

## THE FUTURE OF EUROPEAN INTEGRATION. FOUR ROUNDTABLES IN HONOUR OF L.W. GORMLEY

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### Introduction

While careers in most law faculties around the world start with an inaugural lecture, they end with the advent of retirement. If you are so fortunate to have friends, colleagues and former students around you at this final moment of your career, you may be honoured with speeches, workshops or even a 'Festschrift' (a collection of essays, reflecting on themes from your academic career). Indeed, these events serve to keep the memory of a life of academic work alive and share it with others. For this commentary with Amsterdam Law Forum, I had the great honour myself of being able to attend a final moment of this sort for Professor Laurence Gormley, Chair of European Law and Jean Monnet Professor at the University of Groningen. This event manifested itself in both a 'Festschrift' and a conference with four round tables of internationally acclaimed scholars in the field. On April 5th, 2019 "The Future of European Integration and the Internal Market: Four Roundtables in Honour of L.W. Gormley" took place in the beautiful Van Swinderen Huys around the corner from the iconic main building of the University of Groningen.

With the deepest respect in mind, I hope to share some of the most exciting moments of this event with you both as a law student and a reporter of this immensely endearing and thoughtful get-together. Of course, I will not be able to fully capture the personal intimacy and professional depth of the contributions. Some of the speakers have a 40-year history with Professor Gormley. But I do think that for anyone reading this, a glimpse of the event will be very rewarding: both for scholars of EU law, students interested in Brexit (from the perspective of many of the lawyers and academics that shaped the Union) and for those of you who may be thinking of attending this sort of honorary celebration in the future.

It must be noted that one major reason that this event was personal and heartfelt is that the organizers of the event, Fabian Amttenbrink (Erasmus University Rotterdam), Gareth Davies (VU University Amsterdam), Dimitry Kochenov (Groningen University) and Justin Lindeboom (University of Groningen) were all doctoral students of the honoured Professor Gormley. Personally, I found that they were able to ideally capture the intimacy of their professional friendship and project it onto the format of an entire conference, bringing in the laughs and smiles that go along with this sort of relationship. The conference was organized jointly between the University of Groningen, the Erasmus University of Rotterdam and the VU University Amsterdam, and more specifically the VU Interdisciplinary Centre for European Studies (VICES).<sup>1</sup> All in all, the conference was a great chance to see the glorious end of a long and successful career, full of jokes, puns and even dance.

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<sup>1</sup> Please visit their website for more information and upcoming events: <http://www.fsw.vu.nl/en/research/collaboration/vices/index.aspx>.

As mentioned above, the conference also coincided with the publication of a collection of essays. The book is set to be published by Cambridge University Press as “The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley”, featuring a wide range of scholars (most of them were at the event) and an epilogue by J.H.H. Weiler (NYU Law). I believe it will be available in May 2019. The cover of the collection reflects a very interesting choice: it depicts a 16<sup>th</sup> century drawing of the ‘Ship of Fools’ at the Nuremberg Shrovetide Carnival. For those of you who do not know of this allegory, a bit of context is quite beneficial to understand the message the editors purport to send. In Plato’s Republic, Socrates imagines a ship at sea whose crew is everything but organized. While the captain is slightly deaf and blind, with very questionable navigation skills, the crew is constantly fighting over who should steer and in which direction. A mutiny is immanent, and it never crosses the sailors’ minds to establish a union of authority. So, Socrates raises an interesting philosophical question: In the midst of this parody of a ship, would this strange crew just as easily condemn and disregard a true navigator if he were to present himself? Indeed, the parallels were of continued concern during the conference, and I think it is a powerful allegory to conjure in times of multiple crises across the European Union.

### **Recounting the Conference and Contributions**

Now I turn to a short sketch of the conference. I will highlight the most memorable moments and talking points of the speakers, but this will indeed be a subjective and highly limited presentation, for which I offer my apologies. However, I do think that I have captured the most relevant parts of the events, and I have hopefully done some justice to the memory of the event. The conference was organized in four main panels, discussing various subjects related to European integration and EU law. These were first, ‘Foundations of Free Movement Law’, second, ‘Who and What Makes a Market?’, third ‘Institutions and Judicial Protection in the Internal Market’ and finally ‘European Integration after Brexit’. Following the interventions by selected panellists, Professor Gormley offered rejoinders and responses to the speakers’ thoughts. In addition, each panel had its own guiding phrase or quotation taken from Professor Gormley’s work.

