MacFadyen Lecture

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Donald MacFadyen and I were born in the same year, went to school in Glasgow and studied law at the same university. Our early days at the bar overlapped: we each devilled for the then junior David Edward. Donald's subsequent career was a model of the classic combination of public service and private professionalism which should make us proud of the Scottish bar. He served in a number of the most sensitive controversies of the day: the extraordinary appeal following the Lockerbie bombing, the protection of children in Orkney, as well as a number of other legal and civic matters. I knew him best in our early days at the bar and in his later years. It was an honour to be asked to be the latest in a line of "personalities" charged with delivering this lecture [2] in his honour, the first being that same David Edward.

The invitation came in 2016, in happier and legally more certain times, pre-Brexit. The original idea was to discuss the evolution of links between Scottish law and European law, and speculate about how those links could be deepened and reinforced, and particularly how Scots practitioners could play a part more frequently in the shaping of EU law.[3] However, the trustees and I agreed that the

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[2] It must be obvious that this lecture expresses purely personal ideas and by no means reflect the opinion of the Court or any of its members. I acknowledge with thanks the help of my cabinet colleagues, particularly Ashot Ginosyan, in preparing this article

[3] Scotland has referred about 12 questions to Luxembourg over 46 years, while Latvia has referred about 55 in 14 years.

sensitive subject of Brexit would be, regrettably, a more worthy topic for this lecture in honour of a man who as advocate and as judge was involved in several of the great causes of the day. Brexit, if it occurs, will represent what one English judge has called a seismic shock, a truly revolutionary change. Scotland has seen its share of great upheavals and controversies. One was the Reformation, which has I suggest some lessons to offer us.

In 1560 the Papal Jurisdiction Act abolished the jurisdiction of the Pope in Scotland. A separate act abolished idolatry and another prohibited the saying of the Mass. However, in many respects, even though the jurisdictional authority of the Pope had been abolished, Scotland did not eliminate all traces of the old religion, far from it.[4] The church buildings remained. There was a considerable degree of tolerance, limited purges of the old clergy, and a rather modest degree of social change. The sacking by the crown of the assets of wealthy religious institutions was more of an English phenomenon. In particular, classical canon law remained part of the law of Scotland, albeit rooted in the civil law of Scotland and not in the authority of the Roman Catholic church. To quote the venerable Stair's Institutes:

> "This pontifical law extended unto all persons and things relating to the Roman church … as orphans, the wills of defuncts, the matter of marriage and divorce… And so deep hath this canon law been rooted, that, even where the Pope's authority is rejected, yet consideration must be had to these laws, … as containing many equitable and profitable laws, which because of their weighty matter, and their being once received, may indefinitely be retained than rejected."

[4] I acknowledge the perceptive insight of Michael Clancy OBE, a considerable expert on the challenges of Brexit, in noting these possible parallels.

(Institutions of the Law of Scotland Book I, Title I, 14).

Things muddled through. Things changed. There were problems.

450 years after the Reformation, assuming Brexit goes ahead, it is not the case that zealots will burn books on European law, or imprison European law scholars, or burn flags or smash icons on which yellow stars appear against a blue background. Instead, in many ways, as with the Reformation in Scotland, there will be little change; but in many ways there will be big changes.

Following the June 2016 referendum the country's political leaders were faced with exceedingly difficult choices; political, constitutional, commercial, regulatory and legal and very many of these remain unresolved.

Tempting though it may be, it is not my intention to say that Brexit would be a good thing or a bad thing, politically speaking. To quote Sir Geoffrey Vos, Chancellor of the High Court, judges are not paid to decide what is good for the country. They do not deal the legal cards, as he put it. Judges in the UK are observing the ongoing debates and will await outcomes which are, so to speak, judicially actionable. But they can point out problems and questions which are likely to need attention, uncertainties which need to be borne in mind as the negotiations progress.

I propose to consider some practical legal topics which would be presented by a Brexit.

- The first relates to an area where there may not be much change, and where the government appears to hope for as little change as possible – technical regulation of our daily lives. I will discuss the spirit in which European law should be applied judicially in the UK after a Brexit would have occurred.

- The next is to record the existence of matters which need to be addressed and where there will be grave problems if they are not addressed before a Brexit happens.
- The last is a plea for moderation and clarity in discourse.

Let me begin by noting where we are today.

Since January 1, 1973, the UK has managed the regulation of much of the country's affairs in collective cooperation with its European partners.[5] The topics of cooperation in regulation are vast and include access to higher education, agriculture, professional qualifications, access to healthcare, sex discrimination, customs, potentially hazardous chemicals, financial services, energy, nuclear safety, national security, terrorist asset freezes, the right to reside mutual recognition of judgements, food safety, animal welfare, environmental protection, criminal law enforcement, fisheries and data protection.[6] The UK is a highly regulated society and I have no expectation that Brexit will make it more casual about workers' rights, dangerous chemicals, protection of wildlife, equal pay for men and women, child abduction, access to data, competition, motor vehicle design or aviation. So what is going to happen?

