



First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Dublin, 12-16 July 1987

Conclusions

SUPERVISION OF THE CONDUCT OR BEHAVIOUR OF THE JUDGES:
CONCEPT; WHO SUPERVISES; RIGHT OF DEFENCE (AND HUMAN RIGHTS);
INDEPENDENCE OF THE JUDGES

On the basis of national reports prepared by the representatives of the Judiciaries of the Argentine, Austria, Belgium, Brazil, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Morocco, the Netherlands, Norway, Portugal, Senegal, Spain, Sweden, Switzerland (both French - and German - speaking), Tunisia and the United Kingdom, the Commission considered in depth the questions that were the subject of its present session. A particularly interesting exchange of views took place.

We found as a result of our discussions that, whilst of course there can be conceptual differences about, in particular, the mode of recruitment of judges (contrast between the system that prevails in the United Kingdom, and which has been adopted in a number of other countries represented in the Commission, with the systems prevailing in countries where recruitment to the junior ranks of the judiciary is much more broadly based, allowing for young persons to join it), account must also be taken of the fact that institutional and cultural contexts differ considerably from one country to another and even, in the same country, from one place to another, for instance as between rural and urban areas.

The conclusion can be drawn, from our discussions taken as a whole, that the behaviour of a judge in his private life is relevant where it is such as to undermine the confidence that the public, i.e. those amenable to his jurisdiction, need to have in him. Any conduct that undermines the credit of a judge is reprehensible.

It is not however possible to decide, in a meeting as large as ours, what conduct is such as to undermine that confidence. That differs from one country to another, and may even, as mentioned above, differ within a single country, from one place to another and from one period to another. In whatever the context in which that act is done.

Another matter, also connected with a judge's private life, is the question of his membership of a political party. As to that, a distinction must be drawn between membership of such a party and public expression of a political opinion.

Some do not even accept that a judge should belong to a political party. Others allow that he should belong to such a party but not that he should express himself publicly in any way in the political domain. Yet others are of opinion that a judge should be allowed the widest freedom to take part in political life. Everyone agrees, at all events, that, even where a judge's participation in political life is allowed, it must take such a form as to be compatible with his continued enjoyment of the confidence of his fellow citizens.

In a word, he who accepts to become a judge must also accept the restraints pertaining to that office. There does not appear to be unanimity as to the appropriate content of any provisions governing judicial discipline. In the opinion of the great majority of members of the Commission, such provisions should be as broadly worded as possible so as to be capable of covering any conduct that might undermine the credit of a judge, in other words the confidence that people must have in him. A minority consider, on the contrary, that such provisions should be precise, particularly where judicial misbehaviour may fall to be judged by a no-judicial body.

The question what kind of body should be competent to judge judicial misbehaviour was the subject of a long discussion. On that point too there is much divergence of opinion.

It must first be stressed that the institutions that exist at present in the participating countries differ widely. In many countries there is either a "National Council of the Judiciary" or a "Superior Council of the Judiciary" which has jurisdiction in disciplinary matters. The composition of such Councils varies considerably. Moreover the appointment of their members is more often than not in the hands of the Executive. There are also countries where discipline is administered by a body entirely distinct from the Judiciary itself. In some cases Parliament exercises that function, at least as regards the higher Judiciary, the discipline of other members of the Judiciary being a matter for a member of the Government. Lastly there are countries where discipline is exclusively administered by the superior Courts and by the presidents of those Courts.

The members of the Commission were unanimous in saying that the basic principle to be respected in the formulation of any solution is that of the independence of the Judiciary. Some members consider that, in principle, judges should be judged only by their peers, to the exclusion of any outsiders, be they the Parliament, the Government or any other persons not belonging to the Judiciary. Other members, on the contrary, whilst recognising the importance of the criterion of independence, think that, having regard to public opinion, care must be taken to allay any suspicion of "corporatism", i.e. of judges protecting each other. With that in mind, these members favour commissions comprising, in addition to a majority of judges, others, for instance eminent people, the choice of whom would differ from country to country.

The question whether the body responsible for adjudicating upon judicial misbehaviour should initiate disciplinary proceedings of its own motion was not studied in depth. On the other hand a number of members of the Commission expressed the view that decisions in disciplinary cases should be open to some form of appeal or review, and that, in any case, the right to be heard should be secured.

The subject of criminal prosecutions was briefly discussed. On the whole, members of the Commission considered that judges should be amenable to the jurisdiction of the ordinary Courts. However, some members pointed out that judges are nowadays the objects of numerous complaints, most of them totally unjustified, which give rise to the initiation of criminal proceedings of a most unpleasant kind. How can one remedy that situation? The creation of a filter, which is accepted in some countries, appears to be difficult in others.