

## Scottish Legal Education after Brexit

*Sylvie Da Lomba, Maria Fletcher and Rebecca Zahn*

### *Contact email addresses*

sylvie.da-lomba@strath.ac.uk

Maria.Fletcher@glasgow.ac.uk

rebecca.zahn@strath.ac.uk

### *Abstract*

This paper offers some reflections on the possible consequences of Brexit on legal education in Scotland. Scotland's small and distinctive legal system is bolstered by devolved legislative powers and characterised by a tradition of openness to external influences. Scotland's legal system and relatedly, its legal education system, will be poorer for Brexit. That said, this paper argues that the features and traditions of the legal system and legal higher education system in Scotland make them well-placed (and perhaps better placed than the other domestic jurisdictions) to resist such dampening pressures and indeed to embrace EU-legacies and other European and international influences.

### *Key words*

Scotland, Scots Law, legal education, Brexit

### *1. Introduction*

A process of internationalisation<sup>1</sup> and Europeanisation<sup>2</sup> has affected the law and legal (education) systems of the UK over a number of decades with the effects of European Union

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<sup>1</sup> We understand this to mean a process of integrating an international, intercultural, or global dimension into the law or legal system, or purpose, functions or delivery of legal education.

<sup>2</sup> We understand this to be an interactive process that involves bottom-up and top-down procedures or projection and reception between the EU and (sub-) Member State levels. This is drawn from Bulmer, S. and Burch, M. 'The Europeanization of Central Government: the UK and Germany in historical Institutional Perspective' 73, in Schneider, G. and Aspinwall, M. (eds), *The Rules of Integration: Institutional Approaches to the Study of Europe* (European Policy Research Unit Series Manchester University Press 2001).

(EU) membership being a significant part of that.<sup>3</sup> The UK joined the (then) European Economic Community (EEC) in 1973 and is set to leave it in 2019. While the precise implications of this rupture on the law and legal systems of the UK are difficult to predict in the current absence of a clearly articulated future EU-UK relationship, multiple legacies of EU membership on the UK's legal institutions, legal culture and practice are likely to endure. Brexit, in whatever form, will inevitably exert dampening pressures on the process of internationalisation and Europeanisation in the UK but it is unlikely to put it into reverse. Scotland's small and distinctive legal system is bolstered by devolved legislative powers and characterised by a tradition of openness to external influences. Scotland's legal system and relatedly, its legal education system, will be poorer for Brexit. That said, we argue that the features and traditions of the legal system and legal higher education system in Scotland make them well-placed (and perhaps better placed than the other domestic jurisdictions) to resist such dampening pressures and indeed to embrace EU-legacies and other European and international influences.

This chapter offers some reflections on the possible consequences of Brexit on legal education in Scotland. It focuses in particular on the LL.B (honours) qualification, the Scots law undergraduate degree, which is also the route to professional legal practice in Scotland. It begins by outlining the nature of the Scottish legal system and how that has traditionally embraced European, international and indeed English influences. Against this important contextual backdrop, the chapter then looks more closely at the legal education system and sets out the main ways in which EU membership has impacted upon Scottish law schools in general and how it is reflected in the teaching of EU law as part of the Scots Law LL.B. A final section discusses what the future might hold. While Scottish legal education might be the poorer for Brexit, there are reasons - structural, historical, intellectual and political - to suggest that it will reflect a continued openness to EU law and processes of internationalisation and Europeanisation in the future. We concur with other voices<sup>4</sup> that

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<sup>3</sup> Definitions of the terms internationalisation and Europeanisation are the subject of much discussion in legal and education scholarly literature. See for instance Guth and Hervey who identify EU law as a 'vector' of internationalization of legal education and regard Europeanisation as a variant of internationalization; Jessica Guth and Tamara Hervey, 'Threats to internationalised legal education in the twenty-first century UK' [2018] *The Law Teacher* 52(3) 350, 355.

<sup>4</sup> Jessica Guth and Tamara Hervey, 'Threats to internationalised legal education in the twenty-first century UK' [2018] *The Law Teacher* 52(3) 350, 362.

predict that Brexit will force a greater diversification of legal education in the UK and suggest that Scotland may emerge as one of the key fault lines in the years and decades to come.

