

EU law before and after the referendum - challenges and opportunities



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What follows is a slightly edited version of the Inaugural Lecture I delivered at the University of Bristol on Tuesday 1st May 2018, complete with references and links. In the lecture, I sought to explain the transformative effect which the referendum and the wider Brexit debate has had on (my) EU law scholarship. I first discussed the themes and issues with which I have grappled in my academic career – with a focus on the nature of the EU as a developing political entity, the nature of the EU internal (or single) market, and the EU's relationship with national legal and political structures. I then went on to explain the impact of Brexit, which, of necessity has involved re-imagining not only the UK's relationship with the EU, but also the role of legal academics.

Introduction

I am really pleased that so many of you, and so many familiar faces, are here for this. I am not sure that this will be the most entertaining hour of your lives (at any rate, I hope that you've all had better hours...); but hopefully this lecture will give you a bit of an insight into the way in which 'that Brexit' is affecting my life as an EU law academic.

The talk will have two parts. In the first, I will explain the nature of my EU scholarship, from the early 1990s through to 2016. The aim will be to show the nature of the political and constitutional questions I have been grappling with through that time. These questions, as the later section of the talk will make clear, are now of huge political salience.

In the second part, I will explore the impact which Brexit has had on (my) EU law scholarship. During the referendum campaign, and, since then, while the Government has been working out (I use the words loosely) how to turn the referendum result into policy and accomplish the task of leaving the EU, the nature and urgency of the debate concerning the UK's relationship with the EU has changed out of all recognition.

This has afforded both great opportunities and great challenges to EU lawyers. I'll explain the nature of my response, which involves both re-imagining the UK's relationship with the EU (and beyond) and re-imagining the role of legal academics as the Brexit process continues to unfold.

If you are here for answers to Brexit, I fear that you are going to be disappointed. The only confident prediction I will make is that all those making confident predictions about the way in which things are going to pan out do not know what they are talking about.

EU law before the referendum

Between the very early 1990s, when I started studying law at Jesus College, Cambridge, and 2016, when I became a Professor of EU Law at the University of Bristol, I have been interested in the

relationship between the UK and the EU; both with the policies pursued, and with the constitutional framework.

Policies

Let me begin with the policies pursued at EU level. In the early years of my career, my focus was on EU labour law.¹ It has since spread to EU internal market law more broadly.²

A lot of my focus has been on the market building process. So, I have tended to ask these sorts of questions: What do we need to do to create an internal market in Europe? Looking at the wording of the Treaties, what does the elimination of ‘barriers to free movement’ entail? What about the elimination of ‘distortions of competition’? To what extent is it important that rules are harmonised? What is the ‘right’ balance between unity and diversity in Europe? Is the EU internal market (as many Left-wing supporters of Brexit, the so-called Lexiteers, argue) an irredeemably neo-liberal market place?

It is clear to me that there are several *important tensions* within the internal market (some of which exist in all markets). First: the economic versus the social; the left versus the right. Second: the unified/harmonised market versus the diverse market.

Behind these, are more legal questions. Are these matters for *the constitution* (in the EU’s case, the Treaties) to resolve (or to steer us towards an answer), or are they for policy makers? How prescriptive is the Treaty framework, and how prescriptive should it be? If, to some extent, they are political rather than constitutional matters (and I contend that they are), does the EU’s institutional structure provide for the proper representation of the various interests involved?³ What, for example, is the relationship between the Court’s interpretation of the Treaties and the secondary legislation adopted by the EU legislature?⁴ And, how are EU level decisions taken? Is the balance of

¹ My D Phil thesis, ‘The Rationales for European Community Social Policy: An Analysis of EC Worker Participation Law’, supervised by Professor Paul Davies, was submitted to the University of Oxford in August 2000. The thesis formed the basis of my *EU Intervention in Domestic Labour Law* (Oxford University Press, 2007).

² From the start of my career, I have been interested in the relationship between market integration in Europe and social policy, writing ‘The Integrationist Rationale for European Social Policy’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart, 2000), ‘Smoke Without Fire: The Social Policy Agenda and the Internal Market’ (2001) 30 *Industrial Law Journal* 271, and, most recently on this theme, ‘The EU’s Role in Labour Law: An Overview of the Rationales for EU involvement in the Field’ in A Bogg, C Costello and A Davies (eds) *Research Handbook on EU Labour Law* (Edward Elgar, Cheltenham, 2016). In later years, my focus shifted away from social policy to the internal market more generally. I have edited two collections of essays on the internal market: *The Judiciary, The Legislature and the EU Internal Market* (Cambridge University Press, 2012), and with Panos Koutrakos and Niamh Nic Shuibhne, *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart, 2016).

³ In the labour law sphere, see, with Tonia Novitz, ‘Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism’ (2006) 35 *Industrial Law Journal* 367

⁴ On this theme, I have published ‘The Relationship between Primary and Secondary Law in the EU’ (2015) 52 *Common Market Law Review* 461, and ‘Regiopost - A Constitutional Perspective’ in A Sanchez-Graells (ed) *Smart Public Procurement and Labour Standards: Pushing the Discussion after Regiopost* (Hart, 2018).

power between the Council (Member State Governments), the European Parliament, and the European Commission sensible? Does it satisfy the requirements of democracy and legitimacy?⁵

