There has been no shortage of papers telling us what is wrong with the preliminary reference system and what should be done to put it right. Most of the problems are already self-evident. So are many of the proposed solutions but they are often mutually incompatible, or, while improving matters in one direction, would only make things worse in another. Some of them proceed from a national viewpoint that takes little or no account of the attitudes and traditions of other member states. Most of them could not be implemented without the unanimous consent of the member states — a scarce commodity.

What is surprising is not how badly, but how well the system still works. It was, after all, devised for a Community of six member states with broadly similar legal systems. Almost fifty years later, in spite of all the problems, references are made in ever-growing numbers, on an ever-expanding range of subject matter, by judges at all levels of the judicial hierarchy in 15 member states with widely differing legal systems and traditions. Given the workload and the complexity of some cases, most references receive an answer within a reasonable time. In all but a few cases, the Court’s judgments are available on the Internet in 11 languages by the evening of the day they are pronounced.

Inevitably, some judgments give rise to criticism, but not, proportionately, more so than the judgments of courts in the member states. In very few cases does the referring court make a new reference because the Court’s judgment was unhelpful or unclear.

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1 What is a “reasonable time” depends, of course, on one’s point of view. By the standards of some member states, the Court’s speed of reply is positively electric, and delay is a problem even for the best regulated national courts. In Case C-167/97, Seymour Smith & Perez [1999] ECR I-623, the claimants were dismissed by their employers and commenced proceedings in 1991. It was five years later, in December 1996, that the decision to refer was taken by the House of Lords. The reference reached the Registry of the Court in May 1997. The Court gave judgment in February 1999 (21 months from beginning to end). The House of Lords gave judgment in February 2000.
So Doomsday has not yet arrived, though it is clear that reform is necessary if the system is not to break down. Rather than add to the corpus of wish-lists and magic solutions, this paper approaches the problem by identifying the legal and practical constraints within which the Court has to work. These are the rocks past which reformers will have to navigate, and it is important to know where they are before setting out.

This approach will, it is hoped, put the proposals submitted by the Court to the Council on 28 May 1999 in context. Their adoption would provide the necessary breathing space for proper consideration of the long-term options. As regards the longer term, this paper points out some of the issues that need to be faced without necessarily offering a solution. The worst course of all would be to rush into radical changes without adequate assessment of their potential consequences.

The constraints on the working of the preliminary reference system fall into the following broad categories:

1. Procedural and structural constraints imposed by the basic texts (the Treaties, the Brussels and other Conventions, the Statute of the Court and the Rules of Procedure);
2. Linguistic constraints;
3. Constraints resulting from “cultural diversity” – the divergences between the legal systems and the underlying traditions and attitudes of lawyers and judges;
4. Constraints of the workload, caused by
   (i) the volume of references (a quantitative constraint) and
   (ii) the subject-matter (a qualitative constraint), and
5. Practical constraints of time, manpower, budget and technical resources.

I Procedural and Structural Constraints

The basic texts dictate in considerable detail how the preliminary reference procedure is to work. Unlike the Court of Human Rights, the Court of Justice has no autonomous power to alter its own rules of procedure or to derogate from them. Every amendment of the rules requires the unanimous approval of the member states in Council or at an Intergovernmental Conference.

The texts impose constraints, first, on the way in which the reference procedure is initiated and, second, on the procedure to be followed thereafter.
Initiating the reference

The texts

If a national court or tribunal decides that a reference is necessary, the Court must, in principle, accept it and answer the questions posed. All references must, in principle, follow the same procedure and ought, if possible, to be dealt with in the order in which the preparatory inquiries in them have been completed. The President may “in special circumstances” order that a case be given priority, but this power must be exercised sparingly if cases are not to become priority cases as a matter of routine.

As far as the referring court is concerned, Article 20 of the Statute envisages that the referring court shall “suspend its proceedings” in order to make the reference. In some countries, the effect of suspension is that the referring court cannot act further until the Court has dealt with the reference.

The texts envisage only one circumstance in which a reference need not go all the way to judgment. That is where the question referred is “manifestly identical to a question on which the Court has already ruled”. In that case, the Court may dispose of the case by order, but only after informing the referring court and hearing the parties, the intervening governments, the Commission and, where appropriate, the Council.

This provision was introduced in 1991 in response to a proposal of the Court at the administrative procedures involved in consulting the parties, governments and institutions, and the need to translate both the reference and the observations submitted, make the procedure extremely clumsy to operate. The obligation to consult was insisted upon by the Council, though one might have thought that, if a point is manifest, the Court could be trusted to deal with it. This illustrates the extreme caution with which the member states have approached quite modest proposals for reform.

Mitigating the rigour of the texts

The Court has mitigated the rigour of the texts in three ways: (1) by informal contacts between the Court Registry and national courts; (2) by rejecting some references as inadmissible; and (3) through the CILFIT judgment.

Informal contacts

A number of references are withdrawn following informal contacts between the registry and the referring court. The Registry draws the attention of the referring court to previous judgments which seem to provide the answer to the ques-
tions posed. In most cases, the reference is then withdrawn or the questions are reformulated with a more detailed explanation of the reasons for making the reference. The national court rarely insists that the reference be dealt with as it stands.

This informal approach is not available where suspension of the national proceedings has the effect that the referring court is unable to act.

(2) Inadmissibility
Since Foglia v Novello, the Court has rejected references as inadmissible for want of clarity, relevance or basic information. This practice has been criticised as a breach of the principle of judicial cooperation, but it is important to keep the criticisms in proportion. In the past nine years, only 27 references have been rejected as inadmissible - on average, around one per cent per year.

In practice, the Registry of the Court makes great efforts to give national courts the opportunity to supplement inadequate references. But even where there is no formal barrier to their doing so, some national judges seem unable or unwilling to see what is needed. Also, where the terms of the reference have been drafted by the parties, the judge may feel unable to amplify the reference without reopening the procedure and hearing the parties. In these cases, it is quicker in the long run to reject the reference as inadmissible, allowing the national court to make a fresh reference if required.

