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Lessons from Roman law: EU law in England and Wales after Brexit

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ABSTRACT

The experience of Roman law in legal education in England and Wales may serve as a cautionary tale for EU law post-Brexit. Similarly, past debates as to the position of Roman law in the curriculum may also be instructive in the EU law context. After tracing the history of the teaching of Roman law in England and Wales, this article posits first that the factors that appear to have caused the decline of Roman law could apply equally in the context of EU law. Secondly, based on both pragmatic and liberal education arguments that have historically been proffered for the study of Roman law, it advances arguments for the retention of a compulsory stand-alone EU law module in England and Wales after Brexit. To this end, the paper contends that the arguments for the retention of EU law in legal education are more robust than those asserted traditionally in favour of Roman law.

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Introduction

Brexit presents an existential threat to the status of EU law as a stand-alone, compulsory module. Among those who argue for its retention in some form, there is a multiplicity of views as to how Brexit should affect the module.[1] If the "best of prophets of the future is the past",[2] it may be instructive to look to the past to see how our forebears dealt with similar challenges. This article examines the history of the teaching of Roman law in England and Wales to glean insight into the potential fate of EU law as a module after Brexit. Roman law is a useful comparator, as it faced similar challenges to those facing EU law, with the suppression of canon law during the reign of Henry VIII being the most obvious example. The fate of Roman law also serves as a useful reminder to legal educators in England and Wales that students should be adequately prepared and "sophisticated enough to discuss" EU law and that "law teachers are prepared to be adventurous enough to explore its possibilities".[3]

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[1]See Martin Trybus (ed), "Brexit and the Law School: Re-Imagining EU Law" (CEPLER Working Paper Series, 27 November 2017).

[2]Lord Byron, Journal, 28 January 1821.

[3]David Edward, "The European Content of British Law Degrees" (1995) 29 Law Teacher 142, 150–51.

This article begins with an analysis of the decline of Roman law in legal education in England and Wales, tracing its history from the 1100s to the present. From this analysis, a number of significant factors that may have influenced the decline of Roman law are identified, including the impact of contemporary political priorities, the effect of isolationist and nationalistic sentiments, the ever-prevailing concerns over space on legal education curricula, and, finally, the need to ensure the practical appeal of the law degree. It is further asserted that these factors might also pose a threat to the status of EU law after Brexit. The article then moves on to reflect critically on the arguments that have traditionally been made for the retention of Roman law in legal education, and determines their relevance and usefulness in the context of EU law. These arguments are placed into two categories: (1) pragmatic arguments and (2) liberal education arguments. The pragmatic arguments, which relate to matters of more direct or obvious relevance to the practice of law, point, in particular, to the significant influence that EU law has had on the substance and methods of English law, and the important role that it is very likely to continue to have in that regard after Brexit. Moreover, the authors suggest that instruction in substantive EU law rules cannot be fully divorced from the institutions that create, apply and interpret these rules, a factor which militates in favour of a comprehensive, stand-alone EU law module, rather than the subsumption of EU substantive rules into other modules. The liberal education arguments focus on the central role that EU law can play in contextualising the English legal system by providing points of comparison and contrast. These arguments also emphasise the potential utility of EU law in ensuring English legal education does not become too insular in nature, as well as its function in helping students to engage with what has possibly been the most significant and persistent question in British public life for well over a generation: what is the role of the UK in Europe? The categorisation of the arguments into pragmatic and liberal education arguments is also broadly consonant with what the authors view as the interconnected twofold purpose of legal education: first, ensuring that students are provided with adequate grounding in law and legal methods for a career in law, whatever the branch (practice, academic or other); and secondly, providing the student with a rounded education that allows a more complete understanding of the contemporary context within which the law is created, applied, and interpreted.

The article concludes that, owing to, *inter alia*, the strength of the influence that EU law has had and will most likely continue to have on the English legal system, as well as its importance in contextualising understanding of the English legal system, there is a very strong argument for the retention of a stand-alone, compulsory EU law module post-Brexit.

The decline of Roman law in legal education in England and Wales

"The Roman period of English legal history"

While establishing a precise narrative is difficult, it appears certain that Roman law was first taught at Oxford in 1149 by Vacarius, a renowned Lombard scholar of Roman law.[4]

[4]Albert R Crittenden, "Roman Law in Modern Life and Education" (1919) 15 The Classical Journal 148, 149–50.

Whether Vacarius was the first to teach Roman law in England is, however, unclear; there are suggestions that the subject was taught at the Cathedral School at York as early as the seventh and eighth centuries.[5] Whatever the extent of Roman law scholarship in Anglo-Saxon England and in the first century after the Norman conquest,[6] it is evident that Vacarius' activities had an impact. In about 1152, King Stephen prohibited the study of Roman law, possibly because it lent support to the clergy's arguments against the Crown.[7] Ultimately, Stephen's attempts to suppress the teaching of Roman law were unsuccessful, and Oxford and Cambridge continued to give degrees in both civil law and canon law.[8] Indeed the study of the subject was so well established in England by the first half of the thirteenth century that Henry III, in 1234, issued an ordinance prohibiting the teaching of Roman law in the schools of London.[9] This ordinance, which followed a similar prohibition issued in 1219 by Pope Honorius III in the context of Paris schools, was motivated apparently by a desire to arrest a diminishing interest in theological studies, which had been linked to increased enthusiasm for the study of Roman law.[10]

