EUROPEAN LAW IN THE UNITED KINGDOM[1]

Jonathan Faull[2]

Sir Alan Dashwood, the distinguished President of the UKAEL, guided me in my first steps as a European lawyer and his presence here this evening gives me particular pleasure. When he invited me to give this lecture, I wrote to him in the following terms:

I am honoured by UKAEL's invitation which I accept with pleasure. I will give some thought to a theme and a title. It would be extraordinary, indeed perverse, not to talk about Brexit, the British contribution to the development of EU law and the challenges of withdrawal.

I may not be alone in this room in preferring that it were otherwise, that we could talk about competition, justice and home affairs, financial regulation or some other subject to which I devoted years of my professional life, but it would be

[1] This is the text of the annual United Kingdom Association for European Law lecture, given in London on 14 December 2017.

[2] Sir Jonathan Faull KCMG, Visiting Professor Vrije Universiteit Brussel, King's College London, College of Europe; Chair, European Public Affairs, Brunswick Group; European Commission 1978-2016. I speak and write in a personal capacity.

indeed be very odd not to reflect on the circumstances in which the United Kingdom and the European Union find themselves.

This is not, however, an analysis of the "Cameron renegotiation". First drafts of that history are beginning to appear[3]. I have much to say on what happened and why, but will wait until some of the dust has settled before adding my personal perspective.

Since we joined the European Communities, as they then were, in 1973, the UK has carved out for itself a series of special rules and exceptions which culminated in the February 2016 agreement in the European Council, to give it its proper name, the Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union[4].

The Heads recalled:

that the Treaties, together with references to the process of European integration and to the process of creating an ever closer union among the peoples of Europe, contain also specific provisions whereby some Member States are entitled not to take part in or are exempted from the application of certain provisions or chapters of the Treaties and Union law as concerns matters such as the adoption of the euro, decisions having defence implications, the exercise of border controls on persons, as well as measures in the area of freedom, security and justice.[5]

---

[3] See most recently Sir Ivan Rogers's lecture (25 November 2017), available at https://www.prospectmagazine.co.uk/politics/the-inside-story-of-how-david-cameron-drove-britain-to-brexit. The whole series of Hertford College lectures on Prime Ministers and Europe is fascinating.

[4] A new settlement for the United Kingdom within the European Union", OJ C 69 I, 23 February 2016.

[5] The text goes on:

Treaty provisions also allow for the non-participation of one or more Member States in actions intended to further the objectives of the Union, notably through the establishment of enhanced cooperation. Therefore, such processes make possible different paths of integration for different Member States, allowing those that want to deepen integration to move ahead, whilst respecting the rights of those which do not want to take such a course,

Recalling in particular that the United Kingdom is entitled under the Treaties:
— not to adopt the euro and therefore to keep the British pound sterling as its currency (Protocol No 15),
— not to participate in the Schengen acquis (Protocol No 19),

Having recalled this state of affairs, the Heads went on to clarify at some length the much misunderstood notion of "ever closer union":

It is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom.

The references in the Treaties and their preambles to the process of creating an ever closer union among the peoples of Europe do not offer a legal basis for extending the scope of any provision of the Treaties or of EU secondary legislation. They should not be used either to support an extensive interpretation of the competences of the Union or of the powers of its institutions as set out in the Treaties.

These references do not alter the limits of Union competence governed by the principle of conferral, or the use of Union competence governed by the principles of subsidiarity and proportionality. They do not require that further competences be conferred upon the European Union or that the European Union must exercise its existing competences, or that competences conferred on the Union could not

---

— to exercise border controls on persons, and therefore not to participate in the Schengen area as regards internal and external borders (Protocol No 20),

— to choose whether or not to participate in measures in the area of freedom, security and justice (Protocol No 21),

— to cease to apply as from 1 December 2014 a large majority of Union acts and provisions in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Lisbon Treaty while choosing to continue to participate in 35 of them (Article 10(4) and (5) of Protocol No 36),

Recalling also that the Charter of Fundamental Rights of the European Union has not extended the ability of the Court of Justice of the European Union or any court or tribunal of the United Kingdom to rule on the consistency of the laws and practices of the United Kingdom with the fundamental rights that it reaffirms (Protocol No 30) (…).

be reduced and thereby returned to the Member States.
The competences conferred by the Member States on the Union can be modified, whether to increase or reduce them, only through a revision of the Treaties with the agreement of all Member States. The Treaties already contain specific provisions whereby some Member States are entitled not to take part in or are exempted from the application of certain provisions of Union law. The references to an ever closer union among the peoples are therefore compatible with different paths of integration being available for different Member States and do not compel all Member States to aim for a common destination.