The most telling objection to dismissal of references as inadmissible is that it gives an impression of discourtesy to the national judge. This seems inconsistent with the idea of judicial cooperation as the cornerstone of the system, even though, in the cases that are so dismissed, cooperation has proved impossible.

To overcome these difficulties, the Court has proposed a new rule of procedure which would enable the Court to make a formal request to the referring court for clarification of the order for reference. This would enhance judicial cooperation and overcome the formal problem for those national judges who feel that, under the existing rules, they cannot act. If a national judge were still to decline to provide the clarification requested, this could be made clear in the order rejecting the reference.

(3) CILFIT
The judgment in CILFIT provides a basis for applying the doctrine of acte clair where the treaty requires a national court whose decision would otherwise be final to make a reference. The CILFIT criteria are criticised as being excessively restrictive and the Court is frequently urged to make them more flexible so as to allow a greater degree of latitude to national supreme courts.

The problem lies, not in CILFIT, but in the texts. According to its terms, Article 234 leaves no room for acte clair, or for any other limitation of the obli-
gation to refer, unless there is, in reality, no “question” on which a decision is necessary to enable the national court to give judgment. It is doubtful how far the Court could go in relaxing the CILFIT criteria while remaining faithful to the terms and intention of the Treaty.

The real issue is whether the texts should be amended so as either (a) to restrict or abolish the right of lower courts to make a reference, and/or (b) to remove the obligation of supreme and other final courts to do so.

(4) Abolishing the right of lower courts to refer

Many, if not most, references raise technical points of interpretation on which it is clear from the outset that a decision of the Court of Justice will be required. What matters, especially to the affected citizen, is that the court first seised should know how to interpret the texts, and that other national courts should follow the same interpretation of the same text. The points at issue very rarely merit the attention of a national supreme court or the delay and cost involved in getting the case there. A single reference made at an early stage by a lower court is surely more economical than creating a logjam of cases on the same point making their way up the hierarchy of one or more national systems until a reference can be made by one of them.9

Where the issue before the national court is one of validity, a more complex legal problem would arise. Could the rule in Fotofrost,10 which requires questions of validity to be determined by the Court of Justice, continue to apply? If so, what would be the position of the affected litigant while the case worked its way up to reach a court competent to make a reference? Could an inferior national court grant interim measures? Could the Court of Justice be called on to do so? If not, judicial protection against an invalid Community act could become illusory.

A less extreme suggestion is that there should be some form of filtering mechanism at national level to ensure that references by lower courts are not made prematurely or in an unsatisfactory way. This would involve treaty amendment since, as the texts stand, a lower court is entitled to refer without reference to any higher court or other authority. Moreover, experience of the time taken to deal with appeals against decisions to refer suggests that an institutionalised filtering mechanism could give rise to unnecessary and unacceptable delays.11

In the absence of evidence that lower courts are consistently making premature, unnecessary or unsatisfactory references, the merits of maintaining their freedom to refer seem greatly to outweigh the disadvantages. The Court’s proposal to allow formal requests for clarification of references, together with a

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9 By the time Seymour Smith (see footnote 1 above) reached the House of Lords, there were said to be thousands of cases awaiting a decision on the same point.
11 In a current case, the reference was made by a lower court in 1996 but it was not until 1999 that the national appeal procedure was exhausted allowing the reference to proceed.
power to deal with straightforward cases by order rather than judgment (see below), would go a long way towards meeting the current problem of caseload.

(5) Abolishing the obligation of final courts to refer

It is argued that the Community legal system has reached a sufficient stage of maturity to make it unnecessary to require supreme and other “final” courts to refer. But how, in that event, would uniform interpretation and application of Community texts be ensured? In particular, how could the internal market be maintained if national courts were free to pursue their own interpretation, not only of treaty provisions, but of a host of technical regulations, directives, customs codes and other texts whose very purpose is to ensure uniform application of the law?12

To meet that objection, it has been suggested that there should be some form of appeal to the Court of Justice from decisions of final national courts and/or that the Commission (and/or some other authority) should be able to refer decisions of such courts to the Court of Justice “in the interest of the law” (pourvoi dans l’intérêt de la loi).

Throughout the history of the Community, both the Commission and the Court have sought to maintain a relationship of cooperation rather than confrontation with national courts. Although there is no reason in principle why the procedure already available to the Commission under Article 226 (ex Article 169) should not be used to challenge decisions of national courts, the objection to using it has always been that it would require the Commission to assume a prosecutorial role, and the Court an appellate role, vis-à-vis the judiciary of the member states.

A formal right of appeal for litigants from national courts to the Court of Justice would create a hierarchical relationship which would not only have profound constitutional implications but would also change a practical working relationship which, with only transitory exceptions, has been amicable and cooperative. It is questionable whether national supreme courts in particular would find this an acceptable price for being relieved of their obligation to refer.

The suggested pourvoi dans l’intérêt de la loi would not raise the same problem so acutely, but the following points merit consideration.

First, does the Commission (or any other authority) have the resources to police the decisions of national supreme courts in the way suggested? And can it be guaranteed that political pressure would not be brought to bear to avoid a challenge to sensitive decisions of national supreme courts?

Second, in order to avoid creating an appellate relationship between the final national court and the Court of Justice, the decision of the national court would

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12 An apparently trivial question as to the tariff classification of, for example, pyjamas (Case C-395/93 Neckermann [1994] ECR I-4027) may have considerable implications for the flow of trade since, if the tariff is set lower in one member state than another because of different interpretations of the same text, the goods in question will be routed into the Community through the cheaper port of entry.
presumably have to become *res judicata* as between the original parties, so that their legal relations would not be affected by the judgment of the Court of Justice in the *pourvoi*. In that event, who would be entitled to appear before the Court of Justice and who, in particular, would appear to contradict the Commission's criticisms of the decision of the national court? The national court whose decision was in issue could hardly be involved, and the government of the member state concerned would not necessarily wish to support the decision of its own court. Yet without a contradictor the Commission's criticisms would go unanswered and the Court would be deprived of the benefit of a balanced debate on an issue which, by definition, would be one of considerable importance.