So... what are my answers. On policy, I think it is important to distinguish between the various things which the EU has done; in particular between the internal market and other policy areas. In relation to the internal market, the constitutional framework, is, my view, balanced and sensible (and there have been changes made when each time the Treaties have been revised, to push the balance towards the social). But, there is evidence, in particular since the Treaties were last amended at Lisbon in 2009,⁶ that the EU institutions, and the Court of Justice of the European Union in particular, does systematically favour the economic over the social; the legacy of the infamous labour law cases, *Viking* and *Laval*.⁷ There is also evidence that the Member States' (and the European Commission's) defence of the social tends to fade when economic times are hard; as we have seen in the aftermath of the 2008 economic crisis. When, to quote Lord Wedderburn, the social conflicts with the economic, it has few friends.⁸

The relationship between uniformity and diversity is nuanced.⁹ In some areas, rules are harmonised (and differences between national laws are problematic and require justification). In others, ways have been found to accommodate the 'rich' diversity within the Member States.¹⁰ Thus, in relation to the internal market, the structure is good, but it could work better. There is a lot to do to ensure that both legal and political institutions work to protect the social aspects of that constitutional structure from 'economic imperatives'.

But, it is also important to note that there are other areas in which the constitutional structure is more problematic. I am thinking here of the EMU governance framework (where we see deficit reduction and austerity almost hard-wired into the Treaties);¹¹ and the Common Agricultural Policy and the Common Fisheries Policy (in which there is much tighter central regulation at EU level, which arguably has not worked as well as it should). It is interesting that it has been these (rather atypical, and arguably, 'non-core') elements of the EU which have been the focus of a lot of criticism from Euro-sceptics.

⁵ I developed an LLM unit at the University of Bristol Law School on 'Democracy and Legitimacy in the EU'.

⁶ See 'The Treaty of Lisbon: Much Ado... But about What?' (2008) 37 *Industrial Law Journal* 219.

⁷ See e.g., with Tonia Novitz, 'Economic and Social Rights in Conflict: Political and Judicial approaches to their Reconciliation' (2008) 33 *European Law Review* 411 and 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A Bogg, C Costello, A Davies and J Prassl (eds) *The Autonomy of Labour Law* (Hart, 2015).

⁸ Lord Wedderburn, *Labour Law and Freedom* (Lawrence and Wishart, 1995), p.391.

⁹ United in diversity, has, since 2000, been the motto of the European Union. See https://europa.eu/european-union/about-eu/symbols/motto_en.

¹⁰ The effects of regulatory competition need close analysis. See, with Andrew Johnston, 'Regulatory Competition in European Company Law after *Cartesio*' (2009) 34 *European Law Review* 378.

¹¹ The contrasts between the internal market regime and the EMU regime, and the implications for labour law, are addressed in 'The EU and National Systems of Labour Law', my contribution to the *Oxford Handbook of EU Law* (Oxford University Press, 2015).

Constitutionalism

The nature of the EU as a political entity has long been contested. It defies easy characterisation. And different people have different aspirations for, and understandings of, the EU's constitutional structure.

One of the pieces which had the greatest influence on the way in which I see the EU is Joseph Weiler's article, 'Europe: The Case against the Case for Statehood'.¹² This was (as you might have guessed) written in response to an article (by a judge at the Court) seeking to make the case for statehood.¹³

For Weiler, and for me, the key and the normative appeal of the EU legal order, is the tension. It is not a system based on hierarchy, or authority. It is instead a system which relies on trust and cooperation. It is a fragile system which can break if either the nation state, or the EU, push too hard.

As it happens, it was in my first year of my undergraduate law degree that the House of Lords (the predecessor of the Supreme Court) decided the famous *Factortame* case in 1991.¹⁴ *Factortame* is a good illustration of the way in which the tension plays out. In the case, the House of Lords made it clear, as a matter of UK law, that a UK Act of Parliament yields in the face of conflicting provisions of EU law; and, as some say, 'accepted' the 'supremacy of EU law'.

There were two reactions to *Factortame*.¹⁵ Let me take the response of 'traditional' UK constitutional lawyers first. From them, it was nonsense on stilts. After all, the key doctrine of UK constitutional law (going all the way back to Bagehot and Dicey) is that Parliament can do anything except bind itself. Future Parliaments can undo what past Parliaments have done. Thus, if Parliament enacts the Merchant Shipping Act 1988, and seeks to allocate fishing quotas in a particular way, its decision to do so cannot be called into question by an earlier act of Parliament, the European Communities Act 1972, the Act which (rather elegantly) made EU law part of UK domestic law.

Second, the reaction of EU lawyers. The Court of Justice of the European Union had said from as early as 1964 (note: long before the UK had joined the European Communities), that all EU law is supreme over all national law.¹⁶ In the event of a conflict, it is the duty of all courts to give effect to EU law, and to disapply inconsistent provisions of national law.¹⁷ For the EU lawyers, the domestic act (the Merchant Shipping Act) would just have to yield. The Court of Justice's case law makes it clear that even a constitutional provision of national law would have to yield in the event of a conflict with EU law.¹⁸

¹² J Weiler, 'Europe: The Case against the Case for Statehood' (1998) 4 *European Law Journal* 43.

¹³ GF Mancini, 'Europe: The Case for Statehood' (1998) 4 *European Law Journal* 29.

¹⁴ *R (Factortame Ltd) v Secretary of State for Transport (No 2)* [1991] 1 AC 603.

¹⁵ For full discussion see P Craig, 'Britain in the European Union' in J Jowell, D Oliver and C O'Connell (eds) *The Changing Constitution* (OUP, 8th ed 2015).

¹⁶ Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

¹⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629.

¹⁸ Case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125.

