The Practice, Procedure and Working methods of the European Court of Justice.

Judge G. Federico Mancini

1. It is a great privilege and a signal honour to have been invited to address such a distinguished group of Judges, advocates and senior officials of New South Wales [and of the federal government]. The fact that so many representatives of those professions are present today in the Function Room is not only flattering. It confirms a sentiment which I tried to convey yesterday morning to the graduates of U.N.S.W.: that the mists of what one commentator has called "Australia's collective amnesia" as regards Europe are lifting. By this I mean that real efforts are being made in Australia to more accurately reflect its rich ethnic diversity by forging links with continental Europe. This is a truly heartening development. From a European perspective it is just as heartening to see an increasing number of European businessmen and intellectuals awakening to the beautiful and vigorous country which lies 30 hours away by air. Doesn't my presence here today bear witness to this.

   Before delving into the nitty gritty of the organisation, practice and working methods of the Court of Justice as prescribed by the Treaties governing the European Union, the Statute of the Court and its Rules of Procedure, I feel that it is vital to convey the extraordinary context in which the Court functions.

   Amongst the judicial organs presently in operation in the western world the Court of Justice is indeed unique in many respects: the native tongues of its 15 Judges are 11 in number; of the States from which they originate seven are monarchies and eight are republics; nine have a unitary structure, while six are divided into regions with varying degrees of autonomy; eight have some form of judicial review of legislation, while in seven of them such a concept is alien or downright blasphemous; two possess a legal culture moulded by centuries of judge-made law, whereas lawyers in the other 13 have been brought up to believe that law-making is strictly the function of the legislature. No less importantly, and central to the talks which I am giving in the course of what is proving to be a magnificent week, the polity which has its judicial branch in Luxembourg has grown into something more than an international organization, but it has not yet become a State. Moreover, its foundations are in a state of constant flux. Suffice it to remember that during its semi-secular life it has undergone two major constitutional reforms and is now on the verge of a third and that, whereas it initially had a single source of legitimacy - the will of the Member States -, it has since acquired a second one, in the shape of the election by direct universal suffrage of a Parliament now endowed with significant budgetary and legislative powers. These and other characteristics of the European Union help to make the Court of Justice an unprecedented and unparalleled institution.

2. In detailing the practice and procedure of the Court, let me first explain the composition of its judiciary, which is governed by Articles 165 to 168A of the EC Treaty. Prior to the events of 1995, when Austria, Finland and Sweden acceded to the Union while Norway decided to stay out, the Court consisted of thirteen Judges, twelve of whom were selected by their respective

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Member States, and one chosen on a rotational basis by the five large States - France, Germany, Italy, Spain and the United Kingdom. In 1993 this practice was confirmed, but it was also determined that if an odd number of States were to accede, thus rendering the number of Judges even, the additional Judge could be allowed to become an Advocate General. This is exactly what happened and this is the reason why the EC Treaty now provides for 15 Judges - namely, for as many Judges as are the States composing the Union. It remains to be seen what will happen if and when the Union is enlarged and whether what is already, primarily for linguistic reasons, a rather ponderous judicial system, will be able to accommodate a similar one-State-one-Judge rule. Personally, I believe that this rule will have to be forsaken, even if I appreciate the danger that its abandonment would pose to the acceptance of the Court's rulings in the States which would no longer be represented.

The appointment of the Judges of the Court is required by Article 167 to be made "by common accord of the Governments of the Member States". In practice, as I have just pointed out, Judges are nominated by their national governments and an unwritten rule, which to date has been scrupulously observed, dictates that the other Member States acquiesce. Judges are appointed for a six year term of office, which is renewable. The appointment of new Judges and the reappointment of existing Judges are staggered so that there is a partial replacement of Judges every three years - a device intended to ensure that the work of the Court is disrupted as little as possible.