Further, the scope of a reference is, at present, determined by the order for reference. What would be the factual background against which the Court would be asked to rule in the *pourvoi*: the facts of the case in the national court giving rise to the *pourvoi*, hypothetical facts, or no facts at all? And what would be the permissible scope of the arguments that could be advanced?

On the one hand, it is difficult to see how a decision of a national court could be reviewed without reference to the facts and legal arguments on which it was based. On the other hand, it is equally difficult to see how, in justice to the original parties, there could, in effect, be a rehearing of their case without allowing them to participate, and without any possibility for their position to be reviewed in the light of the Court's judgment.

Finally, while it may be true that the final courts of the existing member states are sufficiently familiar with Community law to be absolved of the obligation to refer, will the same be true after enlargement?

**B The procedure before the Court**

1 **The existing constraints**

The obligatory steps in procedure before the Court are essentially the following:

- translation and notification of the reference;
- translation and notification of the written observations;
- preparation of the Judge Rapporteur's preliminary report on the basis of which the Court decides whether the case is to be heard by the full plenary (15 judges), a *petit plenum* (11 judges), or a chamber (five or three judges);
- preparation, translation and notification of the Report for the Hearing;
- the oral hearing;
- preparation, translation and presentation of the Advocate General's opinion;
- deliberation by the judges;
- preparation, translation and delivery of the judgment; and
- publication of the judgment and opinion.
Every reference, unless disposed of by order, must follow this procedure. Simple cases cannot be dealt with simply and urgent cases cannot be dealt with fast. Translation is required at five separate stages of the procedure, and a case cannot formally proceed to the next stage until the necessary translations have been completed. On average, translation consumes about seven months of the total time taken to process a reference – i.e. one third of the average total time.

Notwithstanding complaints that the procedure takes too long, critics suggest that the written procedure is fundamentally defective in that the parties have no opportunity to comment in writing on the observations of others or, in due course, on the opinion of the Advocate General. Further, it is said that the oral procedure is limited in scope and usefulness, giving little opportunity for exploring the factual and legal issues through the dialogue between bench and bar which is particularly characteristic of the common law system.

No uniform system of procedure adapted to the needs and traditions of fifteen member states could respond adequately to all these difficulties and criticisms. The existing system at least has the merit that it is known, tried and tested; that it affords basic protection for the rights of defence; and that, for the time being, it still works.

It is important to realise that the parties before the Court (as opposed to governments and institutions) are often represented by advocates (or other people) who have no previous experience of the procedure and may never be involved in it again. It is therefore essential to keep the rules reasonably simple such that they can be understood and applied, not only by experienced lawyers from big cities, but by day-to-day practitioners in all sorts of local courts and tribunals. This will be all the more important after enlargement.

The most urgent requirement at this stage is greater flexibility. In essence, the member states, the institutions and the parties must decide whether they are prepared to trust the Court to deal fairly with their concerns and not require it to work within a procedural straitjacket.

13 Depending on the language of the case and the linguistic skills of the Judge Rapporteur, the Advocate General and their respective cabinets, some work can proceed in the absence of translations.

14 In references, parties can be represented by anyone who is entitled to plead before the referring court. Since many national courts and tribunals dealing with matters such as labour law or social security have no formal rules of representation, parties may be, and quite often are, represented in Luxembourg by people who are not members of a bar and may have no legal training whatever. They are not necessarily the least persuasive advocates!
2 The Court’s proposals

(1) Procedural autonomy
The most radical solution proposed by the Court would be to allow the Court to be master of its own rules of procedure, like the Court of Human Rights. Fundamental rules or principles of procedure would be “entrenched” in the treaties or in the Statute of the Court — in particular, in Title III of the Statute — and amendment would continue to require the consent of the member states. Within that framework, the Court would be free to make its own rules and also to modify them in the light of experience, adapting them to the needs of particular types of cases. This would also, over time, allow room for experiment — new types of procedure could be adopted, and maintained if satisfactory but abandoned or modified if not. Such experiment is practically impossible at the moment.

In the shorter term, the Court has proposed four amendments of the Rules of Procedure which would allow greater flexibility and conduce to greater efficiency.

(2) Greater scope for disposing of cases by order
The first proposed amendment would allow the Court, after hearing the Advocate General, to dispose of a case by order (i) where the question posed is identical (rather than manifestly identical) to a question previously ruled upon, (ii) where the answer can clearly be deduced from existing case law or (iii) where the answer leaves no room for reasonable doubt.

Provided it were adopted in its entirety, this proposal would, by itself, substantially alleviate the Court’s workload overall. In a significant number of references on technical points the answer leaves no room for reasonable doubt, even if it cannot be said to have been acte clair from the point of view of the referring court. Although the answer may not have been obvious from the outset, the written submissions point clearly to what the answer should be. In such cases, it is a waste of over-strained resources to require the case to go through all the subsequent stages of normal procedure, with all the costs and delay involved, especially in translation, in order to reach the same result in the end.

Admittedly, the proposal carries the risk that the Court would too quickly reach an answer which, on more mature reflection, would turn out to be wrong. The safeguard lies in the fact that any proposal by a Judge Rapporteur to dispose of a case by order goes before the whole Court at one of its weekly general meetings. In practice, as any Judge of the Court will bear witness, this is a salutary brake on precipitate enthusiasm to dispose of cases.

Another suggestion, which the Court has not adopted at this stage, is that the referring court should be required, in the order for reference, to provide its own answer to the questions referred. If the Court agreed with the proposed answer, this could be confirmed by order without taking the procedure further.

This idea assumes a degree of sophistication on the part of the referring court which is not always evident from some of the references and could certainly not be counted on in the first years after enlargement. In certain cases it...
might be difficult for the referring court to propose an answer to the question referred without compromising (or being thought to compromise) its objectivity in subsequent proceedings. It should be remembered that the issue of Community law is not necessarily the only issue in the case before the national court.

It is therefore questionable whether it would be wise to insist on inclusion of a proposed answer in every case. But if adopted as “best practice” in the majority of cases, it would certainly enhance the usefulness of the simplified procedure proposed by the Court.

