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Symposium on EU Law: Developments in Honor of Judge Konrad Schiemann

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INTRODUCTION

SYMPOSIUM ON EU LAW: DEVELOPMENTS IN HONOR OF JUDGE KONRAD SCHIEMANN

Judge Konrad Schiemann served on the Court of Justice as the Judge named by the United Kingdom from January 2004 to October 2012. As a member of the Court, he demonstrated that he was a worthy successor in a distinguished line of judges, most recently Gordon, Lord Slynn of Hadley and Sir David Edward. The Current symposium of EU Law is accordingly a due tribute to Judge Schiemann on the occasion of his retirement.

After obtaining his law degree at Cambridge University, Konrad Schiemann enjoyed a successful career as Barrister from 1964–1980, and then as Queen’s Counsel, 1980–1986. Named Justice of the High Court in 1986, he served until 1995, when he was elevated to become Lord Justice of Appeal, serving in that capacity until 2003.

Judge Schiemann’s choice for designation to the Court of Justice was highly appropriate, because his unusual personal history has given him an extraordinary dedication to European integration. Born in Germany in 1937, he was a young child in Berlin during the War years, and lost his father at that time. His mother courageously escaped with him to Munich just before the Soviet army occupied Berlin. Soon thereafter, upon her death, his maternal uncle brought him to England.

It is too often forgotten today that the creation of the European Economic Community in 1958 was intended to promote reconciliation among the founding six nations, as much as to achieve the benefits of economic integration through the achievement of the common market. Judge Konrad Schiemann always regarded his career at the Court of Justice as his personal contribution to the cause of “an ever closer union among the peoples of Europe,” the crucial goal that every treaty down to the Treaty of Lisbon has stressed.

The present symposium on EU law consists of eight contributions on highly-diverse topics. It is only appropriate to begin by nothing those authored by Judge Schiemann's colleague, Judge Koen Lenaerts, and his predecessor Sir David Edward.

Judge Koen Lenaerts has acquired a deserved reputation as a remarkably acute constitutional jurist. His article, "How the ECJ Thinks: A Study on Judicial Legitimacy," provides a fascinating analysis of the Court, as a "constitutional umpire," in adjudicating between competing interests within a democratic society. Judge Lenaerts addresses initially the court's role in interpreting and applying EU legislative acts in a variety of sectors, developing fundamental doctrines of proportionality and legal certainty. He then considers the Court's role in balancing EU and Member State interests, first in the context of harmonized rules, and then in their absence.

Sir David Edward, both as Judge during 1992–2004, and as an academic, is also renowned as a constitutional scholar. His essay, "EU Law and the Separation of Member States," is a novel, yet sophisticated, probing of the constitutional, legal and political issues for the EU in the event that a constituent part of a Member State should obtain independence. Although presently unlikely, it is conceivable that Scotland should become independent from the United Kingdom, Catalonia from Spain, or Flanders from Belgium. Sir David Edward's essay carefully reviews the status of each within the constitutional structure of each one's current national system, and then provides thoughtful reflections on how the EU constitutional structure might, or might not, accommodate the newly-independent states as "successor states" with rights of membership subject to necessary negotiation. The essay is simply fascinating.

Professor Paul Craig, one of the most senior UK academics specializing in EU law, also analyzes a constitutional subject: "EU Accession to the ECHR: Competence, Procedure and Substance." Both the Court of Justice and the EU political institutional have long cited the European Convention on Human Rights as an authoritative source. Article 6 of the Treaty of Lisbon now mandates that the EU itself should join most European nations acceding to the Convention. The procedure of accession is, however, extremely complicated, ultimately

requiring the unanimous approval of all Member States and the consent of the Parliament, so that action will require considerable time. Professor Craig analyzes the complex procedural situation confronting parties seeking to rely on the Convention in EU national courts as well as the substantive issues posed when the Court of Justice attempts to interpret and apply the Convention. His thoughtful article concludes by considering how the Court might deal with textual differences between the relatively brief Convention and the far more detailed Lisbon Charter of Rights.

Two other articles have a constitutional flavor, although concentrating on technical issues. Professor Laurence Gormley, also a senior EU law specialist and a frequent contributor to the *International Law Journal*, has authored “Access to Justice: Rays of Sunshine on Judicial Review or Morning Clouds on the Horizon?” His article describes the rather narrow approach taken by the Court of Justice prior to the Treaty of Lisbon in determining whether private party litigants could have standing to appeal acts of the institutions. The Lisbon TFEU Article 263 deliberately broadens the ability of private litigants to appeal such acts, but the text is by no means crystal clear. Professor Gormley analyzes the language and its interpretation to date, particularly with regard to “regulatory acts.”

One of the most striking examples of “judicial activism” by the Court of Justice in recent years has been its expansive protection of the rights of citizens of the Union and their families. Professor Catherine McCauliff’s article, “EU Citizenship: Why Can’t the Advocates General Keep Sheila McCarthy’s Family Together?” initially provides a valuable examination of the influence that Advocates General exercise on the evolution of Court doctrines. Professor McCauliff then concentrates on a controversial 2011 Court judgment, *McCarthy*, whose fundamental issue was how the Court’s evolving views on the rights of residence of family members of EU citizens should be applied in a case concerning a family that had always resided in the UK and had never moved to any other Member State. The Court held that its internal affairs doctrine prevented EU law from having any application to the case, disregarding the suggestion of the Advocate General to the contrary. The Article carefully analyzes the relevant precedents,

and contends that the Court has lost an opportunity to expand the scope of EU citizenship rights.

A leading authority on international banking and monetary law, Professor Rosa Lastra, has contributed “Banking Union and Single Market: Conflict or Companionship?” As she initially states, “[t]he twin banking and sovereign debt crises in the Euro area have evidenced the inadequacy of the principle of decentralized banking supervision in a monetary union.” But how to achieve adequate EU-level supervision? Professor Lastra describes the initial 2010 proposal for a regulation authorizing banking supervision over banks in the Euro area States, its endorsement by the European Council, and the evolution of the legislative text toward its final form in December 2012. Her article carefully delineates the powers and tasks accorded to the European Central Bank by the regulation in order to enable prudential banking supervision within the Euro area. Although the article is certainly technical, its value is undeniably high.

Peter Oliver, a senior Legal Advisor in the Commission Legal Service and a frequent contributor to the *ILJ*, turns our attention to new developments in environmental protection through his article, “Access to Information and to Justice in EU Environmental Law: the Aarhus Convention.” In 2005, the Council of Ministers subscribed to the Aarhus Convention, prepared by the UN Economic Commission for Europe. All the EU Member States and twenty other nations are parties. The Convention’s goal is to promote the rights of private parties to have access to information, to participate in decision making and to obtain judicial recourse in the field of environmental protection. The article provides a valuable analysis of the Convention, complementary EU legislation, and relevant Court of Justice judgments.

Dr. Rafael Leal-Arcas, a UK senior lecturer in law, and Andrew Filis, his research associate, have provided a timely and important article in another sector, “Conceptualizing Energy Security Through an EU Constitutional Law Perspective.” The EU Member State governments have traditionally regulated enterprises that provide and distribute crucial forms of energy. The EU institutions have however in recent years moved from purely collaborative efforts to the adoption of structural measures in order to achieve greater integration in specific

energy sectors. The article provides valuable background information, a description of legal aspects of energy policy, especially as enhanced by the Lisbon Treaty, and the constant challenges in attempting to develop a coherent EU energy security policy.

Altogether, the eight articles constitute a valuable and quite varied survey of current issues in European Union law, a highly appropriate tribute to Judge Schiemann.

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