Lord Cockfield, the father of the 1992 programme to complete the internal market, used to say that sovereignty was like energy: it could not be destroyed but it could change its shape. The UK has pooled its capacity to regulate with its EU partners. It has exercised its sovereignty in cooperation with other European democracies, a growing number of them, first 8, now 27.

The research, consultation, debate, and decision making are done collectively, usually involving expert agencies or committees. Independent EU agencies are responsible for regulating pharmaceuticals, food safety, security, animal feed, maritime safety, aviation and many other topics.[7] The agencies are located in London (medicines), Alicante (trademarks), Angers (plant varieties), Helsinki (chemical substances), Riga (telecommunications), Parma (food safety), and some

[5] The UK acceded to the predecessor of the European Union as of January 1, 1973 pursuant to the Treaty of Accession and the passage of the European Communities Act of 1972.
[6] Institutions and Bodies of the European Union, PUBLIC DATA EU, http://institutions.publicdata.eu/.
[7] *Ibid*

twenty more cities across the EU of 28.[8] The extent of the responsibility of each agency varies but each of them is engaged in enforcement, investigation and other regulatory actions. These agencies employ experts and produce recommendations or opinions. These technical recommendations are then considered as policy and political questions by the Member States who try after debate to reach a common position. The texts will often have been drafted to reconcile different national interests. Thousands of individual problems arise on subjects such as food safety, customs, health, environment, data security, chemical substances, privacy, animal welfare, private international law and the rest. These debates are resolved within the technical committees. They may render an opinion on the basis of which the Commission will propose or adopt action.

UK officials have been exceptionally successful in contributing UK-friendly ideas in the drafting process.[9] Sometimes the national interest at stake might not have included the UK, while in other cases the text may have been tweaked precisely to satisfy UK concerns.[10] Pursuing consensus is the rule, but in some cases there is a vote. A small number of texts (dozens out of thousands) have been adopted despite UK opposition.[11]

During the debates, it often happens that a state's scientific representative will plead for his state's view of the issue.[12] A Swedish national expert may favour different environmental or animal welfare standards than a Portuguese expert.

[8] *Ibid*
[9] Andrew Lilico, *Staying in the EU would see the UK facing up to economic domination*, THE TELEGRAPH (Feb. 22, 2016), http://www.telegraph.co.uk/business/2016/02/22/staying-in-the-eu-would-see-the-uk-facing-up-to-economic-dominat/.
[10] As an example of both phenomena, the Young Workers Directive (Directive 94/33/EC) was opposed by the then Conservative government; however, although the UK was unable to block the passage of the directive, the Government of Prime Minister Major was able to persuade its EC partners to include various opt-outs, exceptions, and implementation delays into the text. Gerda Falkner et al., Non-Compliance with EU Directives in the Member States: Opposition through the Backdoor?, 27 WEST EUROPEAN POLITICS 452-73, 458-59 (2004).
[11] *Ibid*
[12] For a review of the difficulties of the precautionary principle see Forrester, "The Dangers of Too Much Precaution" in A True European, essays in honour of Sir David Edward QC (Hart Publishing, 2004).

Neither is right or wrong, but they are different. Reaching consensus between them has helped the market which can be served by the product to grow to 500 million people. There are scores, maybe hundreds, of technical or advisory committees staffed by national experts. The purpose of these mechanisms is to help form and implement the language of the legislation—making it work in the real world.

Topics have included such things as whether an antibiotic growth promoter is an appropriate feed additive for calves, turkeys and pigs, what subjects a qualified doctor should study, whether phthalates are hazardous to babies who suck soft plastics, or whether a particular pesticide is safe to be put on general sale or should be removed from the shops. As technology has advanced and as technical choices have become more sophisticated, an ever wider and deeper mass of regulation has emerged.[13] The CBI has estimated that the roles of 34 EU agencies will need to be replicated in the UK to perform for the UK the elaboration of technical regulations parallel to those currently produced under the auspices of the EU 27.[14]

European Union law primarily aims at the construction of a functioning common market, a process which involves the reduction or removal of national rules which impede that goal. While most EU law is economic in nature, it is necessarily technical, prescriptive and precise. General principles are insufficient. It is easy to decree that farmers shall give healthy feed to their animals. It is difficult to decide which feed additive is good, bad or uncertain. The same broadly applies to cars, pharmaceuticals, pesticides, plastics, chemicals and fire extinguishers.

[13] As of 2015 there were an estimated 11,547 regulations, 15,023 decisions from the European Courts, along with an additional 62,397 standards promulgated by specific agencies clarifying and supplementing the regulations and directives, and 18,545 decisions made by different agencies interpreting the rules, regulations and directives. It would not be surprising if these numbers increase. *Number of laws*, EUabc, EUABC.COM (2015), http://en.euabc.com/word/2152 (a compilation developed from Eurlex).

[14] Kate Allen & George Parker, *UK Set to Keep EU Regulations after Brexit*, FT.COM, March 26, 2017, https://www.ft.com/content/64d30780-10b5-11e7-b030-768954394623.