## 2. *Scotland's legal system and its openness to external influences*

Legal education in Scotland must be understood with reference to Scotland's legal system, which is distinct from those of England and Wales, and Northern Ireland. In the seventeenth century, and prior to the Act of Union 1707 which united the Scottish and English Parliaments to form the Parliament of Great Britain based in Westminster, there had been a reception in Scotland of much of the Roman law as developed by Dutch and French jurists in particular. Prior to 1707, Scots law thus formed part of the Roman law-based *ius commune* that was present on the European continent. The influence of English law increased post-Union, exacerbated by the fact that the highest court of appeal in civil law matters was (and is) the (English) House of Lords/Supreme Court.<sup>5</sup> This does not mean that the Scottish legal system is a civil or Roman law system but rather that there is a basis of civil law, not least in the legal language and grammar used, and in the emphasis on principle rather than precedent.<sup>6</sup> As a result, Scotland is generally considered to be a 'mixed legal system' occupying a position midway between the Common Law and the Civil Law, with a rich diversity of historical sources including feudal law, Roman law, Canon law, English common law and statutes. Certain areas of law including criminal law, property law, contract law and delict (tort) draw heavily on the civil law tradition (with varying degrees of common law influences) and are therefore distinctly Scots law. In more recent times, the UK's membership of the EU and the introduction of legislative devolution in 1998 have had significant impacts on the laws and legal system of Scotland. Indeed, Scotland's obligation to implement EU Law and not act contrary to it are enshrined in the devolution legislation, the

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<sup>5</sup> Although there are now Scottish judges appointed to the Supreme Court. English law was also an influence pre-Union but greatly increased post-Union. See W.D. Sellar, 'Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions', [2000] 4 *Edinburgh Law Review* 3; Hector MacQueen, 'Mixed Jurisdictions and Convergence: Scotland' [2001] 29 *International Journal of Legal Information* 310, with further references.

<sup>6</sup> The concept of equity is treated differently in Scotland than in England and Wales which means that Scots law in this field is clearly aligned alongside civil law rather than common law. The Scottish courts' system is also different to that in England and Wales and is closer to continental patterns of court systems.

Scotland Act 1998, together with a domestication of the European Convention on Human Rights.

This brief historical summary gives a good flavouring of the enduring characteristics of Scotland's laws and legal system: as a small jurisdiction it is inevitably always under pressure from outside sources and the effects of globalisation/Europeanisation; yet simultaneously it retains a certain openness to this by historical design and out of a need (desire?) to survive.<sup>7</sup>

### *3. Scottish legal education and EU influences*

The above-mentioned features of the Scottish legal system – and particularly its openness to external influences - provide an important context to the question of how EU membership has been reflected on law campuses and within the LL.B curriculum.

#### *3.a. Scottish Law schools and EU membership*

Guth and Hervey articulate well the range of influences of EU membership and EU law on the nature of higher legal education in the UK.<sup>8</sup> Notable among them are the propensity of EU membership to encourage more understanding and use of international and comparative approaches and the range of consequences for teaching and learning of embedding an international legal system of sorts into a domestic legal system. We will look more closely in the next section at how the undergraduate Scots law LL.B degree, which is most commonly pursued as an Honours degree over four years, has received and engaged with EU law in the curriculum.

Guth and Hervey also note that EU membership has changed the landscape of higher education through its enhanced possibilities of student/staff exchange<sup>9</sup> and mobility

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<sup>7</sup> MacQueen reflects on where Scots law is going and how it might forge a 'good and useful' future in the face of seemingly endless decline in the face of external pressures and influences; Hector L. MacQueen, 'Quo Vadis?' [2017] 1 The Juridical Review 9

<sup>8</sup> Jessica Guth and Tamara Hervey, 'Threats to internationalised legal education in the twenty-first century UK' [2018] The Law Teacher 52(3) 350.