The Treaties allow an evolution towards a deeper degree of integration among the Member States that share such a vision of their common future, without this applying to other Member States.

The Heads' decision, an international law agreement deposited at the United Nations by the United Kingdom[6], provided answers to the questions and concerns raised by the British Government[7]. It does not seem to have played an important role in the referendum campaign and is now, on its own terms, lifeless as a result of its self-destruct provision[8]. Nevertheless, it contains useful statements of what the European Council and all Member States agreed was legally possible and politically appropriate in February 2016.

It would be wrong to focus solely on British exceptionalism. Other Member States, I think of Denmark in particular, have an impressive collection of special rules and arrangements. It would certainly be foolish not to see that many of the objections and concerns raised in the UK's protracted debates about the European Union are shared in various proportions in other parts of Europe.

---

[6] https://treaties.un.org/doc/Treaties/2016/02/20160224%2005-25%20PM/Other%20Documents/COR-Reg-53474-Sr-66666.pdf;

Date of registration 24 February 2016. As far as I am aware, it is still there.

[7] Letter from British Prime Minister Cameron to European Council President Tusk, 10 November 2015.

[8] "It is understood that, should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements referred to in paragraph 2 above will cease to exist." Paragraph 4, C 69 I/2.

Nevertheless, it is commonly accepted that the UK was the champion of having and eating cake long before that cliché attained its current prominence in European political discourse. Some thought that the cake was being enjoyed, others worried about chronic indigestion. No more clichés, I promise.

My point is that the status achieved by the UK as a result of many crises and negotiations proved insufficient when it came to the referendum. The simple question "remain" or "leave" was answered and we now find ourselves in a complex and unprecedented withdrawal process.

British lawyers and academics played important roles during our membership and I will say more about that later. The EU is a legal construct based on treaties and depends on compliance with the rule of law to function properly.

EU law is a wonder of the modern world, a legal system encompassing 28 sovereign democratic states, many of which have recent memory of war and totalitarianism. Enforcement takes place through national law procedures and facilities. There are no EU prisons in Brussels or anywhere else, no EU police officers patrolling the streets. And it works!

Before Article 50 was introduced by the Lisbon Treaty, lawyers enjoyed debating whether withdrawal was possible at all and, if so, how it could be achieved, without expecting ever to confront the eventuality in the real world of politics, legislation and litigation. Scholars weighed in[9]and scarcely relevant precedents were pored over, ranging from Algeria, via Greenland, to Saint Barthélemy. Successive enlargements of the Union and the German unification process were examined for reverse engineering clues[10].

Explaining Britain to Continental friends

[9] See JHH Weiler,, Alternatives to Withdrawal from an International Organization: The Case of The European Economic Community, (1985) 20 (2-3) Israel Law Review, 282-298.

[10] For a recent discussion of the enlargement in reverse idea, see Alex Barker, "Brexit: EU and UK battle over 'an accession in reverse'", Financial Times, 4 December 2017.

Meanwhile, friends across the Channel who thought they knew us well realised that there was more to the UK than met the admiring eye.

As the referendum campaign progressed to its climax and in the months which have elapsed since, I think it is fair to say that we have surprised our European neighbours and partners, except perhaps for the Irish who had always known us better than the others.

We had just about persuaded people that no, the country was not called England[11]. England was just part of a, nay the United Kingdom and one (with Wales) of the country's legal systems.

We also told our friends not to fret, it's true there's no Constitution of the United Kingdom you can find in a library and read, but in fact we do have one, in fact a very fine one, honed down the ages by legislators, judges, professors and even the occasional letter to the Editor of The Times. So we sent them to the library to read Dicey, the Cabinet Manual, Erskine May and lots of legislation which may or may not be entrenched, in addition to judiciously chosen case law and works by learned academics. There, we told them, they will find answers to all the questions they are used to calling constitutional at home.