European law covers the qualifications of the Spanish citizen who works as a doctor in Edinburgh and the Irish pharmacist who dispenses the medicine, as well as the safety and efficacy of the medicine (and the patents covering the active molecule in the medicine as well as those covering the process for making that molecule).

Regulation is an ongoing process. Science and industry keep discovering new techniques and technologies and creating new products. It is not practical to decide each new inclusion on a white list or a black list via a Parliamentary vote, still less a vote by 28 parliaments. The answer to the democratic impossibility of parliamentary voting is expert advice, followed by the adoption of secondary legislation.

The goal of these communings is the creation of a competitive market that will favour innovation, risk-taking, decent treatment, the expansion of choice to consumers through competition, prosperity and security. The process is largely unknown to the public, and has been criticised for being opaque and undemocratic.[15]

Rendering EU law into UK Law

The European Communities Act 1972 incorporated into UK law the EU treaties and the law promulgated under them and charged the UK government with

[15] In recent months, as the terms of the withdrawal legislation are debated, the use of so-called Henry VIII clauses has been criticised, since the withdrawal legislation (at least in draft form) would empower ministers to adopt or adapt rules without parliamentary approval. However, it is doubtful if ten or even twenty years of parliamentary scrutiny would be sufficient to oversee closely the entire acquis being brought into effect as UK norms.

enforcing this law.[16] As part of the Brexit process, the Withdrawal Act is expected to be the mechanism to achieve national jurisdictional independence. The Act is intended to remove EU law from its current status of primacy over the UK's domestic law and institutions.[17] The Act would thus fill the void that would otherwise be left if the UK were to renounce but not replace that vast body of law, the *acquis communautaire*, which has come into being since 1957 and into UK law progressively since 1973.[18] Thus the corpus of European law as of the date of repeal would become UK law. This "nationalisation" will include the primary treaties, regulations, directives, guidance offered by the Commission, and the case law of the European Courts. The total of texts is maybe as many as 92,000 or more. The BBC has mentioned at least 80,000 distinct pieces of legal text.[19]

In any event, it is proposed that tens of thousands of EU texts will enter UK law via the Withdrawal Act, like a vast tangle of EU wires being plunged into a bath of electroplating to make their nationality that of the UK. They cover the environment, animal feed, quality of drinking water, data protection, seatbelt anchorage points, power consumption of vacuum cleaners, labelling for bottled water, the conditions under which a person suffering from diabetes may be issued a driver's license if they suffer hypoglycaemic episodes and many more.[20] Often the rule as originally adopted will have been changed, maybe dozens of times, to respond to technical progress. There are thousands of texts because life is complicated and highly regulated.

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[16] European Communities Act of 1972 Part I, §§2(1) &(2)
[17] *Great Repeal Bill: All you need to know*, BBC NEWS-UK POLITICS, BBC (2017), http://www.bbc.com/news/uk-politics-39266723.
[18] Theresa May's Conservative conference speech on Brexit', Politics Home, 2 October 2016 ; See also HM Government, The United Kingdom's exit from and new partnership with the European Union, Cm 9417 February 2017 para 2.3
[19] *Great Repeal Bill: All you need to know*, BBC NEWS-UK POLITICS, BBC (2017), http://www.bbc.com/news/uk-politics-39266723; See also fn. 11 supra.
[20] *See e.g.* Directive 2016/ 1106 [2016] OJ L183/59 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences.

The UK will have three choices: set up a UK mechanism for adopting and enforcing UK standards, which will be stricter or less strict than those in the EU 27; follow what standards are adopted by the EU 27 according to procedures to be adopted case by case; or not regulate the topic. (During the referendum campaign there was talk of repealing silly and intrusive regulations, but since the referendum I have not heard of specific candidates for deregulation - there may be some.) There may be fields where the policy of the UK would diverge from the policy of the EU: agriculture is one example; fisheries is likely to be more difficult.

It may be helpful to remember the reception of Roman law in the six centuries after the death of the Emperor Justinian across what used to be the Roman empire. Different flavours of the Roman law developed, so that there was a Lex Romana Visigothorum in one territory, different in some respects to the law in what we now call Italy or Germany. Roman law was far less detailed and prescriptive. EU Law and national laws by contrast are very detailed and technical today.

To reconcile the need for good regulation with the political need to escape the reach of the European Union, the concept would be to bring the whole intricate mass of EU law into UK law and then over the years by correcting, pruning, winnowing and discarding to arrive at a result which is that the UK has what its political leaders desire. That will involve an immense amount of work by the UK civil service, legislature and ministers.

I picked the field of technical regulation to show how texts which are technical rather than political are drafted. Now let's pass to how disputes about their meaning would be handled.

Foreseeable controversies

As of the date of a Brexit, the process of rulemaking and enforcement within these expert entities will not stop, and indeed should not stop, since new dangers will be identified, new products will be proposed, new licensing requirements will emerge and adverse events about existing products will be reported.