<sup>9</sup> <<http://ec.europa.eu/programmes/erasmus-plus/>> accessed 20 December 2018

through free movement, and access to significant EU research funding. It is clear from a recently published report by the Scottish Funding Council that Scottish Universities have embraced all of these opportunities.<sup>10</sup> Scottish students' applications to study or train in Europe as part of the Erasmus+ programme has increased by 50% over the last seven years; one in five members of Scottish university teaching and research staff are EU nationals; and on a three-year average to 2016-17, research funding from EU Commission sources represented 10.7% of universities' total research income. While there is no specific data breakdown for Scottish Law Schools, our own knowledge and experience indicates that staff and student mobility, a diverse range of nationalities among the home student and staff body and EU Research income are prevalent features of our work places, and have been increasingly so in the past decade.

### *3.b. Undergraduate Scots Law LL.B and EU membership*

Teaching on the Scots law undergraduate degree has, over the last half century, sought to reflect the different influences on the legal system by placing Scots law within the wider context of the *ius commune* and the European legal tradition.<sup>11</sup> The UK's membership of the EU has infused an extra source of law into its legal systems, inevitably impacting on the substantive content of law curricula.

The LL.B (honours) degree in Scots Law is offered by ten Universities in Scotland which are providers accredited by the Law Society of Scotland ('Law Society').<sup>12</sup> The 'standard' route to qualification as a solicitor as recognised by the Law Society involves a four year Honours LL.B degree (the so-called 'Foundation Programme') followed by a mandatory one-year Diploma in Professional Legal Practice offered at six universities in Scotland, and a two-year traineeship under the supervision of a qualified Scottish solicitor. To qualify as a solicitor, specific subjects must be studied that are designed to meet the Law Society's Foundation

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<sup>10</sup> Scottish Funding Council report, 'EU Exit and Scottish colleges and universities' SFC/CP/01/2018, 9 December 2018.

<sup>11</sup> See W.D. Sellar, 'Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions' [2000] 4 *Edinburgh Law Review* 3, 17.

<sup>12</sup> These are the Universities of Aberdeen, Abertay, Dundee, Edinburgh, Glasgow, Stirling and Strathclyde, and Glasgow Caledonian University, Robert Gordon University and Edinburgh Napier University.

Programme Outcomes.<sup>13</sup> The *knowledge-based* outcomes of the Programme make it clear that students must learn and understand Scots law in ‘the context of the UK, EU and wider international law setting.’ In addition, the constitutional structure and competence of the EU and allocation of competencies between the EU and Member States; the sources of EU law, EU institutions and the legislative process; the relationship of EU law and national law, including domestic and EU remedies; and the principles of the EU single market are all listed as specific knowledge outcomes which students must acquire by the end of their degree. The Law Society gives discretion to Universities as to how to make sure that these knowledge outcomes are met. Notably, today, and indeed since 1989, the study of EU law is also a mandatory subject of study for entry to the Advocate branch of the legal profession.<sup>14</sup> The regulatory body, the Faculty of Advocates, includes ‘European Law and institutions’ among its list of required topics to be studied and passed.<sup>15</sup>

All ten accredited providers of the LL.B degree teach the subject of EU law, albeit in different ways; that is to say, across their own variously organised core courses which cover ‘the profession of law, legal systems and institutions affecting Scotland; human rights; freedoms and protections; persons; property; obligations; commerce.’ So, teaching of the sources, institutions and constitutional principles of EU law are often embedded within a core Scots public law course examining the legal systems and institutions affecting Scotland. And substantive elements of EU law – notably related to the EU single market and competition law – often form part of a separate standalone core EU law course. Importantly, the Law Society of Scotland’s requirements provide for some flexibility for Law Schools to Europeanise the curriculum provided they ensure the ‘pervasiveness’ of EU law throughout the core courses<sup>16</sup>

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<sup>13</sup> The Law Society of Scotland Foundation Programme (Scottish Exempting Degree) Accreditation Guidelines for Applicants available at <<https://www.lawscot.org.uk/media/359157/foundation-programme-guidelines.pdf>> accessed 2 January 2019.