Notwithstanding the pressures exerted by the Crown, the period from the arrival of Vacarius in England to the end of the reign of Edward I has been termed "the Roman period of English legal history".[11] During this period, the purpose of the study of Roman law in England has been described as "thoroughly practical",[12] and although contested, there is evidence that Roman law exerted significant influence on the development of English law.[13] The most obvious influence was in areas where clerics tended to dominate, since canon law, which was in many respects fairly synonymous with Roman law,[14] was utilised in these areas.[15] The Courts of Chancery, dominated in the early centuries by clerics, appear to have used the liberalising influence of Roman law to develop equity as a means of ameliorating harsh common law doctrines. Moreover, the ecclesiastical courts, which had jurisdiction over matters that would now be considered family law and the law of succession, applied canon law, so that the development of English law in these areas was heavily influenced by Roman law.[16] It has also been suggested that Roman law tended to exert greater influence in areas where there was commerce or interaction between citizens of different nations,

[5]Charles P Sherman, "The Romanization of English Law" (1913–1914) 23 Yale Law Journal 318, 319; Edward D Re, "The Roman Contribution to the Common Law" (1961) 29 Fordham Law Review 447, 460. This assertion would reject as fanciful the common narrative that Justinian's Codes were rediscovered at the Siege of Amalfi in 1135, which led to a revival of Roman law and, by extension, the eventual transmission of Roman law as an academic subject from Bologna to England via Vacarius. See Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (2nd edn, CUP 1899) 23; Re (above, this note) 454.

[6]For contrasting views, see Re (n 5) and W Senior, "Roman Law in England before Vacarius" (1930) 46 Law Quarterly Review 191.

[7]Ralph V Turner, "Roman Law in England before the Time of Bracton" (1975) 15(1) Journal of British Studies 1, 6.

[8]Pollock and Maitland (n 5) 123.

[9]Edward Jenks, *A Short History of English Law* (Little, Brown, and Company 1913) 20.

[10]Re (n 5) 467.

[11]Crittenden (n 4) 151.

[12]Munroe Smith, "Roman Law in the English Universities" (1916) 9 The Classical Weekly 218, 218.

[13]For opposing views, see Sherman (n 5); TFT Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century: A General Survey" (1939) 3 University of Toronto Law Journal 24.

[14]Percy H Winfield, *The Chief Sources of English Legal History* (Harvard University Press 1925) 57.

[15]Crittenden (n 4) 153.

[16]Re (n 5) 484–89.

merchant law and admiralty law being good examples of areas where this influence endured.[17] Smith has also argued that Roman law exerted an influence more generally in common law courts in the early centuries, where it was frequently used to assist in solving problems new to the English courts, though this usage went largely unacknowledged.[18]

Scholarship on the laws of England during this period demonstrated some influence of Roman law, although the extent of this influence is disputed. It seems clear that in the first textbook published on the laws of England in around 1190 by Ranulph de Glanvil, a student of Vacarius, Roman law was regarded as foreign law and only a few hints of Roman law influence were exhibited, most notably in the law of contract.[19] However, the second major work on English law *On the Laws and Customs of England*, published by Henry de Bracton in about 1158, which went on to be the leading text until the seventeenth century, placed a significant amount of emphasis on Roman law. Debate has raged as to whether Bracton was accurately describing the contemporary state of English law, in which large parts of Roman law seemed to be authoritative,[20] or whether he simply borrowed large tracts of the *Corpus Iuris* and presented them, misleadingly, as authoritative.[21]

The decline begins

It would appear, based on the silence of the literature surveyed, that very little change occurred in terms of the instruction of Roman law in England and Wales in the two centuries following the death of Edward I and the demise of the Roman period of English legal history: presumably, instruction continued at Cambridge and Oxford without significant impediment. However, close to four centuries after Stephen's unsuccessful attempt to prohibit its teaching, Roman law scholarship in England met its most serious and enduring challenge: Henry VIII's decision to separate the Church of England from papal authority, and the subsequent Reformation. The suppression of canon law led Roman law more generally to fall out of favour,[22] inevitable perhaps in the context of a rise in nationalistic and sectarian fervour, and a political need to assert supremacy over any purported foreign authority. By the time of James I, there was little or no attention paid to the study of Roman law.[23] The decline of Roman law was hastened undoubtedly by the publication between 1628 and 1644 of Sir Edward Coke's *Institutes of the Lawes of England*, the first treatise on the subject since Bracton. Coke and *Institutes* were creatures of their contemporary context. The author, who has been described, perhaps unkindly, as "that bigoted sixteenth century common law partisan",[24] minimised the influence of Roman law on English law.[25]

[17]Crittenden (n 4) 153–54; Re (n 5) 484–89.
[18]Smith (n 12) 219.
[19]Re (n 5) 470.
[20]Sir Paul Vinagradoff, *The Athenaeum* (19 July 1884) (see Sherman (n 5) 326).
[21]Sir Henry Sumner Maine, *Ancient Law* (John Murray 1908) 72.
[22]Charles P Sherman, "The Nineteenth Century Revival of Roman Law Study in England and America" (1911) 23 Green Bag 624, 624.
[23]Sherman, "The Nineteenth Century Revival of Roman Law Study in England and America" (n 22) 624.
[24]Sherman, "The Romanization of English Law" (n 5) 326.
[25]Crittenden (n 4) 152.

