



First Study Commission  
Judicial Administration and Status of the Judiciary

Meeting in Macao, 23 - 27 October 1989

Conclusions

THE RESPONSIBILITY OF THE JUDGE.  
ITS ROLE AND POSITION VIS-A-VIS OTHER POWERS WITHIN THE STATE AND THE SOCIETY.  
THE INDEPENDENCE OF THE JUDICIARY.  
THE ACCOUNTABILITY OF ITS MEMBERS TO THE STATE AND TO INDIVIDUALS.

The subject matter dealt with by the first Commission proved to be very broad and gave rise to several questions. The conclusions reached are summarised as follows:

A. Concerning the relationship between the judicial and the legislative branches

1). Must the judge rule according to law? While almost all members of the Commission considered that the judge must apply the law and that he is not free to disregard it because it appears outdated or inapplicable to present circumstances, the following comments are called for:

a) How should a conflict of legal principles be resolved? Where a factual situation renders applicable two legal principles which in that particular case are mutually exclusive, how should the judge resolve the matter? He must determine which interest should prevail.

b) In several countries, there exists a tendency to legislate in very general terms, leaving to the judge the task of finding the solution to particular circumstances.

This practice gives rise to serious difficulties in achieving certainty in the law, inasmuch as parties cannot know in advance in what way their case will be decided as to matters on which the legislation is not specific.

One may wonder whether in this respect there is not a certain similarity with common law countries. Similar cases should be resolved according to those decided by the Supreme Court. This solution calls for a high degree of self-restraint by courts and tribunals.

c) In criminal matters, a related matter is that of prosecutorial discretion. The decision not to prosecute implies a refusal to apply the law in a case to which the law is applicable. Generally, this problem rests with prosecutorial authority, the decision to prosecute not being in the hands of the judges, but in some countries the "juge d' instruction" is entitled to initiate an enquiry on his own initiative. May he then refuse to proceed on the ground that it is not appropriate to do so? The question remains to be further considered.

2). May a judge exercise any control on the constitutionality of legislation?

Obviously, this question only arises in countries governed by a written constitution.

The answers to this question vary greatly by reason of the differences in the institutions governing each country. Generally, in countries in which there is a Constitutional Court a judge is not empowered to deal with the constitutionality of legislation.

In the other cases, two situations must be considered:

a) that in which a judge who is seized with a legal action is empowered to pronounce upon the constitutionality of legislation and therefore set aside a law which violates the constitution.

b) that in which a judge who has jurisdiction to decide a case may, upon the request of the parties or ex officio, examine whether the law which he is called upon to apply complies with the constitution. In such a case he cannot set aside the law, but refuse to apply it to the case before him, when he decides that the law violates the constitution.

The exchange of views on the subject led to the conclusion that the answer to this question of the control of the judge over the constitutionality of legislation may differ for several reasons including:

a) the institutional set up (type of State, existence of a Constitutional Court),

b) the meaning given to the principle of separation of powers,

c) the extent of the judge's jurisdiction, that is the power to set aside the law or merely to refuse to apply it in the case before him.

3). May the judge exercise any control over compliance of the law with the rules governing human rights and basic freedoms?

Inasmuch as these rules are part of the constitution of a country, the issues are the same as those dealt with above, at least in the absence of any ratification by that country of an international covenant on human rights and freedoms.

If there has been such a ratification, whether it be of the European Convention for the Protection of Human Rights and Fundamental Freedoms, of the African Charter on Human Rights or of the International Covenant on Civil and Political Rights (United Nations) one must distinguish on the one hand whether these international conventions have been implemented in domestic legislation and on the other whether or not these conventions are self executing under domestic law.

More particularly with reference to countries who are members of the Council of Europe, one must take into account the political impact of the decisions of the European Court of Human Rights in Strasbourg.

Essentially therefore it is a question of hierarchy of legal standards. Certain countries recognise the primacy of standards set by treaty while others do not.

B. Concerning the relationships between the judicial and the executive branches

While it is unanimously considered that under no circumstances may a government intervene in the adjudication of matters before the courts and tribunals, it is believed that generally there is a possibility for government to influence indirectly the work of judges by the manner in which support services are provided to them for the fulfilment of their duties.

In this respect the problem of budget preparation is crucial.

The discussion had to conclude to the necessity that qualified representatives of the judiciary be involved not only in the preparation of the budget to determine the requirements of the courts, but also in discussing them with members of the Government and of Parliament and thereafter that the expenditure of the funds so obtained be made under the control of representatives of the judiciary.

As regards security of terms, it appears difficult to define a single system by reason of the variety of ways in which the institutions are designed and perceived in different countries.

While in several countries it is considered that the impeachment of a judge for serious reasons must only occur following the decision of a judicial body not subject to any political interference, in other countries it is considered that the procedure of impeachment by joint address of both Houses of Parliament offers adequate guarantees.

In any event, the essential consideration must be that such a serious measure as impeachment or dismissal should not become a means for exerting pressure on a judge, and thereby impinge upon the independence of the judiciary.

### C. Liability of Judges

This subject encompasses three questions: the personal liability of judges, the liability of the state for the actions of judges and the recourse of the State against the judge, when the State has been held liable for the actions of the judge.

The members of the Commission unanimously considered that the problem is intimately linked with the independence of judges. A judge must not be made subject to proceedings taken by citizens when the latter consider that their rights should have been upheld.

However, must be considered those cases where the actions of the judge involve issues of gross negligence or even fraud.

Most members consider that the proposals adopted by the United Nations relating to the independence of judges (art. 16) should be accepted, that is that the national rules must provide for safeguarding this independence, by exempting judges from civil liability for acts or omission in the exercise of their functions or acting in their judicial capacity, without prejudice to disciplinary proceedings or claims for indemnity against the State. This rule is equally applicable should such acts or omissions be subject to penal sanction.