The judgment of Lord Bridge in *Factortame* is much debated (just as the judgment in *Miller* last year has, and will, be).¹⁹ My take is that, via a straining of UK constitutional law (and the creation of the doctrine of ‘implied repeal’), the House of Lords managed to find a workable way to reconcile the competing logics of the two legal orders. Similar outcomes have been reached in other Member States. National courts have found creative ways of ensuring that EU law is able to take full effect in the national legal system, without ceding ultimate control to the Court of Justice of the European Union.²⁰

The supremacy of EU law has always been my favourite topic to teach, and I have come to view the Article 267 TFEU reference procedure, the procedure through which the Court of Justice of the European Union (CJEU) and national courts are able to interact, with particular fondness.

Students are, to the extent that it is possible to divine this, surprised that the relationship between the UK and the EU legal systems is not, in fact, more hierarchical. They are surprised that there is no mechanism of appeal, from decisions of the UK courts to the CJEU. They are also surprised that no meaningful sanctions attach to failures of national courts to refer EU law questions to the CJEU, even in circumstances in which it is clear that they ‘should’ do so.²¹

They do however become less surprised when they are encouraged to think about the way in which the EU Member States are likely have set up the EU. It is, in my view, unthinkable that the Member States would have set up the system in a hierarchical way. Would Germany and France surrender control of their constitution to an international court? In a word: No. True, the CJEU’s jurisprudence has pushed the text of the Treaties in unexpected directions, sometimes at the expense of the autonomy of the Member States;²² but there are political controls on the CJEU, and also judicial responses at the national level which establish limits to the CJEU’s power.²³ Who decides what impact EU law has in the UK? Answer, the UK. Who in particular? Well, Parliament plays a big role – for example via the enactment of the European Communities Act. And judges play a big role – via judgments such as *Factortame* and *Miller*. They have regard to what EU institutions (including the CJEU) say and do, but, ultimately, it is institutions at the level of the nation state which control the way in which EU law operates.

I am (as is obvious) broadly positive about the way in which the legal structure of the EU, and its relationship with the Member States, has evolved. The system relies on trust and cooperation. And, trust and cooperation do not just happen; they are the products of the connections between the

¹⁹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. *Miller* is discussed further below.

²⁰ See eg N Walker (ed), *Sovereignty in Transition* (Hart, 2003), and K Jaklic, *Constitutional Pluralism in the EU* (OUP, 2014).

²¹ The Commission is, in theory, able to bring cases against Member States before the Court of Justice for ‘judicial breaches’ of EU law under Article 258 TFEU, and individuals are, again in theory, able to bring State liability against Member States before national courts under the *Koebler* line of case law (see Case C-224/01 *Koebler v Austria* [2003] ECR I-10239); but the threshold conditions for such claims are very high, and there have not been successful actions based on a failure of a national court to refer to the Court of Justice.

²² See the seminal J Weiler, ‘The Transformation of Europe’ (1981) 100 *Yale Law Journal* 2403.

²³ See K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).

relevant institutions. The fact that this is not well understood is one of the reasons why the Leave campaign ('taking back control' etc) had such traction.

Given that this structure is today under serious threat, it is worth saying a little more about it. The EU constitutional system is far and away the most developed structure which has evolved in international law. It has the most democratic vision of international law, able to ensure that the interests of the Member States and the people (mainly via the Council of Ministers and the European Parliament) are represented in the law-making process.

There is a debate in the political science about what the relevant comparator bodies are for the EU – are they states or are they international organisations?²⁴ It is useful to compare the EU not only with nation states, but also with organisations such as the United Nations, the World Trade Organisation, and indeed the Commonwealth.²⁵

But... the resulting constitution is very different in hue from that in the UK. It is more legalistic. The EU institutions have limited competences,²⁶ policed by the judiciary. There are constitutional fundamentals (e.g. the general principles of law) which operate so as to constrain (and tame) democratic politics, and which have been the focus of criticism on both right and left.

I think that it is also useful at this point to recall the EU's achievements. The EU is the structure through which its Member States have been able to coexist, and thrive, in the aftermath of the world wars of the early twentieth century. It was created by people who disagreed fundamentally about the likely 'end state'; my take is that the instincts of the compulsive centralisers (and there are many) have been kept at bay, more or less successfully, by those anxious to preserve meaningful scope for action at the national level.²⁷ The tension is again there.

The UK, by choice, did not play a role in the creation of the European Economic Community in the 1950s – but, since the mid-1970s, has played an increasingly important role in shaping the future of Europe (while, I think it is fair to say, never fully able to reconcile itself to the enterprise).

Of course, there are many aspects of the EU which can and should be criticised (I have already alluded to the governance framework around EMU...), meaning that there is a need for reform, but there are no systems of governance which are immune from such criticisms.

²⁴ See e.g. P Craig, 'Integration, Democracy, and Legitimacy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd ed 2011).

²⁵ The endorsement of Prince Charles as the next Head of the Commonwealth occurred in the weeks before this lecture was delivered. This is the report from the Guardian: <https://www.theguardian.com/uk-news/2018/apr/20/prince-charles-next-head-commonwealth-queen>.

²⁶ I have written on the principle of subsidiarity. See 'Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination' (2002) *European University Institute Working Paper 10/2002*, and 'In defence of Subsidiarity' (2004) 24 *Oxford Journal of Legal Studies* 323.

²⁷ See e.g. G Majone, *Dilemmas of European Integration* (Oxford University Press, 2005), and his subsequent debate with Michael Dougan in the pages of the *European Law Review* (see (2006) 31 *ELRev* 865, and (2007) 32 *ELRev* 70).