(3) Accelerated procedure

The Court’s second proposal would allow for an accelerated procedure, omitting or shortening particular stages of procedure, where a national court requests it and the circumstances show unusual urgency. The availability of such a procedure would be particularly important, and may prove to be essential, in Brussels II and Third Pillar cases.

The problem with any acceleration of existing procedure is to know what to leave out and what to speed up. The reactions to the Court’s proposal suggest, as might have been expected, that some would prefer to omit the written procedure altogether and proceed straight to an oral hearing, while others attach fundamental importance to written procedure and would be prepared to forego the oral hearing.

The essential point, at this stage, is to decide whether the system can continue without any provision for accelerated procedure. If it cannot, the Court must be allowed some leeway in adapting the accelerated procedure to the needs of the particular case. The worst solution would be to adopt a rule permitting accelerated procedure but to hedge it about with detailed procedural requirements which could cause unnecessary delay or make the procedure so clumsy as to be virtually useless in practice.

(4) Power for the Judge Rapporteur and Advocate General to seek further information

At present, only the Court as such, acting on a report by the Judge Rapporteur, can ask parties, governments or institutions to provide documents or information. Neither the Rapporteur nor the Advocate General can do so without asking the Court to act. This hampers preparation of the case at two crucial stages: first, in preparation of the Rapporteur’s Preliminary Report and Report for the Hearing; and second, in preparation for the oral hearing.

The Court therefore proposes that the Judge Rapporteur and the Advocate General should be empowered to ask for documents or information without needing to refer the request to the whole Court for prior approval. Experience suggests that this would, in particular, enhance the usefulness of the oral hearing.
(5) Power to issue Practice Directions

The fourth proposal is that the Court should have power, as in Strasbourg, to issue Practice Directions.\(^5\) This would make it possible to specify in greater detail what is expected of those who take part, particularly as regards the presentation, content and length of written and oral pleadings. It would be particularly useful in the context of accelerated procedure. (It is important to note that it is not proposed that the Court should issue Practice Directions to national courts.)

C  Structural constraints

The most serious structural constraint on the working of the Court results from the treaty requirement of partial renewal of half of its membership every three years.\(^16\) Where a new Judge or Advocate General is appointed to succeed another in the course of his mandate, the new member is appointed only for the unexpired portion of his predecessor’s mandate, and must receive a new mandate at the appropriate three-yearly renewal.

The effect is that, every three years, the Court has to go into low gear for nine months in order to be sure that all cases that have reached the stage of oral hearing can be completed by October 6\(^{th}\) when the terms of office of half the Judges and Advocates General come to an end. It is frequently not known until a very late stage which of them will be reappointed.

This is manifestly inefficient. In its paper submitted to the IGC preparing the Amsterdam Treaty, the Court proposed that, whatever the length of the mandate, the mandate of newly appointed Judges and Advocates General should run from the date of first appointment. Over time, this would stagger departures and arrivals and would allow the Court to operate like any other Court that has to make allowance for retirements, whether on grounds of age or of expiry of the mandate. So far as is known, this proposal was not even considered worthy of discussion by the member states.

II  LINGUISTIC CONSTRAINTS

The Court’s language regime is laid down in the Rules of Procedure.\(^17\) All languages are treated as being equal. In particular, Judges and Advocates General are entitled to use any language and to require translation of any document into the language of choice.

Some commentators, particularly English-speakers, suggest that the number of permitted languages should be limited, drawing a parallel with the European

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\(^5\) It has been suggested that the Court already has power to issue Practice Directions. Whether this is so or not, the Court does not have power to enforce such directions.

\(^16\) Article 223 EC (ex Article 167), second paragraph.

\(^17\) RP, Articles 29-31.
Court of Human Rights which works in English and French. But there is a crucial difference between Strasbourg and Luxembourg. Proceedings in Strasbourg can begin only when all domestic remedies have been exhausted. The essence of the preliminary reference procedure in Luxembourg is that it forms an integral part of on-going domestic proceedings conducted in national courts in the national language.

The strength of the Community legal system lies in the willingness of national lawyers and judges to cooperate in referring questions and applying the judgments of the Court. That is why the Court strives to ensure that its judgments are available to lawyers and judges throughout the Community in their own language on the day they are pronounced. Why should it be supposed that lawyers and judges with “minority languages” would be prepared to cooperate in the same way in a procedure that required them to frame references, argue cases or apply judgments in a language other than their own? Root-and-branch reform of the language regime is in any event most unlikely for political reasons. That said, the working of the regime should not be more burdensome than necessary. In that respect, the regime applied by the Court is as economical as it can be, consistently with maintaining the equality of languages. Only the orders for reference which start the procedure, the opinions of the Advocates General and the judgments of the Court are translated into all languages. The Judges and Advocates General do not normally insist on their right to have documents translated into their language of choice, and indeed the system would break down if they did.

Internally, the Court uses a single working language. Largely for historical reasons, this is French, but the cost implications would be the same whichever language were chosen. Use of a single working language avoids extensive cross-translation, the bulk of the translators’ work being translation into or out of that language. So long as this arrangement can be maintained, it is possible to predict with some accuracy the cost of adding new languages as a consequence of enlargement. In broad terms, each additional language would involve recruiting about 30 translators, interpreters and secretaries.

The use of a single working language has other, less obvious, consequences. In some respects these are advantageous, in others less so.

Differences between legal systems are reflected in lawyers’ use of language. Even if legal vocabulary has a common origin, for example in Roman law, development of the same concept in different countries may lead to the same word (e.g. fault18) acquiring different meanings or at least different nuances. The problem is all the greater when legal systems start from radically different assumptions, as anyone knows who has tried to explain the English concept of “trust” to a civil lawyer, or the difference between conclusions, moyens and arguments to an English lawyer.

The Court’s use of French should be compared with the use of Latin in universities and scholarly exchanges at least until the eighteenth century (and at the Gregorianum in Rome well into the twentieth). It ensures a reasonably consistent use of vocabulary which acquires its own “Community meaning” and provides the degree of linguistic stability that legal certainty requires and national legal systems acquire as a matter of course.