Above all we boastfully spread the view that the UK was an island (all right, an island and part of another) peopled and governed by rational pragmatists, wedded to stability and not given to ideological passion. How many times had British politicians, officials, even EU officials of British nationality, argued patiently that before proposing a solution one should make sure that there was a problem in the first place. The best Parliament, civil service, diplomats, uninterrupted traditions - we were not alone in espousing hubris of this sort, but we were probably the best at persuading others that there might be some truth in it.

Suddenly we had to explain devolution, Parliaments and administrations in Scotland, Wales and Northern Ireland, but mysteriously not in England, Salisbury and Sewel Conventions, Barnett formulae, concordats (ah, that sounds familiar

[11] As Orwell pointed out in his essay England Your England (1941): "we call our islands by no less than six different names, England, Britain, Great Britain, the British Isles, the United Kingdom and, in very exalted moments, Albion."

some said), the Good Friday Agreement, even Henry VIII. We expected Gibraltar to be an issue, but I for one shamefully neglected Anguilla[12].

Then we had an early election, just as our friends had understood that we now had fixed term parliaments like most of their countries and had heard the Prime Minister say she had no intention of having an election before the due date in 2020. The result was a Parliament in which no party holds an outright majority. Perhaps, they said, trying no doubt to be helpful, at this momentous time in your country's history, you will have a grand coalition. No, we replied, we don't do that in peacetime and passed around copies of the Democratic Unionist Party's election manifesto.

Of all the potentially controversial words in Article 50, I doubt that scholars expected the reference to "constitutional requirements"[13] to attract particular attention. Nevertheless, the question whether the Government needed parliamentary approval to trigger the Article 50 process went all the way to the Supreme Court for decision and generated vicious outbursts against the highest judges in the land, including the expression "enemies of the people" which sent shudders around Europe. The British Constitution had become an issue in the debate.

One might think that our affairs are easier to follow than those of countries with less widely understood languages. After all, many Europeans read English these days. However, in Brussels at least, my friends and colleagues, usually remarkably proficient in English, tend to read the FT and the Economist and think they speak for the nation. I remember early on in my career my German director general coming into my office with the latest number of The Economist to ask me what a word meant. It was "wherewithal", a useful word which he then began

---

[12] http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/brexit-overseas-territories/written/69295.html?utm_source=POLITICO.EU&utm_campaign=587bcb4f12-EMAIL_CAMPAIGN_2017_07_28&utm_medium=email&utm_term=0_10959edeb5-587bcb4f12-189714813

[13] "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements."

to use regularly and correctly. “Unprepossessing” was another one he stumbled over, but he rightly used that word more sparingly once he had understood it. My point is that many Europeans who visit only London and follow British current affairs through the BBC, the FT and The Economist don’t really know us at all. We make the same mistake with them if we can follow their languages at all. And of course we all make the same mistake with the USA.

Is the UK exceptional in its attitudes to the EU?

It is perhaps for others to say how exceptional we are, but it is true that the EU has a significance in the politics, identity and self-esteem of other countries which it does not have in Britain. It is often said that the British interest in European integration, outside a small circle of true believers, is and always was transactional, commercial, perhaps geopolitical, but never emotional or passionate.

When one looks at other Member States, one sees that:

- Former dictatorships of right and left see the EU as a democratic bulwark and a certificate of modernity.
- Former Soviet or Warsaw Pact countries see the EU as part of their new international identity and protection against Russia.
- Former colonies see the EU as a strong symbol of independence and international identity.
- Former occupying or occupied countries see the EU as a peace and reconciliation project.
- Countries tied to the German economy for a large part of their trade and prosperity want to be inside the meeting rooms where economic decisions are taken with Germany.
- Countries which do not want the continent of Europe to be dominated by a single country see the EU as the best way to achieve that (they include Germany and used to include the UK).
- Countries sharing the euro as their currency or aspiring to do so will want to keep it and participate in the making of monetary policy in the ECB. The thought of abandoning the euro, re-establishing a revalued or devalued national currency and re-denominating everything is a major incentive to

cleave to the status quo. We have seen that most recently in Marine Le Pen's unsuccessful presidential campaign in France.

The UK fits into none of these categories. All the other 27 fit into one or more of them.

