Foreword to Tomasz Tadeusz Koncewicz Aksologia UnijnegoKkodeksu Proceduralnego, Wydawnictwo C.H. Beck, Warsaw, 2010, pp. XXIII-XXV (Polish translation pp. XIX-XXI).

Preface/Foreword

In 1968, Professor John Mitchell, the first Professor of European Institutions in Britain, delivered his inaugural lecture at the University of Edinburgh. His words are an appropriate introduction to this book by a Polish graduate of that University:

> "The role of courts has, or should have, something to do with the realities of democracy. Properly organised, it is through them that the individual can play a larger and more significant part in government while gaining a greater sense of security. … Courts help governments to be good, even more than they compel them to be so."

From this perspective, the judicial process does not take the place of the political process, and the judge does not usurp the role of the legislator. They complement each other. In a complex modern democracy the individual has little opportunity to play an active part in government. For most people participation in government is limited to the right to vote (and sometimes only the right to vote for a party rather than a person). Courts enable individuals to "play a larger and more significant part in government" because the judgments delivered by the courts in their individual cases enable others to safeguard their rights also. In the European context, as the Court of Justice said in one of its earliest judgments, the vigilance of individuals concerned to protect their rights is an effective means of controlling breaches by the member states of their Treaty obligations[1]. "Courts help governments to be good".

Procedure (or process) is central to the role of courts. This is self-evident to those who practise in the courts – advocates and judges: procedure is an integral part of

[1] Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECR 1.

their life in the law. But conventional legal taxonomy treats procedure as "adjective law", defined by the Oxford English Dictionary as "the subsidiary part of law - opposed to substantive law relating to the essential justice of law".

Dr Koncewicz's book challenges that approach, contending that the dichotomy is a false one. The process by which a court reaches the legal result is integral to the result itself – good procedure is in every sense part of "the essential justice of the law".

This way of looking at the law and its working is particularly important in the context of the European Union. The law of the European Union is a complex matrix of law of different kinds, operating at different levels. It includes elements of treaty law and the principles of international law, of the law made under the treaties by the institutions they have created, and of the national law of the member states. In part the law is set out in treaty texts or legislative texts, but what binds it together is the judgments of courts – the Courts of the Union based in Luxembourg and the Court of Human Rights in Strasbourg, and also, directly or indirectly, the constitutional, administrative and other courts of the member states representing all the great legal traditions of Europe. All of them contribute to the corpus of law that we know as "Community law".

The judgments of courts are not abstract propositions or theories. Each of them is a considered answer to a problem of real life. Its relevance and value as a precedent, capable of being applied in other cases, depends on the factual and procedural context in which that problem was presented to the judge. Collectively, as Dicey said, the jurisprudence of the courts helps to maintain the logic and symmetry of the law.

The founding Treaties were, and largely remain, "framework treaties", leaving many details to be filled in about the relationships between the Union and the Member States, between the institutions of the Union and, perhaps most important of all, between the Union and Member States on the one hand and the citizens of the Union on the other. With very few exceptions the task of filling in those details has been

entrusted to the Court of Justice, and with very few exceptions the judgments of the Court have been loyally accepted and implemented. Although the Member States have had many opportunities, in the course of Treaty revision, to overturn the judgments of the Court in interpreting the Treaties, they have not done so.

It is the task of the Court of Justice to "ensure that in the interpretation and application of the Treaties the *law* is respected". In this context, *the law" is *ius* rather than *lex*, and the Court draws upon many sources, including the constitutional and legal traditions of the Member States, to find "the law" that is to be applied. This is a creative task and, in that sense, the Court "makes law". Its results may have profound political consequences, but it is not a political task.

The history of the European Union shows that, where the legislative process has failed, the Court has been called upon, through action taken by individual citizens in their national courts to provide the solutions that the legislator has failed to provide. The Court has been accused of "judicial activism", usurping the function of the legislator. But this is to misunderstand the crucial difference between the legislator and the judge.

The legislator is rarely compelled to act. It may be inopportune to do so for objectively justifiable reasons or it may simply be politically inconvenient to do so. The legislator can choose not to act. The judge cannot.

Judges are rarely in a position to choose the cases they will have to decide. When called upon to decide a case, they cannot refuse to do so. In some cases, they will be inevitably be criticised whatever they decide. Having given their decision, they cannot withdraw it or seek to explain it. "Activism" is in the eye of the critic who dislikes the decision. It is legitimate to criticise the decision, but not, except in rare cases, to impugn the motives of the judge.

Moreover, in carrying out its task of ensuring that the law is respected, the Court of Justice is constrained by the procedural framework set out in the Treaties. The Court is not a court of general jurisdiction. So process and procedure are integral to its work.

This book takes a fresh look at the role of process and procedure in the construction of the European Union. Why is it important? What makes it acceptable? What is the role of the judge and how should the judge relate to the legislator? How should the judicial process relate to the administrative process? Are the categories in which these questions are discussed adequate as a basis for analysis of twenty-first century problems?

These are important questions that deserve to be discussed more than they are at present. I hope this book will stimulate wider discussion.

DAVID EDWARD

Professor Emeritus of the University of Edinburgh

Judge of the European Court of Justice 1992-2004