To take one example, pharmaceuticals are today subject to successive tests in the laboratory, then on animals, then on healthy human volunteers, then on selected patients in order to demonstrate safety and efficacy.[21] Once approved, the performance of the medicine is regularly monitored and apparent problems (adverse health events) reported, for corrective action to be taken.[22] Animal feed in line with the advice of the Scientific Committee on Animal Nutrition is subject to comparable but lighter rules, as are food additives and cosmetics.[23] The basic legislation will have set up a process for deciding technical controversies, and that process is ongoing. The need for a process to approve or disapprove products or standards is of obvious importance. The decisions taken can have serious economic, human and environmental consequences.

It is very common for very divergent technical views to be advanced in intense lobbying by trade associations, NGOs, governments, and individual scientists. Amateur gliding pilots are actively involved in discussing airspace limitations. Football's executive bodies negotiate the training of young professional players. The exchanges are necessary to satisfy technical and political and popular concerns. The outcome of these exchanges will almost never be wholly "good" or wholly "bad". If "public health" is favoured "innovation" may suffer. If farmers will be relieved, advocates for the environment may be dismayed. "Consumer safety" and

[21] *See* Regulation 536/2014 [2014] OJ L158/1 (clinical trials); *See also* Nathalie Bere, AN AGENCY OF THE EUROPEAN UNION HOW ARE MEDICINES EVALUATED AT THE EMA AN AGENCY OF THE EUROPEAN UNION HOW ARE MEDICINES EVALUATED AT THE EMA (2015).
[22] Regulation 536/2014 [2014] OJ L158/1 (clinical trials)
[23] *Compare* Regulation 536/2014 [2014] OJ L158/1 (clinical trials), *and* Regulation 882/2004 [2004] OJ L165/1 (animal feed) or Regulation 1223/2009 [2009] OJ L342/59(cosmetic products)

"price" may be opposing concerns. These comments are not meant to caricature, but to record in shorthand form the sensitivity of the technical choices. So controversy as to the outcome is very likely.

The judicial function

These EU regulations set forth procedures, deadlines, governing criteria and standards, dangers, precautions, how to handle freshly identified problems and adverse health events. And of course they lead to the adoption of measures which can be judicially challenged either directly by those who are "directly and individually" affected, or indirectly by a challenge before a national court at the instance of a trader affected by the EU rule.[24] That presents a set of familiar litigious problems which are addressed under the current regime.

EU regulatory agency activities will continue in the EU 27. These EU agencies' decisions will of course be subject to judicial review in Luxembourg, either by appeal to the General Court or by reference from a national court to the Court of Justice. Suppose that a health scare has arisen about an additive, and the relevant EU scientific committee decides either to ban it or to approve it under limited conditions. What happens if the UK experts and the EU experts take different views? And during the period after Brexit, but before the establishment of a UK agency or committee of experts, what happens if the EU 27 adopts a new standard? Two current or near-future issues can serve as examples of problems after a Brexit: shall UK farmers be free to use the herbicide glyphosate? And what safety standards shall apply to driverless cars in the UK?

[24] TFEU Art. 263. For example, the trader who is prosecuted under national law for selling a product in the manner blessed by European law: Public Prosecutor v Tullio Ratti (Judgment of the Court of 5 April 1979 Case 148/78. European Court Reports 1979 Page 01629).

The right of a UK trader to challenge the new rule in Luxembourg on the grounds of "direct and individual concern" will still be available, but that is a very narrow test. Most litigants have to raise such concerns before a national EU judge and hope for a reference.

As you will see, EU norms will be applicable in the UK even if rebranded as UK national law. This "nationalisation" would respond to the sovereignty concern, in the sense that "we would have regained our independence". But every regulatory text will present ambiguities, some of them unforeseen, some of them arising from the deliberate making of a choice not to decide a particular question. Hundreds of disputes about interpretation are in progress every day. Is the medicine efficacious? Is the work of a cashier (mainly female) equivalent to that of a shelf stacker (mainly male)? Is the bathroom tile to be classified for customs purposes as a filled plastic or an artificial stone? Is the curriculum of a law course in one member state equivalent to the norm? Should the herbicide have been prohibited or permitted? Was the decision on its future use properly reasoned? Was the evidence about the feed additive fairly presented in the regulation which prohibited it?

When deciding such controversies in court, any judge will be guided by the recitals and the other words of the regulation or directive. Today, the UK judge – like any other national judge - will also have regard to the purpose of the measure, the relevance (or not) of the precautionary principle, the importance of market integration and, perhaps, the Charter of Fundamental Rights[25]. In a market of 28 countries and 500 million people, consistency is an obvious merit. If the same product when imported from China is subject to a 5% customs duty in Newcastle and a 7% duty in Bordeaux, there will be a flood of imports into Newcastle. If the

[25] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION 2012/C 326/02

herbicide cannot be used on crops in the EU, all food processors and shops will avoid buying crops made using the herbicide.

Judicial review in the UK after a Brexit

But consider the Scottish judge confronted with a textual dispute after a Brexit: What weight should be ascribed to consistency with the rules prevailing in the EU? Will such consistency be of high importance or of low importance? Will the findings of the EU Scientific Committee on Animal Nutrition be treated as authoritative or merely interesting? What technical priorities should apply in these fields? A high level of protection for consumers, female workers, animals, the environment?