So there is some British exceptionalism, but it is also true that there are other Member States which agree with many British positions and have been happy to allow the UK to lead (and take flak) on them. They will miss us and the EU will change as the pack is reshuffled.

The British contribution

I am too young (it's been a while since I have said that) to remember much about the pre-1973 legal debates in Britain, so I am reluctant to name names for fear of ignoring important protagonists. There were many people involved in the European debate and learned in what we then called EEC law. I will dive in and mention one or two people whose commitment and enthusiasm I was privileged to see close up. In the 1970s, Alan Dashwood was already a fine teacher, co-author of a leading textbook and editor of the then brand new European Law Review. He introduced me to Neville March Hunnings, a distinguished legal scholar and editor who gave me my first job. I remember his academic exchanges with Michel Waelbroeck about the direct effect of EEC-EFTA agreements[14], a topic we may have to revisit one day.

Let us not forget the extraordinary characteristics and achievements of EU law. It has brought together independent countries, initially six, now 28, in a system of laws. Thanks to direct effect and the preliminary rulings mechanism, every court in every Member State is a court of EU law, with the the Court of Justice the supreme arbiter of the interpretation and validity of EU rules. One does not have to agree with every judgment or ignore the occasional frictions between

[14] March Hunnings, Enforceability of the EEC -EFTA Free Trade Agreements, (1977) 2 EL Rev. 173; Waelbroeck, Enforceability of the EEC -EFTA Free Trade Agreements: a Reply, (1978) 3 EL Rev 27; March Hunnings, Enforceability of the EEC -EFTA Free Trade Agreements: a Rejoinder, (1978) 3 EL Rev. 287. Editor Alan Dashwood must then have blown his whistle….

supreme national and EU courts to see the splendour of the system created in the last 60 years. British lawyers, scholars, publishers, civil servants, solicitors, barristers and advocates, *référendaires*, advocates general and judges have played their part to the full in this creation. The United Kingdom is itself a country with a single market and different legal systems coexisting within its jurisdiction. It is a country whose lawyers have contributed immensely to the development of international law and to cooperation between common law jurisdictions. It is a country which made great British jurists out of a generation of exiled continental lawyers fleeing Nazi fury. It is not surprising, therefore, that Britain has contributed greatly to EU law.

In the last 45 years, the EU has changed in many respects, while retaining the fundamental legal order which underpins it and allows it to function. Many aspects of today's EU bear the imprint of British policy and people. Again I will try not to mention names, for fear of missing someone, but will focus on subjects[15] I happen to know something about from my professional experience:

- Successive enlargements of the Union, particularly the big bang of 2004, were pushed hard by British foreign policy practitioners and commentators against those who wanted to "deepen" before "widening" and would have preferred more gradual enlargement or some sort of peripheral waiting-room status as the core got on with integration. The UK was not alone in its support for enlargement, while a complex set of geopolitical, economic, security and social factors shaping enlargement policy existed in every Member State in different combinations. The core versus periphery argument has raged for decades, as has the hope that the Franco-German engine is about to start firing again.
- Competition policy: try to imagine what might have happened but did not. The theory that any restraint on commercial conduct is caught by Article 101(1) might have prevailed. The law and economics movement, translated

[15] The following simplifications are meant to illustrate my general point. I do not claim that the British influence necessarily made things better, just that they are different.

into Europe mainly by British academics[16], might have been rejected. The merger regulation might have been based on a general public interest test rather than a "pure" competition analysis.

- Trade policy, as implemented in successive GATT/WTO rounds and numerous bilateral relationships, rejected mercantilism and protectionism. Without the UK and its leadership of the "liberal" countries of Northern Europe which supported its positions, this might not have been the case.
- Financial regulation would not have been as sensitive to the interests of the City of London and more generally to those of the non-euro countries; we might not have the comprehensive set of detailed rules enacted since the financial crisis started in 2007, which went beyond the original focus on creating a single market to focus on stability, liquidity and high quality common or coordinated supervision and regulation.
- It is even said that the UK influenced the design of euro coins by persuading the others that coins with a national side (obverse) and a common side (reverse) would not confuse the public; after all, the pound sterling, a currency shared by the UK's nations (not to mention other jurisdictions of the British Islands and overseas), had just that, a common side and different national ones.