It is, after all, in the UK system that the Windrush scandal,²⁸ which led to the resignation of Home Secretary Amber Rudd in April 2018, was allowed to happen. And while this, I suspect, is not the time to focus on Universities UK's (and indeed the University of Bristol's own) response to the USS pensions crisis;²⁹ suffice it to say that there were many, rather obvious, shortcomings in those responses.

EU law from 2016

As is well known, David Cameron's Conservative government called a referendum, which was held in June 2016, in which the people of the UK were asked whether the UK should remain a member of the European Union or leave the European Union.³⁰ By 52% to 48% (by 17.4 million to 16.1 million votes), the UK voted to leave. During the referendum campaign, and more particularly since the result, the UK's relationship with the EU has been at the front and centre of the national debate. It seems destined to remain so for years to come.

The debate encompasses both policies (e.g. customs union and single market membership); and 'constitutionalism' (i.e. the structural relationship between the UK and EU; e.g. via ways of managing divergence, and questions concerning the continuing jurisdiction of the Court of Justice). The questions I have been grappling with throughout my career really matter.

It also happened that I found out about my promotion in June 2016, with all the predictable jokes about becoming a Professor of EU law just as the UK's relationship with the EU was about to come to an end.

This is not the time for me to tell the story of the referendum, but it is clear to me that a) David Cameron made a monumental error in calling a referendum in the way in which he did; and b) that people were able to find a whole host of reasons for voting leave.

It became clear during the campaign, as I've hinted above, that the EU was badly misunderstood (encapsulated in the slogan 'let's take back control');³¹ that many voted in order to give the then Conservative Government, in particular Prime Minister David Cameron and Chancellor, George Osborne a good kicking; and, in particular in areas in which immigration is low, that the leave vote was at least in part a result of worries about immigration, deliberately stoked by the leave campaign.³²

²⁸ <http://www.bbc.co.uk/news/topics/c9vwmzw7n7lt/windrush-scandal>.

²⁹ There was a wave of strike action in 2018 in the UK Higher Education sector, in which university staff protested about planned cuts to their pensions. Significant questions were raised about the governance of Universities UK, the umbrella organisation which represents higher education employers in discussions on the future of the USS pensions scheme. In April 2018, USS briefs was launched, to provide a better understanding of the USS pensions dispute. See <https://ussbriefs.com/>. At the more local level, efforts to reform the governance structures at the University of Bristol are now underway.

³⁰ See P Craig, 'Brexit: A Drama in Six Acts' (2016) 41 *European Law Review* 447.

³¹ See 'Taking Back Control from Europe is not the Democratic Option' *The Conversation* 14 June 2016, <http://theconversation.com/taking-back-control-from-europe-is-not-the-democratic-option-60665>.

³² See <https://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants>.

The messages relating to trade, the customs union and the single market, were, to put it diplomatically, mixed, with many leading figures of the leave campaign, including the man who is now Foreign Secretary, Boris Johnson, UKIP's Nigel Farage, and Conservative MEP Daniel Hannan, indicating that a vote to leave would not jeopardise the UK's relationship with the single market.³³ Today, over a year since the triggering of Article 50, the Cabinet (and indeed the Labour Party) are still arguing among themselves about what Brexit means;³⁴ so it is stretching credulity just a little to say that all those who voted Leave can have known what they were voting for.

On the remain side, there was all too little passion about the opportunities and achievements of the EU; and no attempt to seek to discuss the realities of a leave vote (which many did not want to appear to countenance).

Clearly, given the way in which the referendum was conducted, it was going to be difficult for the Government to steer the country forward. The vote to leave was a relatively narrow one. There were, and still are, many mutually incompatible positions espoused by Leave voters.

There have been a lot of legal questions which have emerged since the vote.³⁵ Here, I list just some of the more controversial.

What is the constitutional status of the referendum vote? And, what are its political implications? How does the Article 50 process operate?³⁶ Once Article 50 is triggered, can the decision be revoked (and if so, can the UK do that unilaterally, or does it require the agreement of the EU-27)?³⁷ In the *Miller* case, which saw unprecedented attention focused on the judiciary,³⁸ the constitutional status of EU law in the UK was again explained. The case decided that the Government could not use prerogative powers to trigger Article 50, and required Parliamentary authorisation to do so. More generally, the case shed new light on questions which continue to problematize the Brexit process.³⁹

³³ See e.g. <http://uk.businessinsider.com/boris-johnson-single-market-brexit-campaign-customs-union-2018-1>, and <https://www.youtube.com/watch?v=0xGt3QmRSZY>.

³⁴ See, from April 26 2018, <https://www.theguardian.com/politics/2018/apr/26/cabinets-brexiteers-push-theresa-may-to-drop-customs-partnership>.

³⁵ The UK and EU public law literature has grown exponentially; with excellent coverage both in leading journals, such as *The Modern Law Review*, *Public Law* and *The Cambridge Law Journal*; and online, for example, on the UK Constitutional Law Association's Blog.

³⁶ See, from 8 July 2016, 'What next? An analysis of the EU law questions surrounding Article 50 TFEU', <https://eutopialaw.com/2016/07/08/what-next-an-analysis-of-the-eu-law-questions-surrounding-article-50-teu-part-one/>.