In recent years there has been a tendency in Europe's "Eurosceptic" media to slate the quality of the members of the Court of Justice when decisions perceived as encroaching on the sovereign rights and the interests of one or other Member State are handed down in Luxembourg. Indeed the British press, some of it owned by an erstwhile Australian, has been in the van in this regard. If one looks at the criteria for the appointment of members of the Court, however, this sort of criticism is clearly both misplaced and ill-informed. Pursuant to Article 167, Judges of the Court must be "persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence." This means that the Court is comprised of members who have served as Judges, prosecutors or senior government officials, but also of members who have worked as leading practising advocates and academics. Actually, in today's Court all of these professions are evenly represented.

3. As regards the legitimacy of the Court and the security of tenure enjoyed by its members, the Treaty provisions can be considered, at the very least, curious, when compared with the rules governing other supreme courts whether at national or international level. Although it is quite clear from Article 167 that nominees must be of the highest quality, the standing of the Court of Justice is prejudiced by the brevity and the renewable character of the term for which they are appointed. Indeed, few judicial bodies of the same calibre are so lacking in

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links, direct or indirect, with the symbols of democratic government and in few countries of the Western world is the judiciary so bereft of formal guarantees of its independence. The distinct independence demonstrated by the Court in the course of its life and the moral authority which it has acquired over the years are therefore essentially due - embarassing as it is to admit it - to the robustness of the men who have sat on its benches and to the persuasiveness of their jurisprudence.

The Court is obviously aware of the deficiencies of the rules governing the appointment and the tenure of its members. Thus, in a document prepared in view of the Intergovernmental Conference which was concluded by the Member States last June in Amsterdam, it suggested that a longer and unrenewable term of office would strengthen the independence of the Judges. On the other hand, while not ruling out an involvement of the European Parliament in the appointment procedure, the document clearly opposed the proposal that the nominees be heard by a Parliamentary Committee along the lines of the confirmation procedure in the U.S. Senate, since they would be unable adequately to answer the questions put to them without prejudging positions which they might have to adopt once appointed. Unfortunately, however, none of the Court's proposals regarding the rules governing its organisation and composition were taken on board in the draft Amsterdam Treaty.

A related issue is that of the Court's representativeness. In one sense the Court is highly representative. Its composition reflects Europe's ethnic diversity with great precision and the appointment of its members by the common accord of the governments contributes to making it politically balanced. Since each Judge's term of office expires after six years and since governments change with equal or greater regularity in most Member States, it is in fact likely that at any given time roughly half the members of the Court will have been nominated by a conservative administration and roughly half by a socialist or liberal one. In another sense, however, the Court is extremely unrepresentative. Of all its members since 1952, only one, the French Advocate General Simone Rozès, was a woman.

4. This last remark leads me to the next fascinating aspect of judicial life in Luxembourg - the role of the Advocates General. As I shall point out in greater detail, the fabric of the Community judiciary was originally, and is still to this day, strongly affected by French legal thinking. This influence is particularly evident as regards the office of Advocate General. Its denomination is borrowed from French criminal procedure where the Avocat général plays the role of prosecuting counsel and its functions are equivalent to those of the Commissaire du gouvernement at the French Council of State and the administrative tribunals.

While the method of appointment and the conditions of office of the Advocates General are the same as those applicable to the Judges, although they do not take part in the election of

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the Court's President, their number, national origins and system of rotation are remarkably different. Essentially each of the five large Member States has one permanent member, while three posts are filled by the remaining ten States on a rotational basis. Thus, Germany, France, Italy, the United Kingdom and Spain may always count on putting forward one Advocate General. The others are presently from Ireland, Greece and Luxembourg and their posts will become available to Austria, the Netherlands and Portugal in 2000 and 2003, respectively.

In accordance with Article 166 of the EC Treaty, an Advocate General is entrusted "to make, in open court, reasoned submissions on cases brought before the Court of Justice" with complete impartiality and independence. There is no doubt that the Opinions of the Advocates General, which are followed by the Judges in possibly 70% of the cases, have proved both useful and influential. They tend to provide an exhaustive account of the law governing the issues in the case, sometimes enriching it with comparative surveys also of the laws and the jurisprudence of the U.S., Canada and Australia, and are often a welcome explanation of what are otherwise, as some would say, excessively concise judgments.