British judges could be expected to pursue consistency with the the acquis communautaire, so as to make trade easier. Alternatively, consistency with EU 27 could be given a low priority because of the political importance of "regaining our independence" so that judges are told to have no regard to "European norms". Or again, the subject could vary sector by sector: consistency with EU27 on health and safety and customs, but an "independent" line on mutual recognition of qualifications or data protection.

EU law relies on principles of interpretation, some quite abstract, to achieve something like "fairness" or "sound government". The high general principles of proportionality, legitimate expectations, sound administration, due process, non-discrimination and so on each might affect how to address a controversy. The Charter of Fundamental Rights was an attempt to codify certain basic principles of fair play into EU law. Its future after Brexit is rather entangled.

The Charter is not to be part of UK domestic law, but it is of course an ongoing part of EU law which Brits can refer to in UK courts when interpreting what is to be called "retained EU law", (the directives, the regulations and other directly effective bits of EU law). So for the rules which existed prior to Brexit day, the Charter (and other general principles) can be relied on. But there will be no right of action for failure to comply with general principles of EU law. Indeed, Clause 3(2) says that after Brexit "no court may decide that action is unlawful because it is incompatible with general principles of EU law".

General doctrines and the Charter can be looked at to help interpret retained EU law. But not as means of annulling or challenging errors or excess by the administration. This is to help restore the parliamentary sovereignty which the EU had encroached upon. So old retained EU law remains supreme, yet the traditional means of challenging abuses in applying it seem to have disappeared. (There is a provision that a challenge would be valid if such challenge was provided for in "regulations made by a Minister of the Crown").

How to reconcile parliamentary sovereignty with the need to accord to citizens the opportunity to vindicate rights created by EU law? You can see the tensions confronting the drafters. We must escape the encroachment on UK sovereignty. We cannot not regulate the areas of daily life covered by EU law today. We must shed vague general principles of EU law which can be used abusively or excessively. But we don't want to deprive citizens of the right to challenge measures whose adoption or application was erroneous. But we don't want them to use European law to correct errors in applying European law. This touches equality of pay, the environment, health and safety, free movement and many other aspects of daily life. It might seem that the established way to achieve judicial oversight would have been diminished.

I am not an expert in UK constitutional questions, and these are quite basic reactions to the extraordinary complexity of the doctrines: the ultimate shape of the Act may be different. I predict that there will be immense difficulty in deciding these questions.

Here are a few conclusions about how to approach these likely controversies:

- For as long as provisions of EU law are to be applied in the UK, for so long will it be necessary to think through how EU law problems will be litigated.
- It is not by "nationalising" EU regulations that the country will free itself of EU law. Nor will disputes as to the interpretation of doubtful texts disappear.
- The current criteria for examining the legality of European law, post Brexit, appear extremely complex.
- Political leaders will need to address the necessity of giving guidance to the judiciary about what priorities will apply in interpretation.
- The UK judge should not be blamed for a lack of patriotism if he or she chooses to follow a "European" interpretation of the text.

My next point is a much less subtle one. Geographic proximity requires it. The UK has pooled its sovereignty for 44 years and has in the process opened up for its citizens and businesses a huge market by collectively drafted rules on hundreds of matters. Withdrawing from these rules, annulling these rules, and not replacing them would trigger a number of misfortunes in matters small and large. The rules touch crucial areas of public policy which cannot be arranged informally. They depend for their effectiveness on close cooperation. But they were conceived, drafted and governed within an EU framework.

If Brexit is to go ahead, a number of very important matters will need to be settled first. I will mention a few topics. The whole list is much longer.

1. **Crime, policing, security**

- cross-border arrangements regarding police cooperation, child abduction, football hooliganism, the European Arrest Warrant[26], and terrorism.
- cross-border judicial cooperation in matters of civil justice, the taking of evidence, the enforcement of judgements or the proper law of cross-border contracts[27].

In both cases, the problem is that while the high desirability of maintaining existing levels of cooperation is obvious, the framework of cooperation is European Union legislation. Criminal jurisdiction cannot be arranged by an informal friendly deal.
I cannot imagine not establishing a method of permitting cross border cooperation in these fields, but that will involve procedures established by EU law. The Latvian

[26] Lords Select Committee, Security Risk to UK Identified if European Arrest Warrant is not Replaced, 27 July 2017, https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-home-affairs-subcommittee/news-parliament-2017/arrest-warrant-report-published/

[27] (It is truly harmonized area) See European Commission, Judicial Cooperation in Civil Matters in the EU, A Guide for Legal Practitioners, 2014, http://ec.europa.eu/justice/civil/files/civil_justice_guide_en.pdf

suspect who is candidate for deportation to Dundee will demand the processes and protections of EU law.