The downside is that French legal terminology, although commendably precise, does not always lend itself to translation into other languages, particularly when one is not sure how much intellectual baggage is packed in the French portmanteau. How, for example, should one translate *marge d’appréciation* into English? It is neither “discretion” nor “room for manoeuvre”, nor even “degree of latitude”, although each is partly right. Probably the best solution, as with *acquis communautaire*, is to surrender and adopt the French phrase into the language. But that gives an unfortunate impression of francophone dominance, even in circles where leek and potato soup is relished as *vichyssoise*.

The same problem would exist whichever language or languages were chosen as the working language(s). Legal texts in translation can rarely be quite as clear and precise as the original, and there are relatively few lawyers who can read and write with speed and confidence in a language other than their own.

The language regime is one of the most important constraints on the productivity of the Court and the understanding of its judgments. While it is possible to avoid its more extreme consequences, it is, and will continue to be, a fixed point to be steered round rather than removed.

### III CONSTRAINTS OF CULTURAL DIVERSITY

#### A Differences in legal culture

Differences in legal culture are as important as language as a point of reference for reform. The constraints they impose are more difficult to define but are nonetheless real.

It is often suggested that the Community is divided between the Common Law and Civil Law systems. But the longer one spends in the Court, the more one is aware that there are fifteen different legal systems (or more if you count Scotland and other strange animals in the juridical zoo). Some of them have more in common than others but all of them owe something to particular national attitudes and ways of doing things which are themselves the product of history and culture.

Differences in legal culture and approach become apparent in any discussion of possible reforms of the Court and its procedure. German lawyers attach fundamental importance to the principle of “the legal judge” (*gesetzlicher Richter*), according to which the rules for composition of the tribunal deciding a case must be known and published in advance. English lawyers, on the other hand,
regard it as normal to allocate cases, or to change the composition of appeal courts, as judges become available or are prevented from sitting.

German lawyers prize the written procedure; English lawyers the oral.

In practice, it is surprising how little this cultural diversity affects the day-to-day working of the Court. Indeed, the bringing together of lawyers from widely differing backgrounds is part of the richness of the Community system, and there is no country (including the most recent accessions) whose legal culture has not influenced the Court’s jurisprudence.

Differences of attitude or approach can nevertheless affect a crucial stage in the procedure which outsiders do not and cannot observe – the process of deliberation.

When members of the US Supreme Court visited Luxembourg, Justice Ginsberg perceptively observed that, although the Court of Justice is not a court of first instance, it is often the “court of first view” or of “first look”. The point at issue may never have been the subject of a judgment in any national court at any level. If referred at an early stage, the issues and arguments will not have gone through the winnowing process by which irrelevant issues and bad arguments are discarded before a case reaches the higher courts of a member state.

Quite frequently, the parties to the proceedings before the referring court do not submit written observations or take part in the oral procedure, and the member states which might have most to contribute do not intervene. The Commission no longer has the financial resources or the manpower to provide a comprehensive overview of every case and its consequences, and the Advocates General cannot always do so either.

Consequently, it may only be at the stage of deliberation that the points of view of a number of lawyers with different perspectives are brought to bear in identifying the issues and the possible solutions. Even if, at the end of the day, the judgment appears to “follow” the approach of the Commission or of the Advocate General, this does not mean that the issues have not been extensively debated between the Judges so that a decision could be taken in favour of one approach rather than another.

B The case for and against dissenting judgments

Some commentators suggest that the differences of opinion and differences of approach between judges of different traditions should be brought into the open by allowing dissenting opinions. They say this would speed up the process of decision-taking since a vote could be taken at an early stage, leaving the majority to write the judgment and the minority to write their dissents. The majority judgment would then, so it is said, be less obscure since it would not have to accommodate the views of dissentents.

To anyone bred in the common law tradition, the case for allowing dissenting opinions is seductive. Today’s powerful dissent can become tomorrow’s orthodoxy. Indeed, the case for dissents does not need to be elaborated here be-
cause it has been made so often. The contrary case has not been made in any
detail, so it is worth pointing out some of the questions that have not, so far,
been asked.19

The objection normally put forward against dissenting judgments in the
Court of Justice is that this would subject the Judges to unacceptable political
pressure. This seems a weak argument, considering that Advocates General have
to express their own opinions and that dissenting judgments are permitted in
Strasbourg.

A more persuasive variant of the argument is that the right to dissent might
lead judges to become identified with a particular approach or tendency – pro­
gressive or conservative, strict constructionist or purposive constructionist; fed­
eralist or nationalist, etc. Having once dissented, Judges might feel compelled to
maintain their declared position even if, on reflection, they recognised that it
was wrong or at least not worth insisting on. That has happened to most of us,
and the absence of a right to dissent is a powerful incentive to judicial modesty.

Dissenting judgments do not form part of the legal tradition of all the mem­
ber states – perhaps, indeed, only that of a minority. Where dissenting judg­
ments are permitted, this may only be in the Constitutional Court whose mem­
bers are appointed by a special parliamentary process different from that apply­
ing to the ordinary courts. A comparable procedure applies in Strasbourg. The
question of dissents cannot therefore be divorced from the process of appoint­
ment and the Court cannot by itself, as some commentators appear to imagine,
simply change the practice.

Assuming that dissents were to be possible, it is important to clarify what
would be allowed. Would all judges, as in Strasbourg or the US Supreme Court,
be entitled to file concurring as well as dissenting opinions, or opinions that
concur in part and dissent in part? Or would the dissentent minority be required
to file a single document of dissent, as is the practice in the Privy Council? If so,
what would be the position of a judge who could not, in conscience, agree either
with the majority or with the rest of the minority? That is not a far-fetched ques­
tion in a context where, in a difficult case, the “formation of judgment” could
consist of 15 or, after enlargement, more than 20 judges.20

In terms of total time saved, would the gain, if any, be more than marginal?
It would be difficult to write a dissent without knowing what one is dissenting
from. Presumably, therefore, the majority judgment would have to be available,
at least in draft, before the dissents were written. Could the majority then claim
the right, having read the dissents, to adjust their judgment in order to take ac­
count of them? At what point would the judgments and dissents become final so
that they could be sent for translation – a question that does not arise in a mono­
lingual system?