<sup>14</sup> See further Kirsty Hood, ‘The Future Place of EU Law in Admission to the Faculty of Advocates’ in Nicole Busby and Rebecca Zahn (eds), *Studying EU law in Scotland during and after Brexit* (2017) Open Access Resource Chapter 19 <<https://sulne.files.wordpress.com/2017/11/studying-eu-law-during-and-after-brex-1st-edition.pdf>> accessed 20 December 2018.

<sup>15</sup> Faculty of Advocates Regulations as to Entrants <<http://www.advocates.org.uk/about-advocates/becoming-an-advocate/admission-regulations>> accessed 20 December 2018

<sup>16</sup> Rob Marrs, ‘The Position of EU Law on the Route to Qualification as a Solicitor Post-Brexit’

However, while the missions of law schools and legal professional bodies are mutually supportive, they are distinct.<sup>17</sup> As a result, law schools offer a wide variety of courses and different experiences of teaching and learning EU law which go beyond the externally imposed minimum requirements. Qualifying law degrees may well be the first step towards admission to the regulated legal professions, but beyond that they also offer subject specialisation, encourage deeper and critical reflection of the law and try to inculcate a whole range of skills, many of which are transferable beyond the discipline.<sup>18</sup> In Scotland, a *four* year undergraduate honours degree as standard, makes the achievement of these missions more realistic<sup>19</sup> and is of course, aligned with standard practice in continental Europe.<sup>20</sup>

The *four* year LL.B Honours degree thus provides the time and space to study aspects of EU law in more depth in optional courses. This is particularly the case during the final honours year where teaching is in seminar format with extensive reading lists, the encouragement of independent study and discussion during classes, and where students are even more encouraged to think about the law in an intellectual and critical way. The four year degree also offers the space for students to include a period of study abroad – and many do, through both the EU-related and international programmes –and/ or to take specialist options in other European legal traditions such as French or German law, or other disciplines altogether.

This choice of and exposure to elective honours classes, and the very realistic chance to study in a foreign jurisdiction, enable students to gain a deeper and wider understanding of law as part of their LL.B degree and certainly beyond what is required to go on to legal practice. As such, the Scots Law LL.B degree does two things: it provides specialised

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in Rebecca Zahn and Nicole Busby (eds), *Studying EU law in Scotland during and after Brexit* (2017) Open Access Resource Chapter 19 <<https://sulne.files.wordpress.com/2017/11/studying-eu-law-during-and-after-brexit-1st-edition.pdf>> accessed 2 January 2019.

<sup>17</sup> William Twining, 'Rethinking Legal Education' [2018] *The Law Teacher* 241, 256

<sup>18</sup> Although note the absence of commonly agreed discipline specific mission statements in the higher education sector.

<sup>19</sup> This chimes with Twining's work which offers a damning critique of legal education in England and Wales since the 1960s and includes a recommendation that the introduction of a four year degree would allow for the pursuit of more liberal legal education that better combines the missions of both the legal profession and higher education. William Twining, 'Rethinking Legal Education' [2018] *The Law Teacher* 241.

<sup>20</sup> See on the Bologna Process: <[https://ec.europa.eu/education/policies/higher-education/bologna-process-and-european-higher-education-area\\_en](https://ec.europa.eu/education/policies/higher-education/bologna-process-and-european-higher-education-area_en)> accessed 2 January 2019.

professional training for those wishing to become Scots lawyers in an increasingly interconnected and global world but it also shapes students to become academics and citizens; to question and debate the origins of law, its purpose and value.<sup>21</sup>

### 3. *Scottish legal education and navigating Brexit*

Even without knowing what the future relationship between the EU and UK will be, there is little doubt that Brexit will exert changes to the domestic legal systems.<sup>22</sup> These changes will disrupt and dampen the processes of internationalisation and Europeanisation of law and legal systems that have been influenced so greatly by EU membership. Inevitably, in turn, this will affect the LL.B curriculum (what is taught and learned and how) and the wider higher legal education environment (limiting conditions enabling mobility, a more diverse student/staff body and research funding opportunities in particular). These impacts will be felt across the different jurisdictions of the UK, but they are likely to be experienced and responded to in different ways.

