



Making **COMMUNITY LAW**

*The Legacy of Advocate
General Jacobs at the
European Court of Justice*

Edited by
Philip Moser *and*
Katrine Sawyer

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Philip Moser

Barrister, Monckton Chambers, London, UK

and

Katrine Sawyer

*Barrister, Hailsham Chambers, London, UK and Référendaire,
European Court of Justice, Luxembourg*

Foreword by Sir Christopher Bellamy, President, UKAEL

Preface by The Right Honourable The Lord Slynn of Hadley

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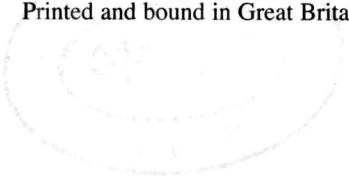
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Making Community Law

'Civis Europeanus sum'
AG Jacobs in Case C-168/91 *Konstantinidis*, Luxembourg,
9 December 1992

Contributors

Anthony Arnall, Birmingham University
Catherine Barnard, Trinity College, Cambridge
Paul Craig QC, St John's College, Oxford
Christopher Morcom QC, Hogarth Chambers
Philip Moser, Monckton Chambers
The Rt Hon. Lord Justice Mummery
Richard Plender QC LLD, 20 Essex Street
Sara Poli, University of Rome
Katrine Sawyer, European Court of Justice
Advocate General Eleanor Sharpston QC
Takis Tridimas, Queen Mary, University of London
David Vaughan CBE QC, Brick Court Chambers
Stephen Weatherill, Somerville College, Oxford
Richard Whish, King's College London

Editors' note

The inspirational ideas of The Rt Hon. Professor Sir Francis Jacobs are collected here for the first time in one volume, in a book that has emerged out of a UKAEL conference held at the Middle Temple on 30 June 2006 in celebration of Sir Francis's eighteen years as Advocate General at the European Court of Justice.

We are pleased that it has been possible to collect the thoughts of fourteen leading practitioners and academics in the field of EU law, and in particular that the book includes contributions by both Sir Francis's predecessor and successor at the Court. Each chapter deals with a discrete topic, ranging from human rights to the temporal limitation of Court judgments and from competition to citizenship. The development and current state of EU law is discussed and described by specialist authors, with specific reference to the opinions of Francis Jacobs. Each author also expresses his or her own views as to the future development of the law in their area. The majority of the contributions are based on the authors' lectures at the June 2006 conference, whilst Chapters 8 and 9 have been written specially for this book.

In our Introduction we aim to give a flavour of the chapters that follow it and to distil the essence of what makes a Francis Jacobs opinion. In the Annex to this book the reader will find a list of Sir Francis's opinions from 1988 to 2005.

We would like to thank all those who have contributed to this book and all those at UKAEL and Edward Elgar Publishing who have made this publication possible. The editors intend to blame each other for any errors or inaccuracies in the text.

Philip Moser
Monckton Chambers
Gray's Inn, London

Katrine Sawyer
Hailsham Chambers, London and
European Court of Justice, Luxembourg

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Foreword

Sir Christopher Bellamy QC¹

This book arises out of the successful and well-attended conference which the United Kingdom Association of European Law, UKAEL, organized in the summer of 2006 to celebrate the 18 years of service given by one of our most distinguished members, and Vice President of this Association, Sir Francis Jacobs KCMG, as Advocate General at the European Court of Justice.

The UKAEL exists to foster the sound development of European Community law by organizing lectures, conferences and other occasions at which important issues can be discussed in depth between academics, judges, practitioners, administrators, students and all those interested in the subject matter. Our strong links with the Court of Justice and other European institutions, with our sister associations in the Member States through *Fédération Internationale de Droit Européen* (FIDE), and with the universities, enable this Association to bring together distinguished participants from many different backgrounds, as shown by the contents of this book.