5. The jurisdiction of the European Court of Justice, unlike for example that of the U.S. Supreme Court, is mandatory. In other words, we are precluded from deciding what to decide. Under this rule, in 1996, the Court reached 219 decisions, 59.8% of which were rulings on preliminary references, and it put an end to 349 cases. On average it took 20.8 months for preliminary references to be concluded, 19.6 months for the conclusion of direct actions and 14 months to conclude appeals. These are undoubtedly extremely long delays, particularly as regards preliminary references, since - as we shall see - somewhere in the European Union a national court is waiting for a response from Luxembourg before determining the outcome of the main case; but the language difficulties facing the Court of Justice which I touched on at the outset and with which I shall shortly deal in more detail are of such magnitude as to defeat all the attempts which the Court has made so far to shorten those delays. In the same year, 423 new cases were introduced so that by 31 December 1996, 694 cases were pending before the Court. It may be of interest for those of you who wonder about the range of the Court's jurisdiction to know that of the new cases, 20 related to competition and public procurement, 55 to agriculture and fisheries and 31 to free movement of goods. By comparison, free movement of persons gave rise to 69 cases, social policy to 42, environment and consumer protection to 36 and taxation to 29.

   In order to ensure that its docket is handled as speedily as possible, the Court refers most of its cases to chambers of three or five Judges. The chambers number six in all and none of them is specialised in any particular kind of case. Judges who have dealt previously with certain specific issues may find, however, that they are called on to act as Reporting Judge in a case involving similar or related issues. As a result of this practice, one of the Court's Judges

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has become intimate with the intricacies of the European wine market, while others hold sway in their knowledge of milk quotas, the protection of wild birds or the rights of Turkish workers resident in Germany and the Netherlands.

Only cases raising novel or important problems are decided in plenary session, which may involve eleven or fifteen Judges, the so-called petit and grand plenum. In recent months cases allotted to the small and large plenary court have ranged from the ongoing dispute about the seat of the European Parliament, which is regarded as a matter of great political sensitivity, to issues never previously addressed, such as the questions whether Sweden's State alcohol monopoly hinders the free movement of goods in the single market, whether France can be held responsible for the damage caused on her territory and by her angry farmers to Spanish exporters of strawberries or whether the European Community's legislation on sex discrimination covers homosexuals.

6. So far I have only been referring to the Court of Justice as a judicial organ. As one of the institutions of the European Union, however, the Court comprises two bodies - the one of which I am a member and a Court of First Instance. While administratively the two bodies are part of a single structure, receiving an annual lump sum from the Community's budgetary authority, judicially they are separate. The Single European Act, which inserted in the Treaty Article 168A, empowered the Community's legislature, namely the Council of Ministers, to create the Court of First Instance which was designed to be "attached to the Court of Justice with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only ..., certain classes of action or proceeding ..."

   Jurisdiction was initially only conferred on the new Court in staff and competition cases. In 1993 the Council decided to transfer to it all proceedings commenced by natural or legal persons and a regulation of 1994 empowered it for the future to hear cases on trademarks. Nowadays, therefore, the only cases which the Court of First Instance is precluded from hearing are those originating in actions brought by Member States or Community institutions and preliminary references from national courts.

   As in the case of a normal judicial hierarchy, the Court of First Instance is subordinate to the Court of Justice. Nevertheless, the jurisdiction of the two Courts may sometimes overlap, as when parallel cases on the same or connected issues are before them, one having been instituted by a Member State, the other by a natural or legal person. The most notable recent example of this are the increasing number of cases brought simultaneously by the British government and the National Farmers' Union as a consequence of the ban adopted by the European Commission against the export of beef from the United Kingdom - Europe's infamous mad cows. The most significant aspect of the relationship between the two Courts, however, is, as we have seen, specified in Article 168A, when it provides that an appeal, as

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occurs in the case of continental courts of cassation, only lies to the Court of Justice on a point of law. The Court has narrowly defined this notion and, as a rule, has so far exercised great restraint on appeal.