Crittenden attributes the ever-greater decline of the status of Roman law up to the middle of the eighteenth century directly to the influence of *Institutes*.[26]

Notwithstanding the difficult political and religious climate in England, Roman law education was surprisingly durable and remained, until the eighteenth century, the only legal science studied at Oxford.[27] In *Commentaries on the Laws of England*, published between 1765 and 1769, Sir William Blackstone, who believed that instruction in Roman civil law had continued in England due to the influence of "the popish clergy",[28] was keen to assert that Roman law, with some exceptions, was without binding force in England.[29] However, Blackstone, perhaps demonstrating a softer attitude than Coke, was prepared to use Roman law as a point of comparison with English law and did acknowledge it as the source of some English doctrines.[30] In terms of Roman law education, however, it would appear that Roman law merely survived in a formal sense at English universities; during the eighteenth and early nineteenth centuries, the study of Roman law had, according to Sherman, become almost extinct.[31]

Partial revival and the academic/practice divide

While Roman law remained relevant to a small number of legal practitioners in the early part of the nineteenth century, the teaching of Roman law had become divorced from its practical usage in English law, becoming instead "a branch of Roman archaeology":[32] instruction in Roman law relevant to practice was learned on the job from older practitioners, rather than at university.[33] In 1870, however, there was the beginning of a revival of study of Roman law in England, a revival attributed by Sherman to the work of a number of influential scholars.[34] In that climate, 1872 saw the establishment of Oxford's undergraduate BA in Jurisprudence, with Roman law as part of the programme of study.[35] The resurgence of Roman law appears to have been assisted also by the fact that the Roman Institutes of Justinian became a required subject for admission to the English Bar.[36] However, Smith, writing in 1916, asserted that this fact had not led to any improvement in the teaching of Roman law, which he maintained continued to focus on elements of the subject that were of no practical benefit to the prospective practising lawyer.[37]

Throughout the twentieth century, the professional bodies increased their level of supervision over the academic law curriculum, which had an inevitable influence on the teaching of Roman law. The Solicitors Act 1922 exempted law graduates from the Intermediate Examination and introduced a requirement of a year of academic study as a prerequisite to entry to the solicitors' profession.[38] An immediate result of this

[26]Crittenden (n 4) 152.
[27]"Roman Law" <www.law.ox.ac.uk/research-and-subject-groups/roman-law> accessed 6 January 2019.
[28]Crittenden (n 4) 152.
[29]Crittenden (n 4) 152.
[30]Crittenden (n 4) 152.
[31]Sherman, "The Nineteenth Century Revival of Roman Law Study in England and America" (n 22) 624.
[32]Smith (n 12) 219.
[33]Smith (n 12) 219.
[34]Sherman, "The Nineteenth Century Revival of Roman Law Study in England and America" (n 22) 624.
[35]"Roman Law" (n 27).
[36]Sherman, "The Nineteenth Century Revival of Roman Law Study in England and America" (n 22) 625.
[37]Smith (n 12) 219.
[38]Committee on Legal Education, *Report of the Committee on Legal Education* (Cmnd 4595, 1971) 12–13; Peter Smith, "The Legal Education–Legal Practice Relationship: A Critical Evaluation" (Master's thesis, Sheffield Hallam University 2015) 43 <http://shura.shu.ac.uk/10826/1/SmithPetemlr.pdf> accessed 1 January 2019.

was that the Law Society sought to retain "considerable control over the curriculum"[39] and subjects like Roman law were now under more scrutiny as regards their importance in an academic degree that was becoming more aligned with legal practice. Within four years of the changes introduced by the 1922 Act, Roman law had lost its compulsory status in most academic law curricula with the exceptions of Oxford, Cambridge, and Manchester.[40] It was still retained as an optional course in many institutions, but the study of Roman law at universities was increasingly considered "high among the unrealities" and "ornamental rather than indispensable".[41]

The continued perceived tension between the exigencies of professional practice and the academic nature of the law degree contributed to further limiting the place of Roman law in the law school curriculum from the 1930s through to the 1960s. The 1966 Wilson Survey revealed that even though Roman law was still required for the Bar Examination, and its study provided an exemption from Part I of the Bar and Solicitor Qualification Examinations, the standard expected of law graduates in Roman law (a pass mark) was significantly lower than that required in other subjects. This was a distinct sign of its waning importance in practical legal education.[42] Indeed Roman law was removed entirely from the Bar Examination shortly after the survey was completed[43] on the grounds that it constituted merely a memory test with no practical benefit.[44]

Law schools reacted to the above-described developments by altering their law degrees, gradually removing Roman law as a compulsory subject and, in many institutions, reducing the number of optional offerings.[45] In 1967, before its removal from the Bar Examinations, Roman law was a compulsory subject in the law degree of 10 out of the 18 law schools where it was provided. Academics surveyed agreed almost unanimously that Roman law should not be retained as a compulsory course, although a sizeable majority (110 of 168 academics surveyed) favoured the retention of Roman law as an optional subject.[46] Wilson concluded that although Roman law had once been "regarded as an essential component of any law degree … there [was] now an increasing tendency to offer it as an optional subject or to include it in a course on Comparative Law".[47] He also demonstrated clearly the tendency for there to be a correlation between compulsory subjects at law schools and the professional examinations. It was no coincidence that all six subjects required for Part I of the Bar and Solicitor Qualification Examinations were included in the list of compulsory subjects in all law schools, and that their inclusion was supported by academic staff.[48]

[39]Andrew Boon and Julian Webb, "Legal Education and Training in England and Wales: Back to the Future?" (2008) 58 Journal of Legal Education 79, 87–88.
[40]HF Jolowicz, "The Teaching of Roman Law" [1926] Journal of the Society of Public Teachers of Law 22, 22.
[41]HG Hanbury, "The Place of Roman Law in the Teaching of Law To-day" [1931] Journal of Society of Public Teachers of Law 14, 14.
[42]John Wilson, "A Survey of Legal Education in the United Kingdom" (1966) 9 Journal of the Society of Public Teachers of Law 1, 70.
[43]Philip Thomas and Geoff Mungham, "English Legal Education: A Commentary on the Ormrod Report" (1972) 7(1) Valparaiso Law Review 87, 121; Michele Slatter, "A Sucker for Punishment: Some Reflections on an Option" (1983) 17 Law Teacher 192, 194.
[44]Wilson (n 42) 74.
[45]Wilson (n 42).
[46]Wilson (n 42) 41 and Table 22.
[47]Wilson (n 42) 41.
[48]Wilson (n 42) 41.