The following chapters will highlight Francis's many achievements and discuss his brilliant and wide-ranging, and often courageous, contributions to many diverse fields of Community law. I of course associate myself with all those tributes and will, if I may, add just one remark. What is not perhaps generally known is Francis's work behind the scenes at the European Court to improve the functioning and effectiveness of that institution. Francis was there when the Court of First Instance was set up in 1989 and helped smooth some of the initial difficulties; Francis helped the evolution of the Court through no fewer than three treaties, Maastricht, Amsterdam and Nice. I would mention in particular his work on the ECJ/CFI *comité mixte* which worked up the Court's proposals for the Treaty of Nice; and more recently his work, at the invitation of President Skouris, as rapporteur and moving force behind some of the more recent procedural changes that the Court has introduced. Francis's contribution to the way in which the Court has evolved to meet the challenge of its expanding caseload is in my humble view one of his major achievements.

¹ President, UKAEL; former judge of the Court of First Instance and former President of the Competition Appeals Tribunal.

I trust that the reader will enjoy and profit from the discussion in this book of some of the themes that emerge from the opinions given by an outstanding Advocate General between 1988 and 2006.

Preface

The Rt Hon. The Lord Slynn of Hadley*

The papers published in this book reflect and expand on speeches at a conference held in the Middle Temple on 30 June 2006. It was a warm, friendly, at times jolly, occasion when former colleagues and students of Francis Jacobs met to pay tribute to his work and to celebrate the Knighthood conferred on him on retirement as an Advocate General of the European Court of Justice.

Only a few people's career in the law in this country have been so devoted to matters European. He began his academic work of course on a broader (or should it be narrower?) basis – jurisprudence at Glasgow and 'law' at the London School of Economics. But the attraction of 'Europe' for him was evident from the beginning and it is in retrospect not surprising that he felt the urge to work at a European institution. When he was ready for that, however, the European Communities Act 1972 was not in force and so the right place to go, perhaps the only appropriate place for him to go in 1969, was to the Commission of Human Rights of the Council of Europe at Strasbourg. It was there that I first met him during the early cases in which the United Kingdom was a party or an intervener and he was a very valuable contact to ask about the procedures which the English team had to follow and which obviously were very new to us. It was not only appropriate that he went to Strasbourg but also in the long run beneficial for his future work both in the United Kingdom and in Luxembourg. His book jointly with Robin White on the European Convention of Human Rights in 1975, an early contribution on this subject by British lawyers, was widely used and appreciated.¹ As the European Court of Justice developed notions of human rights law, his knowledge of the jurisprudence on the Convention, his experience in Strasbourg and his enthusiasm for the subject affected both his teaching and writing and his opinions for the Court of Justice in Luxembourg. That experience, coupled with two years as

* The Rt Hon. Lord Slynn of Hadley, Lord of Appeal in Ordinary; former Advocate General (and Sir Francis Jacobs's predecessor) and Judge at the Court of Justice of the European Communities.

¹ Now C. Ovey & R. White, *Jacobs and White, The European Convention on Human Rights*, 3rd ed (Oxford: OUP, 2002).

one of J.P. Warner's Legal Secretaries, between 1972 and 1974, laid the foundations for his future career in the law-making process.

However, human rights law and European law had begun to permeate the law faculties and King's College, University of London, was one of the leaders in the field. It wisely appointed him Professor of European Law as early as 1974 and as Director of The Centre of European Law in 1981.

Fourteen years of academic work, principally in European law, not only gave him a pre-eminent knowledge and status in the United Kingdom as a European law specialist, but it also meant that he was well known amongst Judges and Advocates General of the Court, many of whom had held academic posts. He was nominated by the United Kingdom and in 1988 appointed as an Advocate General of the Court. He thus arrived at the Court of Justice with a considerable knowledge of the legal structure of the Community and particularly the jurisprudence of the Court and the Court of Human Rights, whereas in the nature of things, Jack Mackenzie Stuart, J.P. Warner and I had largely to pick it up as we went along.