19 The arguments against dissenting judgments in the Court when dealing with references
do not necessarily apply to all direct actions, especially in the Court of First Instance.
20 The Judicial Committee of the Privy Council normally consists of five judges, so the dis­
sentients cannot be more than two.
In terms of *quality*, it is true that Anglo-American legal literature is full of powerful dissents which, in the long run, have changed the course of legal thinking. But the right to file a dissenting or concurring opinion does not always contribute to legal certainty, as any lawyer who has practised in the common law system must admit.

In the Community context, legal certainty is essential to the working of the internal market and it is important that the judgments of the Court be both comprehensible and workable in all languages and all legal systems. Exclusion of the minority from taking part in the deliberations of the majority could result in a situation where the binding judgment of the majority completely overlooked a problem of language or legal technique for one or more member states.

Again, would a member state feel more or less inclined to respect a Court judgment where the "national judge" dissented, particularly if the dissent were based on the ground that the majority judgment would be unworkable in the national legal system? And would the "powerful dissent" be heard in the same way if the dissentient minority were required to concur in a single document of dissent?

Whatever be the merits of dissenting judgments in national legal systems, the merit for the Community system of deliberation *in camera* with no dissents is not that the judgment is (or appears to be) unanimous, but that the points of view of judges representing different legal traditions and languages are fully taken into account at all stages in developing and formulating the judgment. So far as is humanly possible, all the judges taking part should feel comfortable with the judgment as a judgment, even if they disagree with it.

C  "One Judge per member state" and the size of the plenary

The legal (as opposed to political) justification for having one Judge of the Court per member state is to ensure that, in cases meriting the attention of the plenary, the legal culture and traditions, and the needs of the legal system and language of every member state are taken into account. The need to maintain a broad spread of languages and traditions is taken into account in the composition of chambers and in the decision whether to assign a particular case to a chamber or retain it before the plenary.

It is suggested that, after enlargement, there should continue to be one Judge per member state but that the plenary should be limited to a fixed proportion of the total number, as in Strasbourg. This overlooks two considerations.

First, the Strasbourg system specifically entrenches the concept of the "national judge" by requiring that the judge from the state concerned in the case, or an *ad hoc* judge nominated by that state, should always sit. The Luxembourg system has always resisted that approach. Is it desirable to adopt it now?

Second, cases in Strasbourg are, by definition, concerned with the treatment of an individual by a particular state, as such. Cases in Luxembourg have a much wider range. Why, in a reference raising a point that affects all member
states, should priority be given to the judge from the member state from which the reference happens to come?

If the principle of “one judge per member state” should be maintained in order that the legal culture, traditions and language of every member state are taken into account in the most important and sensitive cases, then logic and common sense require that no judge should be excluded from sitting in cases that merit the attention of the full plenary. Of course, with 20 or more Judges, it would have to be accepted that only a small minority of cases should be so treated. But even at the moment, the number of cases heard by the Grand Plén num, as opposed to a Petit Plén num, is very small and further limitation of recourse to the full plenary would simply involve a development of well-established existing practice.

If it is felt that a plenary of 20 or more Judges would be inherently unmanageable, then the honest course would be to abandon the principle of “one judge per member state” as little more than a political figleaf, and to find a new and acceptable way of appointing a Court consisting of fewer judges than there are member states.

D Legal culture after enlargement

Judges and lawyers in all the existing member states have experienced some degree of culture shock in coming to terms with Community law, and some have still not come to terms with it. The culture shock for judges and lawyers in the new member states will be infinitely greater since many of them will have had little or no experience of legal methods which are second nature to judges and lawyers in the existing member states. Moreover, the resources available to judges and lawyers in some of the candidate countries are still very limited.21

Proposals for reform must therefore, more than ever, take account of the need for the resulting structure to be understood – and made to work in a consistent way – by judges and lawyers with very diverse backgrounds and resources.

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21 The author was able to measure the scale of the problem during a recent visit to Poland. There is still no set of European Court Reports available to students in Wroclaw, the third largest university in Poland. A Polish judge asked a Community law enthusiast how he could find the law, and was assured that he would soon be able to find all the law on Internet with his computer. “My computer!”, exclaimed the judge; “I don’t even have a typewriter”.

IV CONSTRAINTS OF WORKLOAD

A The problem

Currently, the workload imposes constraints on the working of the Court in two respects, quantitative and qualitative.

First, it is obvious that, if the number of incoming cases rises disproportionately to the number of cases decided, delays can only get longer and, ultimately, the system will break down. The same result is likely to follow if the member states refuse to give the Court the minimum degree of flexibility that it considers essential. On the other hand, given greater flexibility, the Court could be significantly more productive and the Doomsday scenario will be avoided in the short and probably the medium term.

Second, however, the character of the workload is changing. The 1992 programme put in place a range of regulations and directives whose provisions are now coming forward for interpretation. Although the pace of Community legislation has slowed down, legislative activity will not come to an end.

Much of the new legislation deals with highly technical questions which, in the member states, would be dealt with by specialist lawyers pleading before specialist courts with specialist judges. Indeed, a large proportion of references now come from such courts. In order properly to interpret the legislative text, the Court must first understand the problem. The problem may be obvious enough to specialist advocates or to the specialist judge making the reference, but not necessarily to the non-specialist.

Consequently, the Court, which is "specialist" only in the sense that it specialises in Community law, must try to identify the true issues, a task which is doubly difficult where it is acting as "court of first view". The Court must, moreover, ensure that its judgment will be capable of being understood and applied in all the national systems, even where only one or two member states have intervened to explain the problem from their point of view.

In times gone by, the Commission was able to provide the detailed analysis and comparative study which, in ideal circumstances, the Court needs. It can no longer do so for reasons both of budget and manpower. Nor is it reasonable to expect that the gap can be completely filled by the Advocates General, so the full technical complexity of the questions raised may once again appear only at the stage of deliberation by the Judges.