No-one can say how irreversible these achievements will prove to be in a world in which Mr Trump is President of the USA, the UK charts a new course outside the EU, the EU adjusts to the absence of the UK, we all seek to learn the lessons of these developments for globalisation as we currently understand it and other countries of the world assert their own preferences in domestic and international settings.

Britain may also come to rue some of the changes it engendered or accommodated. Financial regulation has created a formidable set of European

[16] I will break my no names rule and pay tribute to Professor Valentine Korah for her work and influence and to David Deacon, an unsung hero in bringing economics to bear on what had been considered a lawyers' subject inside the Commission in the 1980s.

rules for financial institutions and markets with self-confident regulators and supervisors, built on but not limited to the euro area and the European Central Bank. The UK will have to deal with all of that from outside. In the competition field, the UK has abandoned its pre-EU aversion to the effects doctrine, which extended EU jurisdiction to many parties and transactions originating elsewhere. The UK is now to be part of that elsewhere. In the same way, the UK now applies its EU-influenced domestic competition law in ways which previous generations of jurists would have considered extraterritorial. The risk of friction between two neighbouring systems of law applying the effects doctrine to intertwined transactions is considerable and a sustained effort to cooperate will be needed. Like so much else in this sad story, much will depend on goodwill and trust between those responsible for making and implementing law and policy.

Trahison des clercs?

What is our responsibility as scholars and practitioners of European law? Did we fail to explain the EU to our students, readers and fellow-citizens? How did we arrive at a situation where expertise was not only ignored but also dismissed with disdain? Where the highest judges in the land could be insulted with only belated and lukewarm defence from the Lord Chancellor? One might also ask how it came about that human rights and health and safety became dirty words for many, let alone some of the wild betrayal talk we hear, redolent of the late, darkening days of the Weimar Republic.

Politicians and the media have wider audiences than professors but we are usually flattered to think that we have a public role and are listened to by our students and wider audiences beyond the lecture hall.

To take an obvious example, this audience knows that free movement of people within the EU is far from unconditional. Nevertheless, the view was allowed to prevail that "immigration" was uncontrolled and uncontrollable as long as we remained a member of the EU. The true situation was never put forcefully before the public. The European Commission took no part in the campaign, but I accept as a former Commission spokesman and director general of communication that it could have done more over the years to explain realities. Nevertheless, I have always believed that the only credible explainers of the EU to the general public are the politicians at all levels in the Member States. The idea that the EU is a

foreign body, “Brussels”, is pernicious and has proved costly. It is possible that no amount of rational explanation could have countered the lies that were unashamedly trumpeted by the leave campaign. But whatever the result, out of self-respect we should have done more to expose the lies behind the NHS funding story, the accession of Turkey which the UK could not prevent, the prospect of uncontrollable hordes of foreigners arriving in Dover, the casual clichés about cake and the assurances that German car and French champagne producers would make sure we’d be OK. Some of these stories are still being told and we can all see the difficulties facing the Government in grappling with the realities of establishing a negotiating position which stands a reasonable chance of success in the talks with the EU.

Meanwhile, the Home Secretary has asked the Migration Advisory Committee to examine the role EU nationals play in the UK economy and society and to report by September 2018 on the impact on the UK labour market of exit from the European Union[17] . She has also asked the same committee to assess the impact of international students in the UK[18]. This, I respectfully suggest, might have been done before the referendum.

Anyway, my purpose today is not to lament, reminisce, engage in wishful thinking or consider paths not taken. It is rather to celebrate the British contribution to a work of great beauty, European Union law. The metaphor of architecture is often used to describe the structures of the EU and some of the designers and builders are in this room. The process will continue without us but will always have a major impact on life in this country, so our engagement is not at an end. The study and practice of EU law will continue to be of great importance in and for this country. It may become a foreign law, but I think it will be less foreign than any other, including that of common law countries with which we share a rich legal tradition and many business, professional, academic and personal ties. Why do I say that with such confidence? Because EU law is

---

[17] https://www.gov.uk/government/news/migration-advisory-committee-mac-commissioned-by-government

[18] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639814/HS_to_MAC_-_students.pdf

the organising principle of our continent. It was our law for decades and its terminology and concepts are now embedded in many parts of our domestic law and will remain so for a long time, whatever repeals and amendments follow our departure from the EU.