³⁷ See, from 29 June 2016, 'Once the UK triggers Article 50 to start Brexit, can it turn back?' *The Conversation*, <https://theconversation.com/once-the-uk-triggers-article-50-to-start-brexit-can-it-turn-back-61727>, and from 7 November 2016, 'The *Miller* judgment: Why the Government should argue that Article 50 is reversible', <https://eutopialaw.com/2016/11/07/the-miller-judgment-why-the-government-should-argue-that-article-50-is-reversible/>.

³⁸ The judgment of the Court of Appeal in *Miller (R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768) led to the infamous 'enemies of the people' in the Daily Mail in November 2016. See <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

³⁹ See, from 9 February 2017, 'Law and Politics in the Supreme Court', <https://eutopialaw.com/2017/02/09/law-and-politics-in-the-supreme-court/>.

What is the constitutional relationship between the legislature and the executive? And, what is the division of powers and responsibilities, as between the Westminster Parliament and the devolved assemblies? Is it possible to repeal the European Communities Act, and end the supremacy of EU law in the UK, and at the same time ensure 'business as usual' (this is the task the Government set for itself in the EU (Withdrawal) Bill, in which it sought to marry continuity and change)?⁴⁰ How far is it possible to replicate the existing regime re agriculture, fisheries, medicines, financial services if the UK is outside the EU single market?

A lot of attention has focused on Ireland, and the Irish border (which has a 'must follow' twitter account).⁴¹ I'll discuss that briefly now – but there a lot of other examples I could have chosen to illustrate the difficulties the government is facing. The Irish example is a good one in that it serves as a reminder that there are a range of international commitments (in the Irish case, the Good Friday Agreement), which have to be respected, and/or worked out anew if the UK leaves the EU.

So... is it possible to leave the customs union and the single market, and at the same time avoid a hard border in Ireland and the Irish Sea? The slide below, which I have borrowed from Daniel Keleman, illustrates the difficulty.



⁴⁰ See, from 18 July 2017, 'The European Union (Withdrawal) Bill: Paving the Way Towards a Very Uncertain Future', <https://legalresearch.blogs.bris.ac.uk/2017/07/european-union-withdrawal-bill-paving-the-way-towards-a-very-uncertain-future/>. For a fuller analysis of the EU (Withdrawal) Bill, see the House of Commons Library Briefing Number 8079 of 1 September 2017, available here: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8079#fullreport>.

⁴¹ See, from 6 December 2017, 'The Irish conundrum exposes the harsh realities of Brexit', <https://legalresearch.blogs.bris.ac.uk/2017/12/the-irish-conundrum-exposes-the-harsh-realities-of-brexit/>.

One of the few delights of the Brexit process is the twitter account of the Irish border: @borderirish.

Keleman's claim is that it is impossible to leave the single and customs union, and at the same time avoid either a hard border in Ireland, or in the Irish Sea. Michel Barnier, the Commission's chief negotiator, appears to agree with that conclusion.⁴² The political debate in the UK seems (at time of writing) to be fixated on the customs union; seeming to miss the fact that in order to eliminate the need for border checks, you need both customs union and single market membership (or a very sophisticated system whereby the UK commits to shadowing EU rules). The scene is set for a new debate on mutual recognition and regulatory alignment in the months ahead.

It is also beyond doubt that the process, already a very difficult one, has been badly mismanaged.⁴³ In March 2017, the UK Government triggered Article 50,⁴⁴ which has a two-year time limit, without knowing whether the notice was revocable, and without knowing what the UK's preferred outcome would be. There was a general election called within the 2-year period, in which Theresa's May appeal to the public to give her a stronger hand in the Brexit negotiations (or, as the Daily Mail put it, to 'crush the saboteurs'⁴⁵) was rejected.⁴⁶ The PM has boxed herself in with 'red lines', which were far from the inevitable result of the referendum vote (for example, committing herself to leaving the single market and customs union, and to 'ending the jurisdiction of the CJEU').⁴⁷ The government's economic modelling of the effects of various post-Brexit trading relationships with the EU was suppressed, leading to a rebuke for David Davis, the Secretary of State for Exiting the EU, in Parliament.⁴⁸ The debate has become febrile. The level of vitriol which has been directed at opponents of Brexit, in particular at women,⁴⁹ is appalling.

Time is now very short.

By March 2019 we will have left the EU. That is avoidable only if a) we seek to revoke the A50 notification; b) we seek to extend the A50 period; or c) we set a later departure date. All are legally possible; none are politically likely. Thus, in order to allow for the necessary ratifications in both the

⁴² See, from 22 May 2018, https://twitter.com/nick_gutteridge/status/998925860475473920

⁴³ See, from 18 October 2017, <https://legalresearch.blogs.bris.ac.uk/2017/10/a-call-to-stop-brexit/>.

⁴⁴ In the immediate aftermath of *Miller*, the Government prepared the EU (Notification of Withdrawal) Bill. It was passed by large majorities in both Houses of Parliament. It affords the Prime Minister the power to notify the UK's intention to withdraw from the European Union; and Prime Minister Theresa May did duly notify the UK's intention on 29 March 2017. See <https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk>.

⁴⁵ See <https://www.theguardian.com/media/2017/apr/19/crush-the-saboteurs-british-newspapers-react-to-general-election>.

⁴⁶ See <https://www.theguardian.com/commentisfree/2017/jun/09/the-guardian-view-on-the-2017-election-result-a-call-for-a-different-britain>.

⁴⁷ The key speeches of Prime Minister Theresa May are the Lancaster House speech of 17 January 2017 (<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>), the Florence speech of 22 September 2017 (<https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>), and the Mansion House speech of 2 March 2018 (<https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>).