Before examining in more depth the reasons why and how *Scottish* legal education may forge a distinct path in response to Brexit, let us recall that post-Brexit and post-transition period, legacies of EU law will persist more - or less - overtly in the domestic constitution and legal systems. So, even accepting that pressures towards detachment of the UK from EU influence are inevitable, a number of factors will continue to encourage a strong international and EU dimension to the UK's legal institutions, cultures and practices. These factors include both domestic and external economic and political pressures, but also, importantly, the extent to which the laws, processes, institutions and personnel of the UK's justice systems have been transformed by 40 years of membership of the EU in ways which cannot readily be undone or 'un-learned' overnight by Brexit. The European Union

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<sup>21</sup> Nussbaum describes lawyers as highly influential citizens. Martha C, Nussbaum, 'Cultivating Humanity in Legal Education' [2003] 70 The University of Chicago Law Review 265, 271.

<sup>22</sup> For instance, changes in fundamental constitutional doctrine (sovereignty of Parliament and protection of individual rights); changes to the sources and substance of the law across numerous policy areas; changes related to remedies; and changes in legal processes particularly in relation to cross border civil and criminal matters; potentially reduced numbers of lawyers qualified in Europe in the UK and reduced access to opportunities for mutual learning among legal professionals.



(Withdrawal) Act 2018<sup>23</sup> and its domestication of existing EU law is one clear reflection (and political acceptance) of the legacy effect of EU law. Another example (also reflecting the political and legal controversy surrounding the domestication of EU Law<sup>24</sup>) comes from Scottish Parliament's so-called 'Continuity Bill'<sup>25</sup>, which *inter alia* provides for ministerial powers that allow for Scotland to 'keep pace' with future developments in EU law post-Brexit. Following the Supreme Court's judgment on whether the Bill was within the competence of the Scottish Parliament, it is unclear at the time of writing if the Scottish Parliament will proceed to implement those provisions of the Bill that survive the ruling.<sup>26</sup> Were it to do so, it *could* secure a more EU-aligned future for the development of law within areas of devolved competence, certainly than in the other UK jurisdictions.<sup>27</sup> Let us not forget that the potential for legal and policy divergence within the UK is de facto enhanced by Brexit – which will remove legal imperatives to implement and enforce a supra-national and common set of obligations and rights, spanning many policy fields, across the different jurisdictions of the UK. Brexit exposes the fragility of the unitary territorial constitution of the UK and looks set to continue the recent history of increasing divergence within the UK's territorial constitution.<sup>28</sup> How this plays out remains to be seen over time, but it is at least conceivable that the legacies of EU law will resonate differently across the jurisdictions of

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<sup>23</sup> 2018 c.16.

<sup>24</sup> Christopher McCorkindale and Aileen McHarg, 'Continuity and Confusion: Legislating for Brexit in Scotland and Wales (Part I)' (*UK Constitutional Law Blog*, 2018)

<<https://ukconstitutionallaw.org/2018/03/06/christopher-mccorkindale-and-aileen-mcharg-continuity-and-confusion-legislating-for-brexit-in-scotland-and-wales-part-i/>> accessed 2 January 2018.

<sup>25</sup> The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill

<[www.parliament.scot/S5\\_Bills/UK%20Withdrawal%20from%20the%20European%20Union%20\(Legal%20Continuity\)%20\(Scotland\)%20Bill/SPBill28BS052018.pdf](http://www.parliament.scot/S5_Bills/UK%20Withdrawal%20from%20the%20European%20Union%20(Legal%20Continuity)%20(Scotland)%20Bill/SPBill28BS052018.pdf)> accessed 20 December 2018.

<sup>26</sup> The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland, [2018] UKSC 64, 13 Dec 2018

<sup>27</sup> Albeit that the potential for "keeping pace" in Scotland and thus, divergence, will be limited by the 'common frameworks' dimension of the EU (Withdrawal) Act and of course, by whatever might be agreed in a future EU-UK treaty or treaties.