The decision by the professional bodies in the 1970s to make both branches of the profession graduate-entry professions[49] effectively cemented the link between academic study and preparation for practice. The contemporary mood was captured in a comment in the *Law Teacher* in 1969: "the impending demise of Roman Law as a compulsory subject in the syllabus of the External Intermediate Examination in Laws will be mourned by some but will leave many dry-eyed".[50] The confirmed connection between the professions and the academic study of law had a deleterious effect on Roman law. The "Second Survey on Legal Education in the United Kingdom" in 1975 indicated that "there ha[d] been a dramatic decline in the importance attached to the teaching of Roman law since its removal some ten years [before] from the prescribed syllabus for Part I of the Bar Examinations".[51] Despite the increase in the number of law schools nationwide, the number of offerings went from 18 in 1967[52] to 12 in 1997.[53] Compulsory provision was naturally the greater loser in this decline; from a height of eight compulsory offerings in 1967,[54] the number declined to seven by 1975,[55] and to two in 1993.[56] A survey of legal education in 2004 noted a disappointing decline of a further 6% in the teaching of Roman law at law schools.[57]

A sea change in the twenty-first century

A sea change in thinking around academic legal education and its link to professional practice has emerged since the beginning of the twenty-first century. Concerns about the influence of the legal professions on law school curricula have dominated discourse on legal education.[58] The First Report of the Advisory Committee on Legal Education and Conduct in 1996 recommended a "return to basics in the pre-qualification education and training of lawyers"[59] given the "deficiencies in the current provision", which essentially boiled down to a failure to "keep pace with developments in law and society over the past half century".[60] Hepple noted that the report "stresses the adverse consequences of the artificially rigid distinction between the academic and professional stages of academic legal education",[61] and in particular there was a reference to the "relative lack of attention to an understanding of civil law systems" in

[49]This occurred for solicitors in 1971 and for barristers in 1979 (Boon and Webb (n 39) 87).
[50]"Comment" (1969) 3 Law Teacher 1, 1.
[51]JF Wilson and SB Marsh, "A Second Survey of Legal Education in the United Kingdom" (1975) 13 Journal of Society of Public Teachers of Law 239, 281, Table 28. See also for further evidence of this decline: John Wilson, "A Third Survey of University Legal Education in the United Kingdom" (1993) 13 Legal Studies 143, Table 22; Phil Harris and Martin Jones, "A Survey of Law Schools in the United Kingdom, 1996" (1997) 31 Law Teacher 38, 51.
[52]Wilson (n 42) Table 22.
[53]Phil Harris and Martin Jones, "A Survey of Law Schools in the United Kingdom, 1996" (1997) 31 Law Teacher 38, 51.
[54]Wilson (n 42) Table 22.
[55]Wilson and Marsh (n 51) Table 28.
[56]Wilson (n 42) Table 22.
[57]Phil Harris and Sarah Beinart, "A Survey of Law Schools in the United Kingdom, 2004" (2005) 39 Law Teacher 299, 314.
[58]The Lord Chancellor's Advisory Commission on Legal Education and Conduct (ACLEC), *First Report on Legal Education and Training* (ACLEC 1996) para C 1.12. See further Bob Hepple, "The Renewal of the Liberal Law Degree" (1996) 55 Cambridge Law Journal 470, 478; Lord Neuberger of Abbotsbury, "Lord Upjohn Lecture 2012: Reforming Legal Education" (2013) 47 Law Teacher 4, 12.
[59]ACLEC Report (n 58) para C 1.12.
[60]ACLEC Report (n 58) para C 1.12.
[61]Bob Hepple, "The Renewal of the Liberal Law Degree" (1996) 55 Cambridge Law Journal 470, 478.

the existing academic study of law.[62] Indeed Lord Neuberger in delivering the Lord Upjohn Lecture 2012[63] commented that there was a risk in "limiting the freedom of universities to develop their own academic interests outside the core subjects, such as in legal history, jurisprudence, or Roman law, to name but a few".[64] Shying away from subjects, such as Roman law, "just because they seem on the face of it, to have little relevance for the daily practice of law" is becoming an unfashionable argument.[65] A move to greater freedom from professional requirements has been advocated as a method of reducing the "limiting effect" of overly tight regulation of the law degree by the legal professions.[66] Indeed the decision by the Solicitors Regulation Authority (SRA) to remove the requirement of a qualifying law degree and replace it with the Solicitors Qualifying Examination in 2021 may have a significant effect on the content of law school curricula. The consequence may be to free law schools to some extent from the constraints of professional control, even if the Bar Examinations will still be at the forefront of the minds of law schools.

Despite these shifts in thinking, Roman law appears to be offered by only six institutions in England and Wales[67] and iterations differ greatly: it is compulsory in only two of these institutions[68] and is offered as an optional course in a further two.[69] Two further institutions ostensibly offer Roman law, but these courses are currently not running.[70]

Influences on the decline of Roman law in legal education

From the history of the teaching of Roman law above, a number of trends emerge. First, the status of Roman law scholarship and teaching appears to have changed in line with contemporary political priorities and views of England's/Britain's role in Europe and in the world. Concerns about sovereignty and perceived threats to national executive authority have led at least two English monarchs to take restrictive measures against Roman law. Diminutions in the influence of Roman law in education and in practice seem also to have been tied to rises in isolationist sentiments inspired by nationalistic or sectarian impulses. Conversely, Roman law has enjoyed its greatest influence at times when the outlook was more internationalist and in legal subject areas where there has been commerce or interaction with other nations.