But first, there was an opening speech by **Sir Alan Dashwood QC**. Professor Dashwood is a distinguished British scholar and Emeritus Chair of European Law at Cambridge University’s law faculty as well as a barrister, appearing before the European Court of Justice for over twenty years. He served as the legal secretary to the Advocate General of the Court of Justice from 1978-1980, he is part of the honoured Queen’s Council (QC) and he has a 40-year history with Professor Gormley. His opening speech was very warm-hearted, describing Professor Gormley as a “scholar for all seasons”, responsible for “bringing the common law tradition of doctrinal analysis to European law”, and thankful for once again “providing us with a pretext for having a good time”. Professor Dashwood and Professor Gormley collaborated together in the European Law Review.

### **Panel #1: Foundations of Free Movement Law**

The first panel’s motto was ‘In Heaven, Dassonville Will be Found’, involving a discussion of the merits of the *Dassonville case*.<sup>2</sup> This case dealt with Scotch Whiskey traders who were forbidden to trade their product in Belgium, which had been imported through France, due to

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<sup>2</sup> Judgment of the Court of 11 July 1974. Procureur du Roi v. Benoît and Gustave Dassonville. Reference for a preliminary ruling; Tribunal de première instance de Bruxelles - Belgium. Case 8-74.

a national law that required a certificate of origin. In their ruling, the European court held that this was contrary to Article 34 TFEU, which provides that “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states”.<sup>3</sup> In his extensive research on the case, Professor Gormley held that this case provided for the correct framework for assessing analogous cases, and he was a fierce critic of the later *Keck case*<sup>4</sup> that limited this framework substantially. The first intervention was given by **Professor Peter-Christian Müller-Graff** (University of Heidelberg), who reflected on six aspects of the direct applicability of internal market law. He very eloquently played with the meaning of the cover of the Festschrift, drawing on religious connotations of Gormley’s phrase. He argued that the “legal doctrine requires more than just case law” and that “heaven stipulates imagination”, especially in European law. He drew on Professor Gormley’s work and advocated for more conceptual consistency when dealing with normative systems of law. The second intervention, made by **Dr. Kai P. Purnhagen** (Wageningen University), more directly honoured Professor Gormley’s interpretation of the *Dassonville* case. He encouraged younger scholars, like himself, to remain critical and farsighted when thinking about internal market law and to challenge decisions and judgements made by the Court. Finally, **Eleanor Sharpston QC**, Advocate General at the CJEU since 2006, offered a very short presentation of her thoughts on the court’s interpretation in these cases. Although she was short (because she was presenting later in the day as the keynote lecturer), she speculated that the court may exercise considerable restraint in the future in answering preliminary rulings referred to them by national judges. In his rejoinder, Professor Gormley drew attention to the fact that today much has changed in the nature of decision making in the European legal contexts. Judgments are instantly and easily accessible to both lawyers and judges on the internet, there is more expertise at the national level for jurists<sup>5</sup>, and national judges are more willing to learn about European law.

## Panel #2: Who and What Makes a Market?

The second panel regarded more intimately the constitution of the internal market, the role of citizenship, global value chains and the challenges of Brexit in places not always directly associated with the market. It was also titled ‘As the Waitress Said to the Bishop’, which is phrase taken from Gormley’s 1982 case note about hardworking prostitutes,<sup>6</sup> and is a play on the British idiom equivalent to ‘that’s what she said’. First, **Dr. Martijn van den Brink** (Max Planck Institute, Göttingen) argued for a transition from market citizenship to “real European citizenship”. In his discussion of why it remains unrealistic to detach EU citizenship from free movement, he also drew attention to possible injustice of the current market conception of citizenship. Therefore, he advocated for a wider debate of the meaning of justice in the EU and for a clearer distinction between the concepts of justice and legitimacy in EU law. Next, **Professor Ioannis Lianos** (University College London) offered a very stimulating intervention on how economic and technological developments are affecting the internal market. He

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<sup>3</sup> Article 34 Treaty on the Functioning of the European Union (ex. Art. 30 Treaty establishing the European Economic Community).

<sup>4</sup> Judgement of the Court of 24 November 1993. Criminal proceeding against Bernard Keck and Daniele Mizhouard. Reference for a preliminary ruling: Tribunal de grande instance de Strasbourg - France. Free movement of goods - Prohibition of resale at a loss. Joined cases C-267/91 and C268/91. See also L.W. Gormley, ‘Two Years After Keck’, *Fordham International Law Journal* 1995:3, pp: 866-886.

<sup>5</sup> European law is only now becoming a mandatory subject in legal education.