⁴⁸ See <https://www.theguardian.com/politics/2017/dec/14/david-davis-rebuked-brexit-impact-papers-contempt-parliament-speaker>.

⁴⁹ See e.g. <https://twitter.com/cliodiaspora/status/996128114416734210>, a thread from 14 May 2018.

UK and the EU-27, by October of this year, we need to have a withdrawal agreement, a transition deal (at this stage, it seems inevitable that there will be transition period, and the main questions are about whether it can or should be a time-limited transition), and (at least) the bare outlines of a future relationship deal. Alongside these international agreements, domestic law has to be changed. Thus, following on from the EU (Withdrawal) Bill, whose passage through Parliament has been anything but serene, the Trade Bill, and other pieces of legislation dealing with Immigration, Fisheries and Agriculture; we will also have a Withdrawal Agreement and Implementation Bill.⁵⁰ Timings are not my area of expertise (after all, I am an academic), but given how far we have got so far (since June 2016 or March 2017, to (now) May 2018) there does seem to be a lot still to achieve. And, the Government hardly looks fit for purpose.

Looking back on the period since 2016, I have come to realise that the nature of my academic work has been transformed.

I have been involved in many more high profile events. Before the referendum, I chaired 'The West Decides' debate in the Great Hall of the Wills Memorial Building, in which Conservative MEP Daniel Hannan and Labour MP Graham Stringer (for leave) debated with The Observer's Will Hutton and Green MEP Molly Scott Cato (for remain).⁵¹ I was also a panellist at an Institute of Directors EU Debate at the University of the West of England,⁵² and the speaker at a 'Let's Talk about Europe' at a local church.⁵³ Since the referendum, I have contributed to the Guardian 'Brexit means...' podcast,⁵⁴ and made a short video for the University,⁵⁵ on the triggering of Article 50. I was (together with Paul Craig, David Allen Green, Douglas Lloyd, and special guest Gina Miller) one of the speakers at the 2017 Bristol Law Conference,⁵⁶ and I have spoken on the Brexit process as it has unfolded, to the Industrial Law Society in Bristol and Manchester, at the #BristolBrexit – A City Responds to Brexit event,⁵⁷ to Labour students at the University of Bristol, and to students at Bristol Grammar School. I have, in addition to the blogs mentioned above and below, written pieces for GW4 magazine,⁵⁸ and *Nonesuch*, the University of Bristol's alumni magazine.⁵⁹

I have engaged with the work of the House of Commons Library, obtaining a PolicyBristol knowledge exchange fellowship, enabling me to work with Jack Simson Caird.⁶⁰ The fellowship has involved speaking at, and attending, events in the Houses of Parliament and the University of Bristol, and the

⁵⁰ See <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8321>.

⁵¹ The debate is available here: <http://www.bristol.ac.uk/policybristol/news/2016/eudebatevideo.html>.

⁵² See <http://www.bristol.ac.uk/law/news/2016/iod-brexite-debate.html>.

⁵³ See <http://www.bristol.ac.uk/law/events/2016/lets-talk-about-europe.html>.

⁵⁴ See <https://www.theguardian.com/politics/audio/2016/dec/20/deciphering-article-50-brexite-means-podcast>.

⁵⁵ See <https://www.youtube.com/watch?v=8JbvpTKgyRI>.

⁵⁶ See <http://www.bristol.ac.uk/law/events/2017/law-conference-2017.html>.

⁵⁷ See <http://www.bristol.ac.uk/policybristol/events/2017/bristolbrexite.html>.

⁵⁸ See <http://sites.cardiff.ac.uk/gw4-2014-v2/how-can-universities-tackle-the-challenges-and-exploit-the-opportunities-of-brexite/>.

⁵⁹ <http://www.bristol.ac.uk/media-library/sites/university/documents/publications/nonesuch-autumn-2017.pdf>.

⁶⁰ See <http://www.bristol.ac.uk/policybristol/news/2017/philsyrpishouseofcommonslibrary.html>.

submission of evidence to Select Committees of both Houses of Parliament,⁶¹ which was referred to in the relevant Select Committee Reports.⁶²

I have endeavoured to write on the big issues as they have emerged; though, given that events are so unpredictable, I have not yet managed to write a significant piece, of the sort which might contribute in a meaningful way to the Law School's REF return. I have, as the links above indicate, been a very regular to the Law School's Blog, and to the eutopialaw.com blog (Matrix Chambers' EU law blog). With Michael Ford, I have contributed to the UK Constitutional Law Association's blog, writing about the on the shortcomings of the EU (Withdrawal) Bill, especially in relation to the new legal category 'retained EU law'.⁶³ In a rather less academic post, I wrote about the linkages between Brexit and the USS strikes; in a piece which features on Bristol UCU's website.⁶⁴ I have also written about the Left's position on Brexit and judicial power,⁶⁵ seeking to respond to the Left's hostility to 'legal constitutionalism' (and to the fondness with which Brexit is regarded is some on the Left). My argument is *not* that the Left has nothing to fear from recourse to the law, but that it also has a lot to fear from 'political constitutionalism'. My conclusion was that, contrary to what Lexiteers are saying, a retreat from legal constitutionalism (and the EU) is likely to herald only years of self-inflicted economic and social harm in the UK; and that it should therefore be resisted.

