huang, eds, 2016.

<sup>91</sup> Lui Xiaohong, 'Cultivating High-Quality Internationalized Legal Talents under Legal Globalization'; Wang Zhenmin, 'Globalisation and Legal Education in China Today', and Ji Weidong, 'The Ideal and Path of Legal Education Reform in China', all in Gane and Hui Huang, eds, 2016.

<sup>92</sup> Ming-Yan Shieh and Yen-Chia Chen, 'Reforming Taiwan's Legal Education in the Age of Globalization', in Gane and Hui Huang, eds, 2016.

<sup>93</sup> Johannes M M Chan, 'Legal Education in the Global Context: The case of Hong Kong', in Gane and Hui Huang, eds, 2016.

<sup>94</sup> Christopher Gane and Robin Hui Huang, 'Introduction' in Gane and Hui Huang, eds, 2016, p 1.

<sup>95</sup> Hiscock and van Caenegem, 'Conclusions', in van Caenegem and Hiscock, eds, 2014, p 288.

the UK for both of those indicators (trade and recognition of legal qualifications) is likely to go into reverse.

And there is more to learn from this literature. In particular, it shows that, where there are diversities of responses to the changing environments within which legal education is situated, these differences can be just as much *within* a particular jurisdiction as *across* different jurisdictions.<sup>96</sup> Law schools have many shared characteristics, but they are also a diverse group of institutions, with sometimes profound differences in their aims, trajectories and (corporate or public) identities and values. That ‘internationalization of legal education’ is both interpreted and – crucially – instrumentalized in different ways in different law schools is hardly a surprise. And – across the sector – it’s true to say that, however much ‘global lawyering’ may have taken root, an education in national law remains a ‘need to have’; whereas an international dimension to legal education is merely ‘nice to have’.<sup>97</sup> Only a minority of UK law schools are going to be able to offer the ‘nice to have’ in a post-Brexit and (for England and Wales) a post-SQE world. It is likely that we will see greater differentiation between law schools with some becoming akin to training colleges for solicitors and others becoming (more) elite as they serve a more internationalized market, which values reflective (explanatory, evaluative, analytical) learning over bodies of knowledge.

Brexit moves one crucial international dimension of UK legal education, and one crucial vector by which legal education in the UK has been at least in some senses internationalized, instrumentally speaking, from the ‘need to have’ (necessity) box, into the ‘nice to have’ (luxury) box. For EU Member States at least, Judge Posner’s notion that ‘legal thinking does not cross national boundaries’<sup>98</sup> does not hold true. It is essential for lawyers in EU Member States to understand EU law – as itself a transnational legal system, influenced by comparative law, common law and civil law alike, as well as how it interacts with a particular lawyer’s domestic system. We have argued that, over time, inculcating that understanding will become the province only of the elite UK law schools, along with at least some of those based in London, in the national capitals, in Northern Ireland, given the expected special post-Brexit settlement for the island of Ireland, and perhaps in Scotland, given its desire to forge a new relationship with the EU, drawing on its devolved powers in the still-evolving UK constitution. Regional English and Welsh law schools are likely to be left behind.

This move of the international from necessity (and universal, or near-universal experience across all law schools) to luxury will also be felt in particular in England and Wales through the effects of the SQE. The effects may be felt in a muted form elsewhere, through

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<sup>96</sup> Compare, for instance, the experiences of authors from Australian law schools such as Bond, with those in Melbourne, as outlined in the contributions to van Caenegem and Hiscock, eds, 2014.

<sup>97</sup> Alexander H E Morawa and Julia Ruth-Maria Wetzels, ‘The Globalisation of Legal Education in Switzerland: Possibilities and Challenges’ in Jamin and van Caenegem, eds, 2014.

<sup>98</sup> Richard A Posner, *How Judges Think* (Harvard University Press, 2010), p 368, cited Jamin and van Caenegem, eds, 2014, p 5.

phenomena of marketization of Higher Education: we have not had space to explore this dimension in full here. An instrumentally justified mode of legal learning, serving domestic communities, finds no space for the more reflective (explanatory, evaluative, analytical) modes of legal learning, which draw on international comparisons, and seek to equip culturally aware, global-market-ready lawyers, who will be qualified in one jurisdiction, but will work across jurisdictions. Students and staff – the people who make up ordinary law schools – will become less diverse as the interplays between these drivers take effect.

The post-Brexit, post-SQE world – not in the short term, but over time – will close off some of the current models and avenues for internationalization of legal education that UK law schools currently deploy, and consequently that pretty much every UK law student experiences, even if only implicitly. While ‘elite’ UK law schools are likely to continue to provide an internationalized legal education, including both whole programmes in EU Law, and at least some optional modules on other programmes, this will not be the case across the board. More professionally-focused law schools, especially those which self-identify as serving local communities, or whose graduates *de facto* are not ‘global lawyers’, are likely to see a shrinking of awareness of international perspectives, as the focus on the ‘domestic law of legal practice’ tightens. Over time, we expect to see a greater bifurcation between different types of UK law schools, because an internationalized curriculum, perhaps only in the weaker sense of a Europeanized curriculum, will no longer be a part of a common and shared core. As with so much of post-Brexit higher education, UK legal education in general will be the poorer.