<sup>6</sup> See L.W. Gormley, ‘Free Movement and Social Security: As the Waitress Said to the Bishop’ *European Law Review* 1982: 7, pp. 399-402.

reflected on the role of the internal market in the global economy, the outdatedness of how the EU thinks about integration and how the internet has changed the way that we should think about trade in general. Then, he argued for a more trade-oriented perspective of the internal market that takes the compatibility of regulatory acts in the internal market with global value chains to be the key to understanding governance in the future. Finally, **Professor Margot Horspool**, who is a Professor Emeritus of European and Comparative Law at the University of Surrey and former interpreter for the European Coal and Steel Community, reflected on her history with the European legal system. She emphasized the importance of interpreters, without which the whole project couldn't work, throwing in some comical translation errors along the way. She also discussed her activity in organizing the Erasmus program and collaborating with Professor Gormley. The very practical implications of budgeting for the Erasmus program, she argued, remain obscure and she hopes that close collaboration will continue to flourish if the UK leaves the Union. In his response, Professor Gormley also reflected on the Erasmus program and the history of the close relationship between the UK and the EU in the field of education. He also briefly discussed how the idea of federalism in the EU has never been far but that the UK has been very afraid of accepting this. In fact, the inception of the EU was deeply federal in spirit and that many problems that face the EU and the internal market could be approached in a better way through federalism.

### Keynote lecture

In between the second and third panels, the organizers welcomed **Ms. Eleanor Sharpston QC**, who is the Advocate General at the Court of Justice of the European Union. After a few very warm words of introduction by Julian Langer from the Dutch Ministry of Foreign Affairs, Ms. Sharpston proceeded to build her lecture on the allegory of the 'Ship of Fools' that I mentioned above. She talked about how historically the ship was a float in the Nurnberg carnival parade in the 16<sup>th</sup> century. The participants would dress up as fools and lawyers (which is an interesting piece of history for the legal occupation) throwing ash and flour at the audience while dancing on the ship. Ms. Sharpston then constructed a very gracious thought experiment, tying this imagery to the problems facing the EU. In imagining a wandering scholar on this ship of fools, she posed the question: what would this person make of the European project today? In her very elegant speech – which ranged from discussing the link between the free movement of goods and the free movement of persons, the simple reality that migrants aren't just goods but they are people with families, cultural traditions and health conditions, and the difficult choice of balancing freedom, security and justice – she managed to problematize the fault lines of the European project with exquisite clarity and sobriety. Furthermore, her down-to-earth usage of real-life examples bolstered her point that it is indeed no easy task to intelligently deal with the magnetic poles between the prosperous European Economic Area and those fleeing war, who are willing to spend lots of money just to have a more prosperous life.

I shall just briefly recount two very memorable stories: In gracious but very comical words, she remembered a train ride through England years ago where she picked up a newspaper that was complaining about how the UK had once again lost a case against the CJEU. For obvious reasons (working at that very Court), she was very interested in this new case (and a little outraged that she couldn't recall it), focussing on how the journalist portrayed the EU and the UK in such a negative light. When she reached the end of the article and the name of the case was disclosed, she was astonished: despite not recognizing any of the facts during the article itself, the case was one that she had defended personally at the Court! She even represented the UK, and she worked so very hard for an outcome that would be good for the country. She found the portrayal in the article so astonishing because she believed that although they lost, the settlement that was reached was in fact very positive. From this she would conclude that the

media played a very large part in furthering Eurosceptical views in the UK, created obscurity surrounding the workings of the Court, and spread misinformation that would lead to ill-founded support for leaving the Union.

Another story involved meeting a ski instructor in Austria while on vacation, who was from Essex. While sharing a chairlift, Ms. Sharpston learned that the instructor spent half of the year working in Austria, while also keeping score in her head of how he made use of his free movement rights. She inquired into how he spent the other half, the answer being that the instructor was also a trained chef with friends on the coast of Spain, so he could easily work down there in the summer months. What a great example of how the EU enabled free movement, she thought. But when she asked what he thought about Brexit, she was dumbstruck: of course, he supported leaving the Union! In her opinion, this story speaks volumes about how many of the advocates of Brexit really were uninformed of the consequences of leaving for their own lives. In this case, Brexit quite literally means that the ski instructor will no longer be able to pursue his choice of occupation.