Alongside the events, engagements and writing, I have been working with colleagues bidding for funding for Brexit-related research work, and to ensure that the Law School showcases the work its academics are doing in the Brexit field.⁶⁶ I have also been giving thought the way in which Brexit will affect the Law School's Curriculum, participating in an SLS funded seminar on 'Brexit and the Law School',⁶⁷ and contributing to our internal curriculum review process. Depending on the way in which Brexit evolves, it seems to me to make sense to teach the constitutional dimensions of EU law (i.e. the relationships between the UK and the EU legal orders) as part of public law. I envisage an 'international public law' unit, in which the different ways in which international legal orders (e.g. those of the EU, the Council of Europe, the World Trade Organisation) intersect with the UK legal order are considered, together with an exploration of the implications for the relationship between the legislature and the executive, the devolution settlement, and the role of the judiciary.

Looking ahead to the summer months, I would like to become a little bit less reactive, and to return to the concerns which animated by work before 2016. The intention, at the risk of creating a hostage

⁶¹ See <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/written/70833.html>, and <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-european-union-withdrawal-bill/written/71004.html>.

⁶² See <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf>, and <https://publications.parliament.uk/pa/cm201719/cmselect/cmexeu/373/373.pdf>.

⁶³ See, from 14 February 2018, <https://ukconstitutionallaw.org/2018/02/14/michael-ford-and-phil-syrpis-retained-eu-law-in-the-eu-withdrawal-bill-a-reaction-to-the-house-of-lords-constitution-committee-report/>.

⁶⁴ See, from 22 March 2018, <https://bristolucu.wordpress.com/2018/03/22/uss-strikes-and-brexit/>.

⁶⁵ See, from 26 April 2018, <http://judicialpowerproject.org.uk/phil-syrpis-judicial-power-and-the-left-a-short-response/>.

⁶⁶ See <http://www.bristol.ac.uk/law/research/centres-themes/brexit/>.

⁶⁷ See <http://www.legalscholars.ac.uk/brexit-law-school-seminars/>.

to fortune, is to write an academic journal article on the current, and possible future, roles of the CJEU in the UK, focusing on the nature of the CJEU's relationship with the UK judiciary.

Styles of academic discourse

My work has looked very different to the way it looked before the Brexit vote. Some of the changes go with increasing seniority in the University (with a Chair have come many more doodle polls, and many more meetings which just seem to appear in the calendar). But some are also a direct result of the political salience of Brexit.

I have talked about the substance of my research thus far. It is also worth pointing out another dimension. My research was geared towards academia; towards academic lawyers and political scientists immersed in the studies of European integration. I could, and can, talk about neo- and ordo-liberalism, intergovernmentalism and functionalism, and various strands of transnational constitutionalism. I have also, of course, talked a lot to students about these ideas, and sought to explain the way in which the EU's seemingly arcane structures operate, drawing comparisons with the domestic systems which with we are all more familiar.

But... could I, had I ever, tried to engage the broader public? Had I engaged with the coverage in the media (or on social media)?

Was the level of debate during the time of the referendum 'my fault'? I don't think it was, but the thought continues to trouble me. It also prompts me to think about what I need to do in the future in order to feel more comfortable in my role as a Professor of EU law.

There are, I think, two schools of thought within academia (and I am fully aware that I am here unfairly stereotyping both these schools).

First, there is one which prizes academic engagement, scholarly articles, conversations within the legal profession; and is a little sneering about engagement with the masses, about 'media dons', about blogging, twitter, etc. It looks at citations by leading judges as badges of honour, and seek to provide academic articles in leading journal, hoping for 4* ratings in the Research Excellence Framework 2021.

Second, there is one which places 'impact' front and centre, which seeks to engage with the media and in particular with social media; and is in turn rather sneering about academics in ivory towers talking only to themselves, in inaccessible language. Success is signalled by the reach of one's research, by the number of followers one has acquired on twitter.

In my career, I was strongly an academic of the first sort. Brexit has succeeded in turning me more into an academic of the second kind (note the way I am trying not to claim any agency for the change). The changes are, to some extent welcome. For one; I like to think that I can write a good blog; in many ways, the skills required are not entirely dissimilar to those needed for writing match

reports for my boys' football team – something which I am very proud to have done for the last couple of years.⁶⁸

It is also great to write something, to publish it, and to receive comments on the very same day; a somewhat dizzying experience for those used to writing for academic journals which typically take a year or so to publish. But I also have some misgivings about, the nature of the change.

The key, I think, is to know your audience; and to be able to write in ways which engage your likely readership. It is your expertise which makes, or should make, you able, and qualified, to play a bigger part in the public debate. Legal academia, as a whole, has responsibilities to a broad range of constituencies – to lawyers, judges, campaigners, policy makers; and to the general public; and we should strive to fulfil them all (clearly, this is all part of a bigger picture in which we must embrace more and more responsibilities, with precious little guidance, or thought, given to whether we are able to accomplish everything within the given time frames).⁶⁹

For me, it was Brexit which prompted these reflections, and these changes, but, thinking about it some more, I suspect that these changes are liable to affect all legal academics. It is certainly true, for example, of those writing about the way in which rape is dealt with by the courts,⁷⁰ and about housing in the wake of Grenfell.⁷¹ It is, I think, a dilemma which all academics will or might face, and it is difficult to get right.

In conclusion

I am afraid that I am not able to offer any reassurance about the way in which the Brexit process is going to play out. Much of that is, and will continue to be, down to politics, and the niceties of UK constitutional law. I'm not very qualified to speculate on those.