2. Pensions[28]

At the moment, the Member States have agreed that pensioners living "abroad" in the EU will get their pensions on advantageous terms. Periods of work in different Member States can be cumulated to yield a pensionable working career made up of short periods in several countries. And the pension is paid as if the pensioner resided in his or her home country. By contrast, pensioners living in Canada or South Africa (indeed anywhere on earth except the EU and 12 other independent countries including Mauritius, Serbia, Jamaica and Barbados) see their pensions frozen as of the date of leaving the UK. The topic is direly complicated and hundreds of thousands of people are affected

3. Air transport

The European Common Aviation Area allows EU28 airlines to fly within the EU without needing bilateral route access agreements between governments[29]. Membership in the European Common Aviation Area and participation in the EU-US Open Skies agreement have been the regulatory core of the activity of the numerous airlines based in the UK.[30] Under current EU laws[31], EU citizens are entitled to claim compensation if their flight is delayed or cancelled. Far more economically important, the various air service agreements between the EU and third countries like the US are the current basis for flights from say LHR to JFK. The numerous airlines based in the UK would be handicapped if the UK were outside the European Aviation Security Agency[32].

[28] Proposal for a Regulation on a pan-European Personal Pension Product (PEPP), COM(2017) 343 final 2017/0143(COD)
[29] European Common Aviation Area Agreement (ECAA) [2006] OF J285
[30] Edmond Rose and Rob Walker, UK Aviation and Brexit: Pragmatism vs Politics, *ICF White Paper*, 2017.
[31] EU Passengers Right Directive
[32] Insitute for Government, Aviation and European Common Aviation Area, August 14, 2017 https://www.instituteforgovernment.org.uk/explainers/european-common-aviation-area-ecaa-brexit-explained

These uncertainties are well recognised and are being discussed. Until there is clarity as to the nature of the long term relationship, the rules to govern aviation remain uncertain. Once again, I cannot imagine that the advent of a Brexit would be followed by the grounding of flights from London to New York or Glasgow to Toronto. But it remains the case that such services depend on international agreements, which currently function because the UK is within the EU.

4. Denominations of origin and Whisky.

One field where UK law diverged from the civil law tradition and where producers in Scotland have certainly benefited from EU law is food and drink. [33] We are now accustomed to the notion that Champagne must come from a small part of north eastern France, and that Stilton cheese must come from three English counties and that slices of Parma ham must have been sliced in Parma in order to retain the treasured label. The UK approach the status of high quality food and drink was based on passing off: the butchers who produced Stornoway black pudding could challenge the hypothetical sausage maker in Carnoustie who was passing off an Angus inferior blood sausage as Stornoway black pudding, thereby damaging the goodwill of the makers of the authentic delicacy.

By contrast, the continental tradition relies on appellations of origin. The EU has been remarkably successful in challenging Wisconsin Cheddar and Spanish Champagne and California Chablis. The protection of geographical indications is a central part of the EU's food quality policy [34.] Some 1,402 food products enjoy protection under the Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialities Guaranteed (TSG) labels, which also cover hundreds of wines, spirits and other agricultural

[33] One of my first cases related to Scotch whisky – a friend introduced me to a relative's conflict about a competition law problem with the producers of Johnnie Walker Red Label. Judgment of the Court of 10 July 1980. Distillers Company Limited v Commission of the European Communities. Competition - spirituous beverages. Case 30/78. ECR 1980 -02229

[34] Regulation (EU) No 1151/2012

products.[35] Protected Designation of Origin labels Yorkshire Forced Rhubarb, Single Gloucester and Stilton cheese protect from imitations. Under Protected Geographical Indication labels, Cornish pasty, Melton Mowbray pork pie, Scotch beef and Welsh lamb are protected against confusion from products produced in different geographical areas. (No Danish Stilton, no Liege Cornish Pasties.) Under TSG labels, traditionally farmed Gloucestershire Old Spot pork and Farmfresh Turkey are protected from similar products produced with different raw materials and non-traditional ingredients. At present, the UK has 61 registered GI products and 17 applications in progress. The existing protection of British food names continue but this requires that the UK and EU reach an agreement. The UK would need to set up its own food name scheme with relevant authority and apply for an EU protection once protection at national level had been established.

The food story may sound a little folkloric. But the protection internationally of Scotch Whisky is absolutely vital to the prosperity of that industry which depends on exports to countries where there are many fake "Scotch" "Whiskies". The European institutions have succeeded in imposing on international trade partners respect for European denominations of origin. Thus Article 11.19 of the Free Trade Agreement between the EU and Singapore obliges each party with respect to wines and spirits to ensure the availability of "legal means for interested parties to prevent… the use of any means… that suggests that the good in question originates in a geographical area other than the true place of origin…". Scotch Whisky is in Annex 11.

Other EU Free Trade Agreement agreements are relevant: a deal with South Korea, which reduced tariffs on Scotch Whisky to zero, and another reducing tariffs in Vietnam on Scotch Whisky from 45% to zero over time; and an

[35] Samuel White, EU Demands Protection of Geographic Indications in Brexit Britain, *EURACTIV*, 11 Sep 2017.

agreement with Colombia which will not discriminate against foreign spirits, or restrict availability of Scotch Whisky in that market.[36]

5. Trade and customs

Article 208 of the Treaty on the Functioning of the European Union (TFEU) provides that the EU has exclusive competence to negotiate trade deals with third countries on behalf of its Member States. According to the former Attorney-General, Dominic Grieve, QC, the Foreign and Commonwealth Office reckons that the UK is party since 1834, to over 13,200 treaties, ranging from the UN Charter to fishing rights, of which some 700 have dispute resolution mechanisms. These frequently provide limitations on how the countries can behave towards their citizens and others. According to the Financial Times, currently there are around 759 bilateral EU agreements covering more than 160 countries with relevance to the UK.[37] Thus the UK will have to embark upon bilateral bargaining in order to replicate for the UK the advantages established by these agreements for EU Member States. Possibly the UK could obtain better access to the countries' markets than did the EU, possibly less good. And of course the concessions made to the third countries in terms of access to the UK would be a matter for negotiation.