7. When talking about the oral and written phases of European Court procedure, a distinction must be drawn between direct actions and references for preliminary rulings, although by and large the respective procedures are similar. Preliminary references are made by a national court pursuant to Article 177 and their aim is to obtain a decision from the Court of Justice on a point of Community law necessary for the resolution of the case pending before the former. Most states in the U.S.A. have a similar, although inverted, procedure by which a federal court called upon to apply state law, but uncertain about the content of that law, can ask the highest tribunal of the state concerned to enlighten it in this regard and hold the federal case in abeyance pending the state court's response to its question. In contrast, direct actions are brought before the European Court by Member States or Community institutions and aim at the annulment of a Community act or at a judgment declaring that a certain Member State (it is, I'm afraid, often the case of Italy) is in violation of the Treaty.

   The written and oral proceedings when a question is referred from a national court to the Court of Justice are commenced as soon as the order for reference is lodged at the Court. How should this order be drafted? While it is true that the Court of Justice gives "abstract" answers - namely decisions capable of being applied not only by the Referring Judge in the instant case but also by any Judge in the European Union who is faced with a similar problem - the Court insists on being informed about the factual and legal context in which the issue of Community law arises. The questions posed by the national court must also be indispensable for its resolution of the dispute which pends before it, implying that the litigation itself must be genuine. Although, as I mentioned above, the Court is precluded from operating a system of docket control, failure by a national court to fulfil this latter condition has sometimes led the Court to refuse to answer the preliminary reference. By contrast, when a genuine controversy is thought to exist but the questions referred to the Court are couched in imprecise terms, the Court has no qualms about reformulating them.

   By and large, it must be admitted that the Court of Justice has not yet succeeded in imposing on national courts a common model of order for reference. Some of them do provide an extensive explanation of the legal and factual background, stating their own analysis of the issues. Others, however, send no more than the national file with a list of questions to be answered, assuming that the facts are of little or no importance, since the Court is concerned with questions of law only, or taking it for granted that the Court is familiar with all the relevant Member State law. This is flattering, but not very realistic. The member of the Court belonging to the State from which the reference comes may be able to help, as may the Court's Research and Documentation Division, but in the main the Court

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has to rely heavily on the parties and the European Commission in its capacity as amicus curiae, to obtain the information it needs.

The Court's statistics reveal that lawyers are, to an increasing extent, using Community law to seek a remedy or a defence for their clients which national law does not afford. This may explain why preliminary references now account for almost 60% of the Court's case load: an extraordinary development if one thinks that it took 4 years for the first reference to be lodged at the Court, causing, as legend has it, an abundant popping of champagne corks in the deliberation room in Luxembourg. If we uncorked champagne today for each reference we receive, the majestic but irritable Lord Chancellor who some years ago described our life-style as extravagant would be, as he certainly was not at the time, entirely right.

As soon as proceedings in a preliminary reference have begun, the Court must notify this and all other procedural steps to the parties in the main proceedings and to the national referring court. In addition, the Court must translate the text of the reference into the ten remaining official languages of the Community for notification to each Member State, to the Commission and, in certain cases, to the Council of Ministers and the European Parliament. Once the reference is notified, the addressees have two months in which to lodge written observations.

8. A direct action, for example actions instituted by the Commission against a defaulting Member State under Article 169, or actions for the annulment of Community legislation pursuant to Article 173, commence with the filing of an application with the Registrar, setting out the subject of the dispute, the grounds for the application and the form of the decision being sought. The importance of the application lies in the fact that it contains, for all intents and purposes, the whole of the applicant's case and that it circumscribes the subsequent scope of the action. If the application is in a satisfactory form, it is served on the defendant who has one month to file his defence. The applicant can follow this with a reply and the defendant with a rejoinder which signals the end of the written procedure. All of the above documents are translated into French, the Court's working language. Once the initial application has been lodged, the Court has some discretion to extend time limits for filing written pleadings, which is particularly important when the Commission has brought a case against a Member State on the grounds that it has failed to fulfil its Treaty obligations: an extended period, indeed, enables the two parties to engage in negotiations for a settlement. By contrast, no extended time limits are possible in actions for the annulment of Community measures.

