

— THE —  
HAMLYN  
LECTURES  
— 2020 —

*To be delivered online by*

# Eleanor Sharpston QC

Advocate General 2006 – 2020

Court of Justice of the European Union

## The Great Experiment: Constructing a European Union under the Rule of Law from a Group of Diverse Sovereign States

### Lecture 1:

**Thursday 29 October**, 18:00-19:00  
Hosted by Faculty of Advocates, Edinburgh

*Booking:*  
<https://www.eventbrite.co.uk/e/competing-claims-to-pre-eminence-and-the-lessons-of-history-registration-117632236185>

### Competing claims to pre-eminence and the lessons of history

*Chair:* Rt.Hon.Sir David Edward

### Lecture 2:

**Monday 2 November**, 18.00-19.00  
Hosted by Queens University, Belfast

*Booking:*  
<https://www.eventbrite.co.uk/e/the-hamlyn-lecture-2020-a-new-start-a-new-model-a-unique-challenge-tickets-122368644911>

### A new start, a new model, a unique challenge

*Chair:* Mr Brian Doherty,  
Previously Solicitor to the devolved government of Northern Ireland

### Lecture 3:

**Monday 23 November**, 18.00-19.00  
Hosted by the Honourable Society of Middle Temple

*Booking:*  
Middle Temple members -  
<https://www.middletemple.org.uk/civicrm/event/info?reset=1&id=40584>  
Non-Middle Temple members - please email  
[members@middletemple.org.uk](mailto:members@middletemple.org.uk)

### Taking stock and looking forward

*Chair:* Lord Anderson of Ipswich KBE QC

[www.law.ex.ac.uk/hamlyn](http://www.law.ex.ac.uk/hamlyn)

[www.cambridge.org/hamlyn](http://www.cambridge.org/hamlyn)



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## **The Great Experiment: Constructing a European Union under the Rule of Law from a Group of Diverse Sovereign States**

### **Synopsis**

#### **Lecture 1: Competing claims to pre-eminence and the lessons of history**

Over the centuries, European history has shown a great tendency to repeat itself. At different times, different powers have emerged and enjoyed regional (or wider) pre-eminence. From classical times onwards, trade has followed the flag. Law – or at least the influence of a particular legal system – has followed in their wake, imposed sometimes by consent, often by force. However, the impact of ‘new’ law is not uniform. The law of commercial relations is usually dictated by commercial power, whereas odd corners of private law or land tenure may cling stubbornly and successfully to previous socio-legal patterns and thinking. As a result, by the early 20<sup>th</sup> century the Europe of the nation states had become a patchwork quilt of different legal systems.

Individual systems have their strengths and their blind spots. Sometimes, they merely represent different ways of getting to approximately the same place. Does it really matter whether you must have ‘consideration’ (even if it is merely token) for a valid contract to come into existence, rather than needing to adhere to a particular set of formalities laid down in a code? The influence of any particular system has waxed and waned with the power exerted by its sponsor. Imitation of others’ good ideas has always had its part to play. At the same time, pre-eminence begets rivalry as well as emulation. Alongside struggles for self-determination and independence, contention for economic dominance readily morphed into open conflict. The Great War, for all its carnage, failed to be ‘the war to end wars’. It was instead followed by severe economic depression that spawned more nationalism and isolation. Civilised nations with apparently well-developed legal systems proved vulnerable to toxic populism and totalitarianism and were unable to check gross violations of the most basic rights. World War Two left the continent of Europe shattered and in ruins. The rebuilding project did not merely require bricks and mortar. It called for a new vision of how to run economies and bring together legal systems so as to promote prosperity and safeguard fundamental rights.

#### **Lecture 2: A new start, a new model, a unique challenge**

The founding fathers of the new Europe were idealistic pragmatists. They began by putting coal and steel – the sinews of war – under joint control (thus making future conflict much more difficult) and concentrating on an economic common market with a common external tariff and support for agriculture. Very early on, seminal legal choices were made about the nature, role and authority of the new shared legal system – a system that had somehow to ‘dock’ with the individual disparate national legal systems of the constituent Member States. The doctrines of primacy, supremacy and direct effect, the principle of effectiveness (‘effet utile’) and the parameters of the system of remedies – all ‘created’ by the ECJ, but built on drafting endorsed by the Member States as the masters of the Treaties (‘die Herren der Verträge’) – have played an enormous part in shaping a union of states that is, necessarily and intentionally, radically different from a loose economic confederation linked by a standard international law treaty. The creation of the Area of Freedom, Security and Justice (the ‘AFSJ’), whilst essential, has introduced EU norms into parts of law – immigration law and asylum, police and judicial cooperation, criminal law, even family law – that are much more sensitive and closer to cherished concepts of the State’s imperium than laying down uniform standards for widgets.

As the project evolved from the European Economic Community to the European Community and then the European Union, it grew in membership, in diversity and in scope. That in turn posed an immense technical and intellectual challenge for the project’s legal system: EU law. To what extent can it (should it?) adjust, now that there are not six but 27 different national traditions and legal systems to be borne in mind? How should EU law

interact with national law (particularly national constitutional law and its national guardians, the national constitutional courts), with the ECHR and the 'Strasbourg court' and with international norms? How (and why) is a European Union under the rule of law different from a union based on shared economic or political aspirations that can be horse-traded away if times and popular thinking change?

### **Lecture 3: Taking stock and looking forward**

The last few years have not been plain sailing. The financial crisis, the rise of new competing economic powers, major concerns as to security and terrorism, challenges ranging from climate change and the environment to the refugee crisis to technological restructuring, the UK's painful and time-consuming withdrawal from the project, resurgent populism, the Covid-19 pandemic: all have, in different ways, exposed vulnerabilities and emphasised areas where closer cooperation may be difficult, but is also vital.

Both Economics 101 and Politics 101 tell us that inter-state cooperation is not an optional extra – it is mandatory. How does the European project need to evolve to live up to its founders' ambitions and dreams? How do we create a citizens' Europe, which ordinary people understand and with which they identify? What aspects of the old can perhaps now be discarded, and what, on the contrary, must be safeguarded and strengthened? How do the mechanics and structures of EU law – its legislative process; its supreme court – fit into this jigsaw?

No crystal ball is to hand to provide simple and obvious answers to any of these questions. Yet history warns us that we have to find solutions if we are to take the project forward. Has the trauma (and tedium) of Brexit created a corresponding siege mentality within the EU that will hamper creative thinking: an environment in which those who ask awkward questions will too easily be side-lined as 'disloyal' to the project? Or will there be, in the coming decade, the necessary intellectual space and freedom for true Europeans to 'prophesy, dream dreams and see visions'? EU law cannot of itself initiate that necessary inspiration. It can, however, be used creatively – in the future as throughout the story so far – to put flesh onto the bones. As a necessary corollary to that, it will be vital to ensure that the European Union continues as a project firmly and reliably under the rule of law, for the sake both of its citizens and of all who have dealings with it.