By the stage of deliberation, it is normally too late, if judgment is not to be delayed indefinitely, to seek further clarification from the parties, the member states or the Commission. Although there may be no fundamental disagreement between the Judges as to the result, the precise formulation of the judgment may

22 These include VAT and other forms of indirect taxation; the effect of double taxation conventions; intellectual property rights; regulation of financial services; company law and company accounts; detailed aspects of labour law; and social security.
entail a succession of drafts and deliberations which have to be fitted into an already tight schedule of hearings and deliberations.

B The remedy

The increasing technicality of the questions referred is a problem that would be alleviated, to some extent, by the proposal to allow the Judge Rapporteur and Advocate General to ask for additional documents or information while preparing the case.

It is important, too, that referring courts take care (as the Court has asked) to explain the factual and legal background of the questions and the reason why, as Article 234 itself provides, an answer to those questions is necessary to enable the referring court to give judgment. Experience shows that a well-drafted order for reference promotes written observations that address the real issues and help the Court to find a solution.

The problem would be further alleviated if the Commission’s Legal Service were once again given sufficient manpower (and sufficient funds to consult experts where required) in order to provide an overview of the case from a Community perspective.

In that connection, it might be helpful to establish a series of specialist committees (on the lines of the Customs Code Committee) to which technical problems could be referred by the Commission, by national authorities, and possibly also by national courts, for a non-binding opinion. Even if, at the end of the day, it became necessary to refer the question to the Court for a binding ruling, the availability of an opinion from such an expert committee would provide the Court with the “first look” which, at the moment, it often lacks.

In terms of finance and time, this would almost certainly be less costly than the creation of new specialist courts (or specialist chambers of the Court of First Instance).

V CONSTRAINTS OF TIME, MANPOWER, BUDGET AND TECHNICAL RESOURCES

These constraints interact, as indeed do all the others. As the workload increases in volume and complexity, less time can be devoted to cases that are simple or straightforward in order that more time can be given to important or difficult cases. The more time that is spent by the judges in listening to oral argument, the less time they have for reading files and attending to the finer points of judgments. If there are not enough translators, the procedure cannot go faster and will gradually slow down as the backlog increases.23 The Court cannot take

23 By way of illustration, when the Court started issuing judgments in all languages on the day they were pronounced, the delay between final deliberation and judgment was approximately 3 weeks. This has now extended to 5 weeks because of shortage of transla-
advantage of new technologies unless it has the budget to do so, and access to
new technologies is limited by the extent to which the software on offer is
adapted to a multilingual environment and can operate with the hardware and
software currently in use.

Such constraints are inevitable since the Court is not immune from the con­
straints of the real world. They will not go away - though they may present
themselves in a different form - if the problem is moved elsewhere.

Thus it is suggested that the productive capacity of the Court will be in­
creased if competence to deal with certain classes of references is transferred to
the Court of First Instance. That is true - provided that enough additional judges
are appointed to the already overloaded Court of First Instance and provided that
the two courts do not get bogged down in demarcation disputes (for example, "Is
this case a social security case for the CFI or a citizenship case for the
ECJ?") - see Martínez Sala24).

Whichever court has competence, the translation problem will remain the
same, as will the other budgetary and technical constraints. The issue therefore
comes to be one of priorities, and to some extent of rationality and a sense of
proportion.

For example, as regards the budget, should it really be necessary for the
Court to apply to three other institutions25 for authority to transfer funds from
the telephone account to the computer account? And is it necessary that the
Council and Parliament should control the precise number of translators the
Court may employ? The administrative budget of the Court amounts to 2.7% of
the total administrative budget of the European Union26 - less than the shared
administrative budget of the Economic and Social Committee and the Commit­
tee of the Regions.

The general trend in public administration in the member states is towards a
greater degree of budgetary autonomy - that is to say, greater power for institu­
tions to allocate their use of resources within a global package, subject to control
by the national equivalent of the Court of Auditors. Are the member states and,
in this case, the European Parliament prepared to follow this trend, as the Court
has asked them to do?

The Court's proposals for greater procedural autonomy and flexibility (dis­
cussed above) can be seen in the same light. The present allocation of resources
is inefficient because all references are required to jump through the same pro­
cedural hoops. So long as the existing procedural and budgetary straitjackets are
in place, it will be impossible to achieve significantly better allocation of time,
manpower and other limited resources.

Against that background, four issues merit closer examination, though they
can be touched on only briefly in this paper:

25 The Council and Parliament must authorise and the Commission must give its opinion.
26 This amounts to about 0.14% of the total EU budget.
advantage of new technologies unless it has the budget to do so, and access to new technologies is limited by the extent to which the software on offer is adapted to a multilingual environment and can operate with the hardware and software currently in use.

Such constraints are inevitable since the Court is not immune from the constraints of the real world. They will not go away – though they may present themselves in a different form – if the problem is moved elsewhere.

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24 *Case 85/96, Martínez Sala v Freistaat Bayern* [1998] ECR 1-2691.
25 The Council and Parliament must authorise and the Commission must give its opinion.
26 This amounts to about 0.14% of the total EU budget.
(1) the need for, and the role of, the oral hearing;
(2) the problems of the translation service;
(3) access to new technologies; and
(4) the desirability of moving some of the burden of dealing with preliminary references away from Luxembourg altogether.

(1) The oral hearing
There is a cultural divide between those who value the oral hearing and those who do not. In terms of usefulness, some oral hearings contribute greatly to the judges’ understanding of the case and serve to clarify the questions to which an answer is required. Some, however, do not. They amount to little more than a ritual in which the parties (especially, it must be said, governments) read out memoranda repeating, sometimes word for word, what has already been said in their written pleadings and summarised in the Report for the Hearing.

At present, the Judges spend much of Tuesday and Thursday, and sometimes Wednesday too, at oral hearings. Time spent at oral hearings is time not spent in reading files, discussing problems with référendaires or other judges, drafting judgments and taking part in deliberations. Even an oral hearing that lasts only from 0930 till 1030 eats substantially into a useful morning’s work.

Time spent in unprofitable oral hearings is an unprofitable use of resources which must be balanced against the legitimate concern to preserve the rights of defence. In 1991, the step was taken of allowing the Court to dispense with an oral hearing if no party asked for one. At the moment, the oral hearing is dispensed with in about 10% of references.