<sup>28</sup> For instance, the UK Government expects that Brexit will bring to the devolved administrations in Scotland, Wales and Northern Ireland "a significant increase in their decision making power." <[www.bbc.co.uk/news/av/uk-scotland-scotland-politics-39435533/pm-significant-increase-in-power-for-devolved-administrations](http://www.bbc.co.uk/news/av/uk-scotland-scotland-politics-39435533/pm-significant-increase-in-power-for-devolved-administrations)> accessed 2 January 2019. On how Brexit reopens the question of Scottish independence and revives the border question in Northern Ireland see for instance Aileen McHarg, 'Unity and Diversity in the United Kingdom's Territorial Constitution' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) and Noreen Burrows and Maria Fletcher, 'Brexit as constitutional "shock" and its threat to the devolution settlement: reform or bust'. [2017] 1 *Juridical Review* 49. On the relationship between England and Scotland after Brexit viewed from the perspective of legal and intellectual history and from a continental European view see Andreas Rahmatian, 'Brexit and Scotland: Centralism, federalism or independence?' [2018] 26(4) *European Review* 616.

the UK, and perhaps more strongly and visibly in Scotland, which will necessarily be reflected in the teaching and learning of law.

Looking more closely at the impact of Brexit on the law *curriculum*, as elsewhere, the UK's decision to leave the EU presents Scottish law schools and the professional regulatory bodies with challenges. These arise from the enduring uncertainty that surrounds the conditions of the UK's withdrawal from the EU and the nature of their future relationship. As a result, Scottish law schools as well as legal professional bodies are required to plan for the unknown and consider a range of eventualities that may or may not materialise. Understandably, the immediate focus is on the place of EU law teaching in law curricula, and more specifically in the LL.B, but discussions and decisions will inevitably be shaped not just by the emerging EU-UK legal relationship but also by the *intellectual value* placed on Europeanisation and internationalisation within Scottish legal education, and the *structural capacity* of the LL.B degree to accommodate exposure to different legal systems and cultures (in perhaps new and different ways) within it. Work on this is underway in Scotland. In May 2018 the Law Society of Scotland convened an initial joint meeting between representatives of Scottish law schools, the Faculty of Advocates and the Law Society of Scotland, at which it was confirmed that EU law must remain a core subject until, at least, the end of any transition period following Brexit. Beyond that, what becomes of EU law teaching in the medium and long term is more uncertain, but a watching brief will be maintained. A broad consensus was reached that whatever the nature of the UK's future relationship with the EU, as a small jurisdiction, an international element must form part of the route to qualification. It was agreed that it did not fit with the traditions of Scots law, or a modern globalised world, to have a purely domestic focus.<sup>29</sup>

Since this May 2018 meeting and at the time of writing, little has changed to enable further reflection on the precise nature of the post-Brexit/post-transition period LL.B curriculum. We simply acknowledge that a likely shift will be towards international public and private law subjects as the UK's future relations with the EU will form part of traditional treaty law and as the UK falls back on existing traditional international law instruments and

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<sup>29</sup> Notes of the May 2018 roundtable meeting convened by the Law Society of Scotland on file with the authors.

frameworks and fosters new ties with non-EU states. We suggest that a more widespread study of private and public international law and comparative law<sup>30</sup> may be a desirable, if unintended, consequence of Brexit and that this may be facilitated in Scotland by the structural advantage of a four year LL.B degree as standard. Trade (and, probably, crime and security) is likely to be a key component of a future legal relationship and we, like others, caution against reducing EU law to EU trade law.<sup>31</sup> It almost goes without saying that an understanding of EU trade law (indeed any substantive area of EU law) requires a deeper and broader understanding of EU law as a whole.<sup>32</sup> Quite how this will be embedded in the curriculum – whether as a core or elective subject – is perhaps up for discussion, but a too hasty retreat from EU law as a core LL.B subject would be unwise. Almost paradoxically, there may be an even greater need for lawyers who fully understand EU law post-Brexit.<sup>33</sup> There will be a need for lawyers who “can deal with scenarios which involve a complex matrix of interlinking jurisdictions, national and international, and who can handle and analyse situations of a multi-layered texture.”<sup>34</sup> Thus, in addition to being cognisant in EU law and ‘post-Brexit law’, Scots lawyers will have to be able to engage with those areas of the law that go to the core of internationalisation and globalisation. Any suggestion that Brexit offers opportunities to erase the study of EU law and look increasingly inward to the domestic legal system is to mis-attribute law as a purely national phenomenon, to underestimate the wider forces that facilitate Europeanisation, internationalisation and globalisation of legal systems<sup>35</sup> and to pursue a reductionist vision of legal education and the lawyer that has largely been avoided in Scottish legal education to date.<sup>36</sup>