Secondly, Roman law has at different points suffered from competition for a limited number of spaces on the curriculum: this is evidenced not only by papal and royal attempts in the thirteenth century to promote the study of theology by prohibiting teaching of Roman law, but by the pressures placed upon the subject by a growth in legal subject areas in the twentieth century.

[62]ACLEC Report (n 58) para C 1.13.
[63]Lord Neuberger of Abbotsbury, "Lord Upjohn Lecture 2012: Reforming Legal Education" (2013) 47 Law Teacher 4, 12.
[64]Lord Neuberger of Abbotsbury (n 63) 12.
[65]Richard Susskind, "Provocations and Perspectives: A Working Paper Submitted to the UK CLE Research Consortium (Legal Education and Training Review)" (2012) 28.
[66]Smith (n 38) 52.
[67]This is based on an online search by the authors of current law school offerings in the UK. However, there may well be other offerings available which could not be readily found.
[68]Oxford and Cambridge.
[69]UCL and Bangor University.
[70]University of Kent (European Legal Systems); LSE (European Legal History).

Thirdly, it would appear that the teaching of Roman law tended to lose its significance where it was treated as a historical subject and not one of practical legal utility.

The potential relevance of these trends should be obvious in the context of the status of EU law teaching after Brexit. Though admittedly a contentious assertion, it might be argued that the UK, and particularly England, is currently in the throes of an identity crisis, with the result of the 2016 referendum representing a shift to a more isolationist and nationalistic outlook. Concerns about a corrosive effect of European law on national and parliamentary sovereignty may also have played a role in the referendum result. Stripped of the protection of the European Communities Act 1972, the status of EU law may not be that different from that of Roman law in eleventh- and twelfth-century England. EU law will be the original source of, or inspiration behind, many laws that remain extant. UK courts may be required, or expected, to follow developments in Luxembourg in interpreting these rules on an ongoing basis. EU law doctrines may even influence the development of subjects considered as purely common law areas. This changed status in the UK legal order could, however, render EU law vulnerable to the same changing strains that Roman law has had to endure: not only the ebbs and flows of national self-identity and politics, but also the battle to remain practically relevant in an environment where space in the curriculum is limited.

Why retain EU law? Arguments based on the Roman law experience

Perhaps unsurprisingly, literature advocating the study of Roman law tends to emanate from times when the subject's status was facing imminent threat. This is most evident in the 1950s and 1960s preceding the reforms that led to the removal of Roman law as a prerequisite for entry to the English Bar. It may be foolhardy to look back to the arguments made in that literature to assess its relevance in the context of EU law, given that these arguments were of limited success. Nevertheless, they may impart wisdom on the question of what should happen to EU law after Brexit, and may find a new and more persuasive currency in different times. Upon reading the literature, it becomes evident that many of the arguments advanced for the relevance of Roman law in the legal curriculum overlap. In this article, the aforementioned arguments are divided into the following two categories: (1) pragmatic arguments; (2) liberal education arguments. The pragmatic arguments presented here have more immediate relevance to the practice of law (regardless of the branch). The liberal education arguments focus on the central role that EU law can play in contextualising the English legal system by providing points of comparison and contrast. This categorisation reflects the views of the authors that a modern legal education has a twofold, interconnected legal purpose: first, ensuring that students are educated in substantive law and legal methods to equip them adequately for a career in law, whatever the branch (practice, academic or other); and second, educating the student more roundly as regards the contemporary context within which the law they study is created, applied, and interpreted.[71]

[71]Hepple (n 61) 471.

Pragmatic arguments

The pragmatic arguments often presented in favour of Roman law, and which could in turn be utilised in the context of EU law, have a dual focus: (a) that law students would benefit from knowledge of substantive Roman law; and (b) that law students would benefit from understanding the institutions, systems, and processes from which these rules emanated, and by which the rules were interpreted and applied.

While the extent to which substantive Roman law has influenced English law is a matter of controversy, the argument has always been that the common law was indebted to Roman law to such an extent that the exclusion of the latter from study was inexplicable.[72] Foster pointed to the usual areas of law where is it alleged that English law largely adopted Roman law principles and procedures, and argued that understanding of these areas would be incomplete without knowledge of the system from which they sprang.[73] A natural counter-argument is that law students today do not require knowledge of Roman law to obtain a complete legal education; rather, it could be argued, a focus on the principles of common law is sufficient. This counter-argument relies on two premises: first, that common law has grown so independent from Roman law that a need for knowledge of Roman law has decreased commensurately;[74] and, secondly, that one can, evidently, be a successful lawyer in the absence of Roman law education. There is a partial retort to this counter-argument, however. While Roman law may only rarely be directly relevant in the modern study of law,[75] knowledge of the origins of common law principles offers students a distinct advantage in terms of understanding legal concepts and providing more accurate solutions to current legal problems.[76]

Hanbury, writing in 1931, while agreeing with the sentiment that "a good understanding of English Law may be gained without a knowledge of Roman Law", was of the opinion that "a much better understanding may be gained with it".[77] Indeed he detailed many areas of English law in which Roman law would be an invaluable aid to study,[78] by providing more accurate solutions to existing legal problems, by providing a "breath of understanding" even where the influence of Roman law is not particularly marked, and by clarifying "the mind of the beginner" as to the English law.[79] He concluded by arguing that "there are parts of English Law which for various reasons … are unnecessarily bewildering to a beginner, and for these parts the study of the corresponding portions of Roman Law gives a tough, yet tangible preparation".[80] So while it may be true that "[o]ne may be a clever and a successful practitioner of law without having studied Roman law",[81] one would certainly be a more thoughtful and successful practitioner of law if one really understood and appreciated the origin and background rationale for the development of English legal principles.