Customs formalities affecting the importation of goods by road. It is expected that there would be a five-fold increase in customs declarations. Today 99% of export declarations are cleared in 20 seconds. A very high percentage of exports and imports are to and from EU27. Third country trade takes longer. Some industry pessimists fear that a 2 minute delay in processing a truck at the port of Dover,

[36] Felipe Schrieberg, How Brexit Affects the Whisky Industry, *Forbes*, 24 June2016
[37] Paul McClean, After Brexit: the UK will need to renegotiate at least 759 treaties, *Financial Times*, 30 May 2017; for the benefits of EU Trade Agreements see Christian Salm, Benefits of EU International Trade Agreements, *European Parliamentary Research Service Blog*, 27 Oct 2017.

which handles some 10,000 a day, will lead to queues over 20 kilometres long. Pessimists are generally wrong, but maybe not entirely wrong.

6. Persons. Mutual recognition of qualifications; families

Directive 2005/36/EC establishes the general legal framework for cross border recognition of professional qualifications, based upon the principle of mutual recognition. Thousands of UK citizens work in the EU27 under their home country titles. A UK pilot flies from London to Frankfurt with a UK issued license under European Aviation Safety Agency rules. UK auditors, chartered accountants and bankers are professionally active across borders.[38] An English solicitor advises clients in Brussels under her own professional title. Thousands of EU27 nurses, pharmacists and doctors work in the UK and vice versa. Some 6% of the NHS workforce nationally, and 10% in London, are EU nationals. Around 33% of architects in London come from EU 27. Common sense would suggest that UK qualifications should be recognized in EU27 and EU27 qualifications in the UK. But these professional activities are very strictly regulated for good reason. There are a number of unsettled questions: whether qualifications from third countries recognized in EU27 country (a Serbian engineer or an Israeli doctor) can be recognized in the UK, what procedure will apply to professional qualification in the process of recognition, and whether a future UK-EU free trade agreement in services and establishment would insert the principle of mutual recognition for professional qualifications.[39] Once more, the problem is recognized, but there is a lot to do.

After 44 years of free movement persons between Member States, it's estimated that 4 million people (UK citizens in EU27, EU27 citizens in the UK) are affected,

[38] House of Commons, BREXIT: Trade in non-Financial Services, Chapter 4 Professional Business Services, 2017, https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/135/13507.htm
[39] Julinda Beqiraj, Professional Qualifications After Brexit, *British Institute of International and Comparative Law*, BREXIT, October 2017.

indeed threatened by a Brexit. I know personally many people who are considering taking another nationality or who are unsure how to plan their lives because of Brexit. Some countries do not permit dual nationality (I am told that Austria, Spain and the Netherlands are examples, and Germany accepts it only for EU/EFTA citizens), which means renouncing UK nationality, thus presenting a risk at the end of a career to return to the UK. A separate set of concerns is that the UK citizen in say Luxembourg would be free to supply services there, but not in another Member State. It appears that EU27 and the UK are not in agreement on the question of future family reunification, the future right to "come home" with a foreign spouse. Further problems are the rights of frontier workers, who are self-employed and travel at regular intervals; the rights of citizens previously residing and working for many years in the UK or EU 27, but absent on the date of Brexit; and whether citizens arriving during the transition period would be treated in the same way as those who move after the transition period. It is undecided if EU27 citizens possessing an Indefinite Leave to Remain status (ILR) in the UK would have to acquire a new status and undergo extensive Home Office security checks; will those who are unable to acquire the status, be considered as remaining illegally in the UK and be deported or found criminally liable? Will the UK citizens be treated in the same way as third country nationals and be therefore covered by Directive 2003/09 (for third country nationals), which provides no right to free movement and freedom to provide services in a second Member State?

I have lived as an alien in a foreign country. Dealing with the business of residence and visas can range from worrying to quite miserable. Depending on a sceptical official's approval of whether you can stay, where you can work, what papers and what other proof you need - these are real burdens. They are worst for the poorest, the least educated, and the less confident.

London is now home to something like 300,000 French citizens. Figures for 2015 put the number of Polish citizens living in the UK at 916,000 [40] and the number of Irish citizens at 332,000.[41] It is estimated that approximately 181,000 EU nationals live in Scotland. [42]

This is not the place to describe in great detail in great detail all the problems being debated. What is certain for present purposes is that tens of thousands of ordinary people, in complete good faith, are worried about their professional and personal futures. The numbers are very large and the concerns seem understandable. Once again, there is an immense amount to do. I very much hope that the negotiating parties will come to a conclusion that is worthy of each of them.