In the end, she once again reflected on the wandering scholar, who would be quite confused about the state of the European project, and her own position at the CJEU. She lamented the continued “hopscotch” of not knowing if she would be terminated this month or next, as the date of Brexit remained unclear in the early months of 2019. She also discussed her experience with Twitter and the difficulty of using social media to communicate complex cases, albeit being a very useful exercise for lawyers to keep within the character limitation! And finally, in Q&A, she argued that instead of thinking about Brexit as either pointing to a democracy problem or an identity problem in the EU, rather we should focus on the clarity and consistency in communication. The quality of information is what has really been lacking in the media; in her opinion people are just as French or British as when she started working for the European Court in the 1970s.

### **Panel #3: Institutions and Judicial Protection in the Internal Market**

The third panel dealt with the role of institutions and judicial protection, titled ‘Full of Holes on Closer Inspection’. The first intervention was by **Professor Paul Nihoul**, who has been a judge at the General Court of the European Union since 2016. He discussed the very famous *Plaumann* case,<sup>7</sup> and the implications of the case on the right of access to justice by individuals. Instead of arguing for a certain position (possibly compromising himself as a judge), he welcomed the audience and panellists to reflect on the protection of individuals in the internal market and that “the dream has not come true, this far”. **Dr. Matthijs J. van Wolferen** from the University of Groningen offered an eloquent contribution about the role of narrative storytelling in law. He then argued that in light of the history of the narrative of European law, we should ‘fess up’ to the federalist system of the EU. Finally, **Professor Pieter Jan Kuijper** from the University of Amsterdam contrasted having too many holes and having too many rules. He argued for a more realistic picture, where judicial politics, the biases of politicians and personal conduct play a fundamental role in the way we understand the EU’s institutions. He lamented the abuses of power and the lack of ethics in the commission, diligently citing interesting cases throughout the history, and he argued for more judicial accountability of the commission. This was also a theme that Professor Gormley would come back to in his response to these panellists, remarking that the commission is also bound by the rule of law and that politicians tend to abuse their power.

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<sup>7</sup> Judgement of the Court of 15 July 1963. *Plaumann & Co. v. Commission of the European Economic Community* Case 25-62.

#### Panel #4: European Integration after Brexit

The final panel regarded the implications of the UK leaving the Union as well as the external relations of the EU. It was also titled ‘Nevermind the Whys and Wherefores’, which is a tip of the hat to Professor Gormley’s 2017 article of the same name.<sup>8</sup> **Prof. Sir Alan Dashwood QC** reflected on the difficulties that face the academic community, but he maintained that EU legal scholars will continue to pursue close relations. Regarding Brexit, he argued that he was not sure that it would actually happen because of the challenges that face dealing with Ireland and the Good Friday Agreement. While he was not optimistic about what is to come with the Brexit negotiations, he did have a grain of hope that maybe the UK wouldn’t have to leave the EU after all. However, deeper constitutional problems and party politics have indeed entrenched the problems for the UK to deal with Brexit. Picking up here, **Dr. Thomas Horsley** (Liverpool) discussed the role of the constitution at the domestic level and argued that while it is not currently the moment to think of reform in the UK, it may be a good starting point after the Brexit saga is over. However, he also portrayed the phenomenon of the “Europeanisation of domestic law” in the UK, whereby national politics and regulations have come to resemble European law even in the face of wishing to leave the EU. Finally, **Professor Peter Van Elsuwege** (Ghent) concluded the last panel with a discussion of the future of external relations for the EU. Touching both the history of European integration and what we can expect for the UK, he looked closer at the case law and difficulties that arise regarding integration and regulating the internal market.

#### Conclusion and Final Remarks

After the last panel was over, Professor Gormley took the podium for the last word. After a full day of panels, he respectfully thanked the speakers and the contributors to the Festschrift. He said that when he received the book the day before, he was overjoyed and touched by the work that his friends and colleagues had put into it. However, as a final act, he was asked to perform his (in)famous dance that for many years he used to explain the *Defrenne* case to his students.<sup>9</sup> This was truly the most glorious moment of the conference! And it was a great way to end a day that was full of both systematic investigation of some of the trickier matters in European law as well as witty and cynical reflection on the strange, wandering ship that the project of European integration currently is.

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<sup>8</sup> See L.W. Gormley ‘Brexit - Nevermind the Why and Wherefores? Fog in the Channel, Continent Cut off!’ *Fordham International Law Journal* 2017: 4, pp. 1175-1210.

<sup>9</sup> Judgement of the Court of 8 April 1976. Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena. Reference for a preliminary ruling: Cour du travail de Bruxelles - Belgium. The principle that men and women should receive equal pay for equal work. Case 43-75.