[72]WF Foster, "The Study of Roman Law" (1898) 7 Yale Law Journal 207, 212.
[73]Foster (n 72) 208.
[74]BC Stoop, "Hereditas Damnosa? Some Remarks on the Relevance of Roman Law" (1991) 54 Journal of Contemporary Roman Dutch Law 175, 180. See also Andrew Domanski, "Teaching Roman Law on the Eve of the Millennium: A New Beginning" (1996) 59 Journal of Contemporary Roman Dutch Law 539, 541.
[75]Domanski (n 74) 542.
[76]Hanbury (n 41) 21.
[77]Hanbury (n 41) 16.
[78]Hanbury (n 41) 19.
[79]Hanbury (n 41) 21.
[80]Hanbury (n 41) 21.
[81]PR Coleman-Norton, "Why Study Roman Law" (1950) 2 Journal of Legal Education 473, 473.

If one is to argue that the teaching of Roman law is necessary or desirable due to the substantive influence it has had on English law, then a logical consequence of this argument is that the student, in order to understand fully the substance, will require an appreciation of the institutions from which these rules emanated, as well as those that applied and interpreted these rules. Perhaps even more importantly, the student will require knowledge of *how* the latter institutions applied and interpreted the rules, in particular, modes of legal interpretation and reasoning. Students may also require familiarity with overarching principles and values that informed interpretation of specific substantive legal rules in Roman law. There may, as such, be a spillover effect: the necessity of acquiring an understanding of substantive rules begets an inextricable need for a wider understanding of the originating legal system, its institutions, its methods, and the wider principles that influence the interpretation and application of those substantive rules.

Foster, in making a wider argument that university legal studies should focus less on the teaching of substantive rules and more on the principles that underpin them, pointed to the continued relevance of Roman law principles in underpinning common law solutions.[82] Perhaps eager to present an alternative argument, one not dependent on maintaining the controversial assertion as to the substantive influence of Roman law on the English legal system, advocates of the relevance of Roman law have pointed to "the influence of the Roman law on the English way of looking at the law and on English law writing".[83] Indeed, it has been argued that this influence of Roman law thinking was far more significant than the reception of Roman substantive rules in the English legal system.[84] Smith also cited Roman law as having provided an exemplary method of solving legal problems, especially in private law.[85]

The above substantive and methodological rationales for the retention of Roman law study would appear to apply *a fortiori* to EU law. More significantly, in the context of EU law, the arguments for retention are stronger than those advanced in favour of Roman law as EU law has a greater and more immediate impact on a wider range of UK laws, is more deeply imbedded in the legal system, and will retain currency and importance even in the event of Brexit. This supports the view that not only should EU law be retained from a pragmatic perspective, but also that it is imperative that it should be retained as a compulsory stand-alone module.

Substantively, although it became a matter of some controversy during the referendum campaign as to how many UK laws were derived from EU laws, with estimates ranging from 13% to over 60%,[86] it is clear that even at the lowest figure EU law has had a significant impact on UK substantive law for more than four decades. Indeed, as Eeckhout has argued, the very mechanisms for the implementation and application of EU law, the directive being a prime example, have blurred the boundaries to such an

[82]Foster (n 72) 214 citing, in part, EJ Phelps, "Methods of Legal Education" (1892) 1 Yale Law Journal 139, 140.
[83]Munroe Smith, "Elements of Law" in Arthur T Vanderbilt (ed), *Studying Law* (Washington Square Publishing Co 1955) 341.
[84]Smith, "Elements of Law" (n 83) 341.
[85]Smith, "Roman Law in the English Universities" (n 12) 218. See further Albert A Ehrenzweig, "A Common Language of World Jurisprudence: Teaching Roman Law in Twenty Hours" (1945) 12 University of Chicago Law Review 285.
[86]Clive Coleman, "Reality Check: How Much UK Law Comes from the EU?" (*BBC News*, 8 June 2016) <www.bbc.com/news/uk-politics-eu-referendum-36473105> accessed 6 January 2019.

extent that it is difficult to see the EU legal system and English legal system as two autonomous, self-contained legal systems.[87] There are today very few subject areas taught in law schools which do not involve some understanding of principles of EU law. Excluding a study of specialist EU law courses, a typical law student will encounter principles of EU institutional and substantive law in both compulsory and optional subjects such as public law (constitutional and administrative law), obligations (contract and tort), insurance law, public international law, medical law, commercial law, legal history, human rights, environmental law, company law, employment law, intellectual property law, criminal law, criminal evidence, immigration law, and sports law, even where the effects of EU law may appear to be less obvious, for example in the contexts of family law[88] and property law.[89] The influence of EU law and European law more generally, if we consider the European Convention on Human Rights (ECHR), has gone beyond mere incorporation of substantive rules. What has been equally important has been the importation of wider European law principles and concepts for use as a lens through which substantive factual or legal problems may be viewed and solved.[90] The most obvious such concept is the administrative law doctrine of proportionality.[91] Although notionally the concept is confined in English law to cases where EU or ECHR law applies, English courts have acted "to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality".[92] The incorporation of terms such as proportionality, legitimate expectation,[93] and good faith,[94] indicate that the "development of English common law has … been accelerated and shaped by the very existence of a body of Community law".[95] As such, it may be difficult to uncouple English law doctrines from the European concepts that inspired or informed their development.