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<sup>30</sup> On the importance of comparative law in legal education, see: Jaakko Husa, ‘Comparative Law in Legal Education – Building a Legal Mind for a Transnational World’ [2018] *The Law Teacher* 201-215. Nussbaum highlights the role of comparative legal study plays in transforming law students into world citizens (Martha C, Nussbaum, “Cultivating Humanity in Legal Education” (2003) 70 *The University of Chicago Law Review* 265-279).

<sup>31</sup> Cherry James and John Koo, “The EU Law “Core” Module: Surviving the Perfect Storm of Brexit and the SQE” (2018) *The Law Teacher* 68-84, 81.

<sup>32</sup> Kenneth Armstrong, ‘Editorial – Brexit and the Future of European Legal Studies’ [2016] 18 *CYELS* 1.

<sup>33</sup> A similar point was made by the roundtable meeting convened by the Law Society of Scotland, *supra* n. 27

<sup>34</sup> Cherry James and John Koo, ‘The EU Law “Core” Module: Surviving the Perfect Storm of Brexit and the SQE’ [2018] *The Law Teacher* 68, 82.

<sup>35</sup> Klabbers summarises: “If the internationalization of law is taking place primarily in response to economic self-interest (as with the W.T.O.) and moral pressure (as with universal human rights), the internationalization of legal education is taking place in large part because it is finally possible to fulfill the strong desire of young people and scholars to meet their counterparts from other parts of the world.” in Jan Klabbers and Mortimer Seller, (eds), *The Internationalization of Law and Legal Education* (Springer, 2008) 2. In the field of higher education, “[g]lobalisation and internationalisation are usually regarded as distinct forces – the former being defined as the economic, political, and societal forces pushing twenty-first higher education towards greater

As for the wider matters of research funding and ‘who’ is on our law campuses, the dampening effect of Brexit on accessible research funding streams and immigration and exchange opportunities is to be regretted. Their value lies not only in the economy but also in the less quantifiable, but equally important, realms of intellectual and cultural enlightenment. Beyond the confines of *legal* education, it is noteworthy that in November 2018 the Scottish higher and further education sectors, together with trade unions and the Scottish Government, issued a joint statement in which they set out how they would work together to protect higher and further education from the negative impact of Brexit.<sup>37</sup> The statement acknowledges at the outset that “Scotland's story, and especially that of our universities, has been shaped by our close relationship with Europe” and concludes with the following commitment; “[w]e will work together using our collective influence in Europe and beyond to ensure it is widely understood that Scotland’s universities and colleges remain open and welcoming to EU staff and students, and will do our utmost to continue to collaborate with our European partners.”<sup>38</sup> Publication of such collective positions and ambitions is important even if the practical pursuit of them is fraught with obstacles, not least, those presented by the domestic devolution settlement which currently sees migration issues reserved to Westminster, but (higher) education devolved to Holyrood.

A final brief word about Scotland’s political context. The complex, multi-layered governance system of the UK, and the intertwined policy competences across EU, UK and devolved levels mean that Brexit puts much at stake for the peoples, governments and legislatures of the devolved nations. In Scotland, the electorate voted by a large majority (62%) to remain in the EU and membership of the EU is linked (at least for some) to the constitutional question of independence. The Scottish Government has repeatedly expressed the view

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international involvement and the latter as the policies and practices of higher education that have been developed to deal with this” (Anil Balan, ‘Meeting the Challenges of Globalisation in Legal Education’ [2017] 51 *The Law Teacher* 274, (referring also to P. Altbach and J. Knight, ‘The Internationalization of Higher Education: Motivations and Realities [2007]11(3) *Journal of Studies in International Education* 290).