   Each case, whether a preliminary reference or a direct action, is assigned by the President of the Court to a Reporting Judge soon after the order for reference or the application are lodged. The task of the Reporting Judge is to steer the case through the various stages of the

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procedure and to draft the judgment of the Court. Each case is also assigned by the First Advocate General to one of his colleagues, whose task, as we have seen, is to present an independent opinion setting out his personal view of how the case should be resolved. Once all the written pleadings are lodged and translated into French, the Reporting Judge prepares and presents to the Court and the parties a report for the hearing summarising the facts of the case and the parties' arguments. He also submits a shorter and more personal report to a general meeting of the Court's members indicating if and what additional questions should be posed to the parties, what issues of fact need to be proved and suggests whether further enquiries must be made such as the production of documents, the supply of information or the commissioning of an expert's opinion. The parties may request a hearing which is usually short, with the lawyers' submissions rigorously limited to 30 minutes pleading time. These submissions are simultaneously translated into several languages - the language of the case, the internal working language of the Court and the languages of the sitting Judges, Advocate General and Registrar. The hearing is followed, within a period of variable length, usually about 6 weeks, by the Opinion of the Advocate General.

9. A crucial aspect of the Court's work is that it operates as a collegiate body: in other words, if a Judge, even when holding the office of Reporting Judge, disagrees with the majority opinion or with its reasoning, he must still grit his teetch and sign the ostensibly unanimous decision. The brevity and the slightly oracular tone of our judgments, which this system inevitably encourages, will no doubt appear singular if not bewildering to an Australian eye, accustomed as you are to poring over what can sometimes amount to hundreds of pages of judicial erudition and learned debates among the Judges.

   The absence of a dissenting or concurring faculty is understandably regretted by several Court watchers; but I would suggest that few of the Judges would be willing to compromise the authority of the Court's rulings by openly revealing that it is divided on some issues. EC law is still in its adolescence and as Chief Justice Marshall recognised in the early days of the U.S. Supreme Court, a young judicial body administering and helping to create a new legal order has much to gain from cloaking any disagreement within its ranks. Indeed Marshall sought to solidify his Court by cutting down on the previous practice of each Justice issuing his own opinion seriatim; in most cases - 97% between 1811 and 1833 - he convinced his colleagues to reach a collective decision (usually written by him), thus enhancing the U.S. Supreme Court's authority by getting it to speak with one voice. It should be noted, however, that when the European Court is split on a highly contentious issue, the minority will often be able to bring their opinions to bear on the structure and the language of the judgment with often dubious consequences. When controversial passages are jettisoned one by one so that only the bare minimum of a draft more or less acceptable to all is retained, the result is at best an elliptical judgment; at worst a decision ambiguous on matters of importance or based on an intellectually dissatisfying reasoning.

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10. Let me now turn to other and no less important aspects of the Court's life. The hegemony which France as a political power (and hence French legal culture) exerted in the framing and the early application of the Treaties that gave rise to the European Community is evidenced in the first place by the monopoly of French as the Court's working language since 1952. Echoing Winston Churchill, one of my colleagues, Advocate General Jacobs, has recently written that "unlike the English and the Americans, who are divided by a common language, language differences in Europe do not prevent a common way of thinking". The irony of this remark hides an undoubted truth, at least to the extent that when, for example, I talk in French or English with my Greek, Danish or Finnish colleagues, we are not on different wavelengths.

    Nevertheless, the fact of having to speak French in the deliberation room and having to draft judgments in French, puts me at a definite disadvantage vis-à-vis my brethren from France, Belgium and Luxembourg. Being of course accomplished gentlemen, they would never consciously take advantage of my handicap; but the full mastery of a language - especially so noble and captivating a language - is an irresistible weapon; and the owner of that weapon will not be likely to refrain from using it. In my opinion, however, this situation is not destined to last forever. In the words, uttered in 1492, by the Spanish grammarian, Antonio de Nebrija, language is the companion of Empire. With the accession of Austria, Sweden and Finland, the French imperial monopoly has come under quiet attack, the force of which is bound to increase when new Member States from Central and Eastern Europe, where English or German are more commonly taught as second languages, accede to the European Union at the turn of the next century.