Substantive EU law will also continue to have direct relevance post-Brexit, irrespective of whether or not a withdrawal agreement is ratified.[96] Existing EU laws at the date of withdrawal will, pursuant to sections 2 and 3 of the European Union (Withdrawal) Act 2018, remain in force until such time as repealed. Under the Draft Withdrawal Agreement,[97] the Court of Justice of the European Union (CJEU) will retain jurisdiction over pending cases and preliminary references made before the end of the

[87]Piet Eeckhout, "The Growing Influence of European Union Law" (2011) 33 Fordham International Law Journal 1490, 1519.
[88]Claire McGlynn, "The Europeanisation of Family Law" (2001) 13 Child and Family Law Quarterly 35.
[89]Barbara Bogusz, "Modernising English Property Law: The Influence of Internal Market Principles" (2006) 17 European Business Law Review 1395.
[90]Edward (n 3) 145.
[91]Yvonne Cripps, "Some Effects of European Law on English Administrative Law" (1994) 2 Indiana Journal of Global Legal Studies 213, 217–22.
[92]*Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 [105] (Lord Sumption) (Lord Neuberger, Lady Hale and Lord Wilson agreeing).
[93]Cripps (n 91) 222–30.
[94]Cristina Ferreira, "The Europeanization of Law" in Jorge Oliviera and Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer-Verlag 2009) 171–91.
[95]Cripps (n 91) 231.
[96]TaylorWessing, "Brexit – The Potential Impact on the UK's Legal System" (June 2016) <www.taylorwessing.com/download/article-brexit-uk-legal-system.html> accessed 6 January 2019.
[97]European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018, TF50 (2018) 55.

transition period,[98] and infringement proceedings which arise during that period.[99] Judgments and orders of the CJEU handed down before and delivered after the end of the transition period will have binding force in their entirety on and in the UK.[100] Perhaps most significantly of all, the placing of the entire UK in the EU customs union, until such time as both the EU and UK agree that such an arrangement is no longer necessary, would mean that significant portions of the EU rulebook would remain extant in the UK, possibly indefinitely. Even in the event of a "no-deal Brexit", EU law may be expected to retain significant influence in the UK; trade with EU Member States would be severely restricted if UK laws did not comply with EU laws and relevant CJEU decisions.

If one accepts that EU law has had a significant influence on the substance of English law, and that it will continue to do so for some time after withdrawal, it follows that instruction on substantive EU law cannot be divorced from that of the institutions that create, execute and interpret it. More particularly, in order to apprehend how EU rules are understood and interpreted, students will need to acquire knowledge of the historical context in which the EU was created, as well as its objectives and values. The EU legal system differs from the English legal system in at least one crucial aspect: even over 60 years after the Treaty of Rome, the EU legal system is still maturing and is one which remains fundamentally purpose-driven and destination-oriented, with European integration being the overarching aim; the English legal system in contrast, beyond the maintenance of more (politically) neutral principles, such as the rule of law, has no such singular vision to pursue. This distinction manifests itself very clearly in the interpretative methods and legal reasoning utilised by the judiciaries of the two systems. Whatever one's thoughts on the CJEU's methods, it should be obvious that the lawyer who approaches substantive EU law problems solely through a parochial common lawyer's perspective is liable to prescribe inaccurate solutions.

The authors take the view, based the significance of the influence of substantive law on the English legal system and the distinct likelihood that economic realities will ensure that much of the EU's rules are going to be of continuing relevance after Brexit, that instruction in EU substantive law should remain compulsory. Moreover, the authors maintain that EU law should be retained as a stand-alone module.

Liberal education arguments

While of less obvious significance to the prospective lawyer, the study of Roman law traditionally ensured the law student received a more holistic legal education. Roman law achieved this in two ways: (a) by contextualising the English legal system; and (b) by instilling in the student a knowledge of the ancient world, its problems and solutions, which assisted students in understanding more critically their own contemporary world.[101]

As regards contextualisation, a more complete understanding of a legal system requires one to see a bigger picture: to be able to view the system as a whole, assuming of course that is possible given interconnectedness with other systems; to recognise not only what the legal system is in terms of its identifying characteristics,

[98]Draft Agreement (n 97) art 86.
[99]Draft Agreement (n 97) art 87.
[100]Draft Agreement (n 97) art 89.
[101]Domanski (n 74).

but also what it is not; to understand how the legal system relates to other legal systems; to understand how the legal system has evolved and is evolving, and what alternative directions it might have taken. For students to put the legal system within which they are being educated in such context, an understanding of comparative systems is clearly important. Traditionally, within the otherwise insular nature of the study of English law, Roman law performed these contextualising tasks.[102] For a start, Roman law, at least in its later epoch as a codified civil law system, which became the basis of the European continental systems, provided a ready contrast with the common law. Concurrently however, the Roman constitution, which was largely unwritten and evolved over time, offered an obvious parallel with the UK's constitution and its development. Roman law also served to grant students a "passport to the appreciation of Continental legal systems".[103]

Additionally having knowledge of Roman law elevated the lawyer, in the words of Pleydell, from a mere "mechanic" or "working mason" to an "architect".[104] Duff concluded Roman law ought to be studied because it "throws light on present-day affairs" and because its "intrinsic excellence … makes it worthy of contemplation".[105] In addition, the study of Roman law had a unifying effect: in a world where peace is fragile, Duff concluded that statesmen "who understand each other are at least a little less likely to quarrel than those who do not; and there is perhaps a little more hope of understanding if the statesmen or their advisers have received a basic training in Roman law".[106] The 1996 ACLEC Report recognised that there was a "relative lack of attention to an understanding of civil law systems" in the existing academic study of law.[107] This required more than a study of EU law, but "should lead to a wider study of civil law systems, not least as a means of gaining a great understanding of the distinctive characteristics of our own system" and in order to have an ability to "respond to the profound change which EU law is making to our legal system".[108] The tenor of the report was that legal transactions are becoming more international and that knowledge of external legal systems "based on Roman Law" was essential if the lawyers of tomorrow are to compete successfully in this European and more international environment.[109] The report favoured "integrated education and training, in which liberal values and transferable professional skills are learnt throughout the educational process".[110]