<sup>36</sup> The “apprentice model” of legal education which views it solely as professional training has lost ground, especially in Europe and in the US; Jan M. Smits, ‘European Legal Education, or: How to Prepare Students for Global Citizenship’ [2011] *The Law Teacher* 163. See also Aalt Willem Heringa, ‘European Legal Education: The Maastricht Experience’ [2010] 29 *Penn State International Law Review* 81, 83

<sup>37</sup> <<https://www.universities-scotland.ac.uk/higher-education-sectors-joint-statement-brexit/>> accessed 2 January 2019.

<sup>38</sup> Available at web address, *ibid*.

that staying in the EU is the best option for the whole of the UK and Scotland and that leaving the EU but the UK, or indeed Scotland, staying in the customs union and single market would be the next best options.<sup>39</sup> Taken as a whole, this context is certainly relevant to the teaching of and learning about domestic constitutional law in Scotland today. The extent to which it is and can be relevant in shaping the contours of legal education in response to Brexit is necessarily less certain and more indirect. We simply recall the alignment of (policy) positions espoused by the Scottish government and higher education providers and legal professional regulatory bodies in the various interactions outlined above.

### *Conclusion*

The impacts of Brexit on Scottish legal education will indeed vary in intensity depending on the nature of the relationship eventually settled on between the UK and the EU. Standing back from this, we have suggested that whatever kind of Brexit is reached, Scottish legal education is perhaps uniquely (in the UK) placed to respond in ways that might secure a continued openness to the EU and valuing of Europeanisation and internationalisation processes. Scotland's legal system cannot be self-contained; it has historically absorbed external influences as a matter of survival. This Scottish legal tradition of openness and the intellectual value placed on that as reflected within the Scots law LL.B and Scottish higher legal education more generally combined with the structural advantage of the four year degree and a prevailing pro-European political context create distinctive conditions in Scotland. These conditions may come together to make Brexit 'harder to take' but equally to enable a different and perhaps preferable future for legal education. Where choices *can* be made, for instance (in due course) in relation to curriculum reform beyond the anticipated transition period, LL.B providers must be mindful of both its vocational function to prepare Scots legal professionals for an "increasingly integrated but complex world"<sup>40</sup> and its wider mission to develop students into academics and citizens. The process of internationalisation

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<sup>39</sup> See Scottish Government, *Contribution to the UK Government's White Paper on the Future Relationship with the European Union*, June 2018 and the full range of position publications via <<https://www.gov.scot/brexit/>> accessed 2 January 2019.

<sup>40</sup> Cherry James and John Koo, 'The EU Law "Core" Module: Surviving the Perfect Storm of Brexit and the SQE' [2018] *The Law Teacher* 68, 69.

will continue to provide the most valuable platform for engaging with the complexities of the contemporary world by fostering awareness and understanding of the law, legal systems, societies and people beyond the national borders. Brexit makes those things all the harder and all the more essential. Sellers reminds us that “[t]he greatest eras of university education have been the periods of greatest mobility and international exchange, as in the years of the *ius commune* in Europe, or in the United States after the Second World War. These have also been the periods of the greatest advances in government and law.”<sup>41</sup> Brexit should force us to look afresh at what we teach, to and by whom, how and why. Higher education providers of law in Scotland must collectively reflect on these matters, together, as appropriate, with the legal professional bodies.<sup>42</sup> The Law Society of Scotland has made important first steps to facilitate such an inclusive and on-going conversation. Effort should be expended to ensure that this is not a missed opportunity. After all, for many of us, Brexit offers too few of those.

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<sup>41</sup> Jan Klabbers and Mortimer Sellers, (eds), *The Internationalization of Law and Legal Education* (Springer, 2008) 5.

<sup>42</sup> In this process thought should be given to the inclusion of and sharing with (at least) the further education sector.