The Court has now proposed to take this a step further, but not to give the Court exclusive discretion to decide whether there should be an oral hearing or not. All that is proposed is that those who ask for an oral hearing should be required to specify why they want it. Both the Court and the other parties could then come to the hearing with a much clearer idea than at present of the purpose of the hearing and the scope of the arguments. The Court’s proposal should therefore be seen, not as an attempt to restrict the rights of defence, but as a way of making oral hearings more useful.

(2) The translation service
For reasons already discussed under linguistic and cultural constraints, the task of a translator (more accurately, a “lawyer-linguist”) in the Court of Justice is unique. It involves a familiarity with, and a capacity to convey the nuances of

27 The position of the Judges differs, in this respect, from that of the Advocates General. An Advocate General has to attend hearings only in cases where he is acting as Advocate General. Judges have to attend all hearings in which they are part of the “formation of judgment”.
28 RP, Article 44a.
legal language as used, on the one hand, in the Court and, on the other, in 15 member states using 11 languages.

When translating documents coming into the Court, the translator must not only be familiar with the established conventions for translating legal expressions from one language to another but also be ready to find an adequate translation for an expression that has not been encountered before, often in highly technical fields. When translating an Advocate General's opinion or a judgment of the Court, the translator must be aware of subtle differences in emphasis — for example, between "discrimination", "inequality of treatment" and "difference in treatment". These nuances may shift over time, so it is just as important to know when the conventional translation is not appropriate as to know when it is. There is a constant coming and going between the translators, the members of the Court and their référendaires on such points.

Over the past few years, the Court has insistently sought an increase in the number of translators. For the 1999 budget, the Court asked for 40 additional translators. The Council allowed 10 (one less than the number of languages that have to be translated). The Parliament then froze five of those posts, requiring the Court to produce a report with proposals for "stabilising the volume of documents to be translated". The Court produced a report (dated 23 March 1999) demonstrating, not only that the productivity of the Court's translators is already significantly higher than that of the other institutions, but also that the volume of documents to be translated is not under the control of the Court and is rising at an alarming rate. In the light of that report, the Court asked for an additional 51 translators. The Council and Parliament have allowed 30 additional posts.

Privatisation, farming-out and greater use of individual freelance translators is no answer to the Court's problem. Close and continuous contact between the translators and cabinets would be impossible. But the overriding consideration is the need for confidentiality. The need for confidentiality of draft opinions and judgments is obvious, but many other documents that pass through the Court are of considerable commercial or political sensitivity, and therefore of considerable value if leaked.

In any event, experience shows that it takes a considerable time fully to train a Court translator and that any saving in use of freelances can be more than offset by the additional costs involved in revision of the text by an experienced translator based in the Court.

(3) Access to new technologies
Access to new technologies is subject, like all other aspects of the Court's activities, to budgetary constraints. Considerable progress has, however, been made on this front. The Court now has a Division specially dedicated to com-

29 Approximately 12% of translation is done by freelance translators.
puters and new technologies, and the Translation Division is making imaginative use of computer technology to reduce the burden of routine translation.

The aim is, to the greatest extent possible, to move from paper-based to electronic communication and storage, both within the Court and between the Court and the outside world. Three particular constraints have been encountered which are not insuperable, but for which there is no straightforward solution:

(i) the need to ensure confidentiality;
(ii) the need to authenticate documents in terms both of content and date of lodging; and
(iii) the need for multilingual compatibility.

Taken together, these constraints restrict the extent to which the Court can buy in commercially available software. Consequently, special programs have to be written for the Court which requires manpower, time and money.

Looking towards the longer term (particularly in connection with the replacement of the asbestos-ridden Palais), consideration is being given to the use of video-conferencing as a means of access to the Court and of communication between the Court and parties, governments and institutions. In the context of enlargement, with a catchment area potentially extending from Portugal to Estonia and from Ireland to Cyprus, there would be considerable cost savings overall if parties did not need to come to Luxembourg to plead.

In references, the availability of video links might make it easier for poorer litigants to be represented. At present, particularly in social security cases, the claimant is frequently not represented before the Court and observations are submitted only by governments and institutions. In complex cases (particularly before the Court of First Instance) informal video conferences could be used to clarify the issues and identify the points for discussion at the hearing.

At this stage, video-conferencing seems to present three particular difficulties:

(i) the need for mutual compatibility of systems since the participants would have to be linked not only to the Court, but to one another;
(ii) the need to maintain continuous communication with all participants since, if one link went down, the proceedings would have to be suspended until it was restored; and
(iii) the need to make facilities for video-conferencing conveniently available in all the member states (possibly in local courthouses), with staff trained and available to operate the machinery.

These difficulties are again not insuperable, but setting up and working such a system would require a considerable collaborative effort on the part of the institutions, the member states and the European Bars. Up to now, no-one has attempted to put in place a system of electronic filing or video-conferencing on a
continent-wide basis, and certainly not in the context of 11 or more languages and 15 or more legal systems. Imagination is required as well as money.

When the difficulties have been overcome, the use of new technologies will go a long way towards meeting the last point to be discussed here: moving work away from Luxembourg.

4 Moving work away from Luxembourg

Numerous proposals have been made for “renationalising” preliminary references, creating regional courts or, in one way or another, shifting some of the burden away from Luxembourg. It should, however, be recognised that moving work away from Luxembourg would not necessarily make the system more efficient or less costly. The linguistic and cultural constraints are unavoidable components of any Community system. To take only one example, it could be inordinately costly to move interpreters round Europe in order that all national governments could be represented in national or regional courts and plead in their own languages.

Given the constraints, the question must be whether it is not better to concentrate adequate resources in one place (Luxembourg) and develop the new technologies so as to make that place more readily accessible and user-friendly. The long-term aim of any reform must, after all, be to make the system work better. That will not be achieved by applying mid-twentieth century solutions to twenty-first century problems.

Many of the Court’s existing problems can be overcome with the political will of the member states and the goodwill of national courts and legal practitioners. The true challenge lies in finding imaginative ways of creating a system that will stand the test of time in the uncertain world of the new Millennium.