These arguments can also inform the debate about the place of EU law in the legal curriculum after Brexit. There is a distinct danger that law programmes in England and Wales could become insular.[111] This would be problematic, not only because of the liberal-educational value of broader legal-cultural horizons, but because isolationism might well lead to a diminished understanding of the nature of the English legal

[102]FF Stone, "The Role of Roman Law in Teaching Law Comparatively" [1956] Butterworths South African Law Review 119, 126; Cherry James and John Koo, "The EU Law 'Core' Module: Surviving the Perfect Storm of Brexit and the SQE" (2018) 52 Law Teacher 68, 79–80.
[103]Paul du Plessis, *Borkowski's Textbook on Roman Law* (5th edn, OUP 2015) ix.
[104]PW Duff, "Roman Law Today" (1947–1948) 22 Tulane Law Review 2, 11.
[105]Duff (n 104) 11.
[106]Duff (n 104) 12.
[107]ACLEC Report (n 58) C 1.13.
[108]ACLEC Report (n 58) C 1.13.
[109]ACLEC Report (n 58) C 1.13.
[110]Hepple (n 61) 471.
[111]Jessica Guth, "Brexit and Learning, Teaching and Research Committees: The Changing Nature of the UK Law School" in this edition.

system. EU law presents to the law student a whole legal system, and one that can be compared and contrasted with the English legal system. The EU's is a multi-level legal system, involving as it does a multiplicity of actors, from supranational political and judicial institutions, to national organs, to the citizens of the Member States. EU law also provides something of a passport to the continental legal systems. Moreover, it provides students with a case study in the genesis and development of a modern, supranational legal system, one with a de facto codified constitution and relatively obvious overarching normative priorities, all of which can be compared with, or contrasted to, the English legal system.

It is argued that in order for the liberal education benefits afforded by the study of EU law to be properly appreciated, it should be offered as a compulsory stand-alone module. The stand-alone argument is perhaps easier to isolate: EU law is an existing and evolving legal system which provides ample scope for students to develop understanding and comparative knowledge of an entire legal system and other continental legal systems and to gain a wider appreciation of their own legal system and its place in the international community. The argument that such a module should be compulsory follows from this: it is obvious that the EU legislature and the CJEU have had a profound effect on politics and public discourse in the UK. For future law students, particularly those in the years immediately following withdrawal, not to be instructed in the law surrounding arguably the greatest economic, legal and political issue in modern Britain would seem a dereliction of duty by law schools, who should ensure their students are equipped to engage with international affairs, economics, social justice, and politics in an increasingly globalised world.

Conclusion

For those who fear a decline in the status of EU law after Brexit, the Roman law experience should offer both cause for concern, but also for some, admittedly limited, optimism. From once being the only legal science that was taught at universities in England and Wales, it appears that Roman law is now taught, de facto, in four institutions, and compulsorily in only two. The factors suggested in this article as influencing the long-term decline of the subject have been threefold: (1) assertions of national sovereignty, often accompanied by isolationist sentiment; (2) competition for limited space on the law school curriculum; and (3) a perceived lack of practical utility. Each of these phenomena could also pose a risk to EU law as a subject after Brexit. Notwithstanding its decline, Roman law has, against all the odds, survived, even if only just. This survival can be attributed to the pragmatic and liberal-educational benefits afforded to students by the study of Roman law. This article has argued that these pragmatic and liberal-educational benefits apply *a fortiori* in the context of EU law.

This article concludes that EU law should be retained after Brexit as a stand-alone compulsory module in the legal curriculum. The authors are of the view that the impact of EU law on the English legal system has been such that a deep understanding of that system requires knowledge and understanding of substantive EU law. Moreover, it is argued that much of the substantive EU law will, even in the event of a "no-deal Brexit", for reasons of economic reality, continue to exert significant influence in England and Wales post-Brexit. In addition, it is contended that an understanding of

the EU's substantive law requires an appreciation of the institutional framework of the EU, as well as its value, priorities and methods. Even leaving aside the foregoing arguments, the authors also contend that a stand-alone compulsory EU law module would, among other things, play an important role in helping students to better contextualise the English legal system, and would do much to arrest any threat of the law degree become insular and disconnected from the wider legal world.

While suggesting the precise content of a post-Brexit stand-alone compulsory module is beyond the scope of this article, based on the pragmatic and liberal education arguments presented here, the authors are convinced that EU law would, for the reasons stated above, need to continue to cover both the institutional structures and substantive elements of EU law. The authors acknowledge, however, that in the various possible post-Brexit scenarios, certain alterations would have to be instituted to reflect peculiarities in the EU–UK relationship.[112]

Disclosure statement

No potential conflict of interest was reported by the authors.

[112]Phil Sypris, "The EU Law Module: A Suggestion for an International Public Law Unit"; Francesco Maiani, Alla Pozdnakova and Sarah Progin-Theuerkauf, "Extra Unionem Nulla Salus? Teaching and Researching EU Law in Norway and Switzerland"; Jeff Kenner, "EU–UK Legal Relations: A New Core Module?" in this edition.