    The curt phrasing of the Court's judgments, its steering clear of obiter dicta and its refraining from ruling on questions wider than those necessary in the case, may also be attributed to the monopoly of French which, apart from being charming, is a rigorous and terse language - hence intolerant of the florid and the twisted. But the main cause of those aspects of our jurisprudence is, I believe, the powerful influence exerted on the Court by its early models, the French Council of State and Court of Cassation. Throughout the 1950s and early 1960s, indeed, the judgments of the European Court looked like a carbon copy of the decisions of these great judicial bodies: same conceptual frames of reference, same idiosyncrasies (such as a reluctance to use general principles of law), same method of exposition (for example, the opening of each paragraph with the words "considering that", which results in making the judgment look like a single, winding sentence).

    There is no doubt, however, that this subservience has receded with time. Germany, the other great powerhouse amongst the six original Member States, had too important and proud a legal tradition for the German Judges in Luxembourg to accommodate themselves to a backwater role in the development of the Community case-law. As a consequence, and

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perhaps in the wake of the growing prestige won by the Federal Republic as a State impeccably respecting the rule of law, a certain German approach to the study and the use of the law began to work its way into the jurisprudence of the Court. Its acceptance of the notion of proportionality - that is the idea that a public authority may impose on citizens, for the benefit of the public interest, only such obligations, restrictions and penalties as are strictly necessary for the attainment of the purposes pursued - is perhaps the most telling example of the German influence on the jurisprudence of the Court.

1973: enter the British and Irish Judges. They certainly enriched the cultural patrimony of the Court with rules and notions drawn from the common law (for example, estoppel), but their most conspicuous contribution was to the style and format of the hearings. The typical advocate in continental Europe is accustomed to put on his robe, make his submissions - would-be Cartesian in France, ornate in Italy, ponderous in Germany, entangled in the Netherlands, artful in Greece - and bid adieu. If a member of the bench dares to question, let alone interrupt him, he is at a loss, coughs, stares at the ceiling and grumbles out a usually irrelevant answer. Some go as far as to resent these judicial interferences, as they would call them, and make no effort to conceal their annoyance, the case of a German lawyer's gruff response of "nein", which was tactfully translated by an English-speaking interpreter as "I beg to differ from your lordship", being an eloquent case in point. The advent of the two insular Judges put an end to such habits in Luxembourg. Their colleagues loved their refusal to listlessly accept the kind of assistance which the lawyers were prepared to give them and started to act in a similar fashion. As a result, interruptions are now frequent and a question period has become a permanent feature of the hearings, much to their advantage in terms of usefulness and liveliness.

The accession of Greece, Spain and Portugal in the 1980s strengthened the warm concern for the plight of migrant workers which the Italian Judges and Advocates General had brought to the case-law of the Court since its inception. This southern leaning has since been complemented by the entry of Austria, Finland and Sweden, the latter two States laying considerable - and sometimes inordinate - emphasis on the need for greater accountability and transparency in the workings of the Community's institutions and therefore of the Court itself.

My concluding remark will touch again on a leit-motiv of this talk, the language problem. In spite of the frustrations suffered by the non-francophones and the inevitable delays which result from the fact that all Court documents must be translated into French, a strong case can be made for the obligation to deliberate and draft in only one language. Some of its positive effects are of a practical nature and are obvious: a decision-making process devoid of interpreters is clearly more efficient or, in any event, less cumbersome, than one which must rely upon them. Other effects are less obvious, but probably more important. In a microcosm

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whose inhabitants have such diverse roots the use of the same language, bringing with it shared access to the culture which finds expression in that language, facilitates the formation of an esprit de corps: in other words, it promotes that sense of togetherness without which an institution which is obliged to take several new members on board every three years and which acquires detractors in direct proportion to its increasing visibility could not function effectively or even survive. The withering of the monopoly of French to which I have alluded above may be therefore inevitable; but it should be viewed with apprehension, as a dramatic challenge to the nature of the Court I have known. Let me express the fond hope that my successors will be able to cope with it.

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