In the following seventeen years he wrote very many opinions, as the chapters in this book demonstrate. But he did more. He was a prodigious participant at conferences in Community law throughout the Community – indeed if conference organizers wanted an Advocate General to contribute, they usually, if not invariably, began by inviting Francis Jacobs. He did it so well that he himself found it difficult to say no. His contribution to law journals and the literature of Community law has been no less voluminous and important. His participation in the production of the Yearbook of European Law, even before his appointment, and in other journals such as the Common Market Law Review, the European Law Review, and the Cahiers de Droit Européen made considerable demands on his time when already he held an appointment itself very demanding. He continued throughout as a member of the Board and Vice-President of the United Kingdom Association for European Law and as a member of the Council of the King's College Centre.

However, in the end it is to his opinions at the Court that one must turn to see his contribution and the chapters in this book rightly pay warm tribute to that, both as to content and style and originality. I asked when invited to write this Preface whether I should comment on his 'top ten cases' and I was told firmly, and rightly, that I should not be concerned about that. The essays spoke for themselves and the editors were in any event going to write a thorough first introductory chapter on the law and King's was going to do a *festschrift*. So in effect I should write a short preface to the man rather than to the book. It is impossible, however, not to say two things. In the first phase of seventeen years in post there are few areas of Community law with which Francis Jacobs did not deal in these opinions and not many fewer where his opinions did not have a significant impact on the law directly or indirectly. That was so whether

or not the Court wholly followed him. Many of his opinions provided fruitful material for the academic lectures of others – *Hag II*² is a good example – though my own view on first reading his opinion in that case was that his academic opinion in *Hag I*³ produced a better result. That, however, was a minority view. *Konstantinidis*,⁴ which Henry Schermers enjoyed lecturing about in a mirthful way; *UPA*⁵ which advocated a loosening of the *Plaumann*⁶ test, a result I had quietly lobbied for since 1981 (thereby shocking the President of the Court who did not approve of the Court reversing its earlier decisions) to no effect except in the case of the *Chilean Apples*.⁷

In the second place I pay tribute to the quality of the opinions apart of their jurisprudential correctness. His analysis and exposition of the points in issue is admirable and never pedestrian, as sometimes in the process of the domestic law courts one is almost inevitably driven to be. This I think explains why, when I asked him when I was leaving the Court ‘do you want to be considered as a judge?’ he firmly said no. I am sure that temperamentally that was a right decision for him. Moreover, it had the great advantage that he could write in depth, without being unnecessarily diffuse, and at the same time concentrate on the quality of expression (if you like the poetry as well as the clarity). The influence of such writing, exploratory and creative, may have a longer-term effect on the development of the law than the short-term importance of the immediate disposal of the case. In his case the confidence which came from his experience enabled him to be exploratory and creative. For myself I have not yet decided whether it is more agreeable to be ‘in at the kill’ (the judicial process) or to be able to write language and conclusions which afterwards are important in the long term. Francis Jacobs clearly decided this question for himself. Whichever is individually the more agreeable, in Francis’s case being highly respected by his colleagues, he has made an important contribution which is there for the future.

His opinions on the free movement of goods and intellectual property; on free movement of people linked to the principles of human rights law; on taxation and, so important, the concept of the legal system as part of the Constitution of the Community are well known. These and many other cases are analysed by distinguished professors of European law in this book and it is not the function of the Preface writer to repeat them. On any view now that

² Case C-10/89 *CNL-Sucal v HAG GF* [1990] ECR I-3711.

³ Case 192/73 *Van Zuylen v HAG* [1974] ECR 731.

⁴ Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

⁵ Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

⁶ Case 25/62 *Plaumann v Commission* [1963] ECR 95.

⁷ Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477.

he is back here there will be a great deal more for him to write about, if not *ex cathedra*. I anticipate, I hope, I am sure that he will continue to write and to lecture for everyone's benefit.

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