Of course there are not going to be mass deportations, but I suggest that the ordinary worries and problems of ordinary people who would no longer have a constitutional right (or might have retained only a part of it) deserve to be weighed carefully against the governmental advantages to be gained by renouncing or removing those rights. There is a great difference between a right and a right to ask.

7. Driving licenses

This may seem trivial, but symbolic. Directive 2006/126/EC provides for mutual recognition of driving licenses issued by Member States. After Brexit, the EU would no longer recognize UK-issued driving licenses.[43] Then, UK citizens would not be able to drive or hire cars with insurance in the EU27. In order to address this danger, the UK is planning to adhere to a United Nations Convention on

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[40] ONS, *Population of the UK by Country of Birth and Nationality: 2015*, 25 August 2016 [Online]. Available at: https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/ukpopulationbycountryofbirthandnationality/august2016#statisticians-quote [Accessed 8 November 2016].

[41] *ibid*

[42] Scottish Parliament Information Centre, *Financial Scrutiny Unit Briefing – EU Nationals Living in Scotland*, 3 November 2016, p.3

[43] European Commission DG Move, Notice to Stakeholders, Withdrawal of the United Kingdom and EU Rules in the Field of Air Transport, 19 Jan 2018.

Road Traffic (1968 Vienna Convention), which the UK avoided joining previously.[44] Under the Convention, the UK would need to set up a new system of registration of trailers and issue IDPs (International Driving Permits). It would appear that only a tiny number of travel permits are potentially available for British truck drivers.[45]

There are I presume solutions to these challenges and there is good faith on both sides. But the tasks are enormous and numerous.

8. Devolved administrations

In the Queen's speech delivered on June 21 2017, a pledge was made to consult and work with the devolved administrations in Wales, Scotland, Gibraltar and Northern Ireland. A special Joint Ministerial Committee or JMC was established for EU negotiation (JMC(EN)). The relevant MOU says that there are "no legal obligations between the parties" as it is "binding in honour only". The Scottish government is stating that "the UK as a whole should remain a full member of the Single Market, through the European Economic Area, as well as the Customs Union". The difficulties of reconciling the interests of Scotland's population which voted to remain and the time-bound process of the Brexit negotiations are obvious. Ireland, Gibraltar and Wales present a variety of different questions. I record this as a political matter which presents a number of difficult constitutional problems, in addition to the technical difficulty of the unsettled items I have mentioned.

The conduct of discussions on these topics is for civil servants, diplomats and political leaders. That is obvious. There are very great challenges to be addressed by the UK government, the devolved governments, the civil service and the EU.

[44] Dan Roberts, No Deal Brexit Would Trigger Wave of Red Tape for UK Drivers and Hauliers, *The Guardian*, 8 Feb 2018.
[45] Ibid

I would add as a citizen, a parent and a judge that the subjects are of immense importance and they affect the interests of literally millions of people. I summarise: we should acknowledge the difficulties, the number of topics to be resolved, and the impossibility of not addressing them.

It would be a very grave matter if they were not settled by carefully drafted texts, drafting which may take a long period because the questions are very complex and difficult both legally and institutionally.

The third point is more philosophical. Let us all pursue these matters with proper moderation. Nationality has never exactly matched predictable categorisation on the basis of political frontiers in Europe. In Nelson's fleet at the Battle of Trafalgar in 1805 there were 28 nationalities. Education, training, falling in love, economic aspiration are each well recognised incentives to travel. The constitutional architecture of the EU is creaky and there are plenty of imperfections: the democratic deficit has been criticised frequently. The European public cannot by a vote reject the Commissioners. Regulating is indeed very complicated. There is no opposition and no government in the European Parliament. But the achievements of the four freedoms have been immense. The elimination of military rivalry in Western Europe, and the bringing down of the Berlin Wall were massive events for which "Europe" can claim much credit. Young people can now regard it as their right to move in search of study, taking a job, opening a business or building a family. Europe is the only place on earth today where (almost) a continent of states have agreed to deliver access to healthcare, equal treatment of men and women, safe and healthy goods and workplaces, a pension, education, and democratic values, not just to their own native citizens, but to those of other states.

There is a great burden upon the negotiators to deliver a result which preserves Europe's values. The work has started and will presumably become even more intense in the next months. The UK civil service and the staff of the EU Commission are exceptionally gifted, but their tasks are enormous. I suggest that there is a duty upon commentators, politicians, journalist, teachers and bloggers. There is a great temptation to exaggerate, to polarize, to mock, and to accuse. The seriousness of the challenge deserves better. It is unhelpful to say "Just leave" as if we were resigning from a golf club because we dislike the new committee or the dress code. We should not pretend that the issues at stake are simple. Plainly they are not.

Winning should not be the goal. We should have learned from history that bad treaties, unrealistic treaties, may not survive crises. So let us all calm down, breathe deeply, reproach zealots and encourage sensible discourse. That, I venture to speculate, would have been an approach of which Donald MacFadyen would have approved.