Some also depends on EU law – on finding a basket of policies which will form the basis of the future relationship between the UK and the EU, and on the institutional structures within which those policies are able operate. There has been a lot of talk of the Canada model, the Norway model, the Turkey model, the Jersey model, etc; and on the UK side of the need for imagination and creativity. Jonathan Lis, writing in *Politics.co.uk* in December 2017, delivered a warning to the UK side – and in the process produced perhaps by favourite Brexit related quote. He said that the only thing the Government will find between Canada and Norway is the wreckage of the Titanic.⁷²

⁶⁸ Match reports for the 2015-16, 2016-17, and 2017-18 seasons are available on request. In April 2018, the Clifton United Hawks were crowned champions of the AYL U14 Division 4. See: <http://fulltime-league.thefa.com/ProcessPublicSelect.do;jsessionid=2BE3F90B579DA276E4593EA791973181?psSelectedSeason=70310947&psSelectedDivision=3230768&psSelectedCompetition=0&psSelectedLeague=3323170>.

⁶⁹ Albert Sanchez-Graells' excellent *How to Crack a Nut* blog contains a post on 'Becoming a Digital Scholar' which contains a lot of valuable food for thought. See <http://www.howtocrackanut.com/blog/2018/4/12/becoming-a-digital-scholar-some-thoughts>.

⁷⁰ See e.g. <https://legalresearch.blogs.bris.ac.uk/?s=rape>.

⁷¹ See e.g. <https://legalresearch.blogs.bris.ac.uk/?s=grenfell>.

⁷² See <http://www.politics.co.uk/comment-analysis/2017/12/20/brexit-all-that-s-left-for-may-to-get-through-is-the-unyield>.

In terms of policies; there is indeed chasm between membership of the customs union and the single market, and a looser trade relationship with the EU. The single market relies on a combination of harmonisation, and mutual recognition. Take the relatively simple case of the free movement of goods (people and services are a little more complex). Where there are no common rules, Member States agree (in the absence of a justification, whose scope is dictated by EU law principles) to accept others' rules and agree not to impose their own higher/different standards to imports from the EU, so long as products meet the rules in their home state. But... why do they accept these? The answer is that all Member States are part of the same, single, market, and that each state's standards can be monitored and assessed within EU law frameworks, and, if necessary, can be brought within the scope of the EU's harmonisation efforts.

Faced with a UK with a stated interest in diverging from EU law rules, the EU will not, and legally cannot, just accept mutual recognition. It will insist on checks (at borders, or elsewhere) in order to monitor compliance. The more divergence is limited or controlled, the easier the access of UK products to EU markets. The more divergence is permitted, the more difficult (expensive and time-consuming) market access will be.

Current debates (e.g. in the House of Lords) on customs union membership, and on the alignment of the UK with EU environmental and social standards,⁷³ speak to this, fundamental, choice; a choice which we have yet to make, and which we appear scarcely to have confronted.⁷⁴

In terms of constitutional structure, the talk has been of 'ending the jurisdiction of the CJEU'. It is presented as though UK courts are, currently, bound by EU law, and controlled by the CJEU. The reality, as I've stated above, is very different. The relationship between national courts and the CJEU is not hierarchical. But it does rely on cooperation and trust. It is important that the current reality is properly understood, in order for sensible and workable proposals for the future relationship to be advanced.

It is important to think about the extent to which future provisions in UK law will provide sufficient guarantees for EU citizens living in the UK. There is a lot of reassurance needed.⁷⁵

The message I want to leave you with is this. The UK, like all countries (even North Korea) exists in an interconnected world. It has, and will continue to have, all manner of relationships with other states; each of which will impact on its 'sovereignty' and the 'control' it has over its policies.

The EU represents a system of international governance which goes further than any other in the world. I think it works reasonably well; others point to flaws in the EU construct and may prefer that things were organised differently. I urge people to think about the policies and institutional structure of the EU; and to compare those with the alternatives (e.g. trading under World Trade Organisation

⁷³ See e.g. <https://www.theguardian.com/politics/blog/live/2018/apr/18/pmqs-may-corbyn-eu-withdrawal-bill-lords-ministers-face-questioning-by-peers-over-brex-it-meaningful-vote-politics-live>.

⁷⁴ See <https://www.parliament.uk/business/committees/committees-a-z/commons-select/exiting-the-european-union-committee/news-parliament-2017/progress-negotiations-may-report-published-17-19/>.

⁷⁵ See, re citizens' rights, e.g. <http://blogs.lse.ac.uk/brexit/2018/03/26/eu-citizens-in-the-uk-need-a-independent-authority-to-monitor-their-rights/>.

rules; making bilateral deals with other States; establishing closer linkages with our natural allies in the Commonwealth; whatever it may be).

It is a matter of huge concern that we still do not know what 'Brexit' means – will we end up part of the customs union and single market; will there be a hard border in Ireland or the Irish Sea; what will the economic consequences be? We still do not know; and even making educated guesses is very difficult. There is a lot to do between now and October; and precious little sign of progress.

Of course, that makes it difficult to know whether, and to what extent, Brexit may be a success (especially given how overstretched the machinery of government and Parliament is). There is still time for this to become clearer... but that time is fast running out. This is, quite rightly, a time of worry and concern for many; with uncertainty over the contours of the likely deal, and uncertainty over the ways in which what look like 'second-best' (or 'disastrous') outcomes may yet be averted.

Like many other EU law academics, I have been embroiled in national debate. I have been bemused by many of the statements the government and other key decision-makers have been making. I have learned a lot about the intricacies of Parliamentary decision-making. Most of all, I have been puzzling about what being a Professor of EU Law entails. It is very much a work in progress. Let's see what the future brings.