First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Berlin, 22-24 August 1988

Conclusions

THE APPOINTMENT AND THE SOCIAL STATUS OF JUDGES

Twenty four countries furnished reports in reply to the Questionnaire which had been sent to the members of the Commission.
These reports described the situation which exists in each of the countries and they formed the basis of the discussions which took place between the members of the Commission.
The first question which was discussed in the exchange of views was to decide whether the moral behaviour of a candidate for judicial office ought to be taken into account and, if so, in what manner this subject should be evaluated.
In most countries the law does not contain any provision expressly dealing with this subject. However the law of one or the countries studied has provisions saying that a candidate for judicial office who had been convicted of fraud could not be considered for such office until he had been rehabilitated.
The question therefore was whether one could accept the possibility that a person who had been so convicted could obtain a nomination to be a member of the Judiciary.
It was felt that it would not be possible to express an opinion on this subject without qualifications. If the act committed by the convicted person was very serious then even after rehabilitation one could not entertain the idea that such a person should be the subject of a nomination to the Judiciary. But if the act had been one of little gravity or was the consequence of some youthful mistake long since forgotten one should not attach too much importance to it.
The principle which should govern the evaluation of this criterion should be how it affects the credibility of the judge that is to say the confidence which a judge ought to inspire in the litigants. The whole emphasis should be upon the question of whether this confidence would be imperilled. It is therefore necessary in every case to evaluate the importance of the question on the bases of this principle.

Part 2
The second question concerned the method of recruiting judge. In what manner should the authority which is charged with the task of making such nomination decide upon the method of selection?
On this subject the solutions in various countries are very different. Certain countries based it upon the results obtained by a competitive examination. Others take into consideration the practice acquired at the Bar or the experience gained as a trainee or apprentice judge. Still other countries have established special schools devoted to the training of future judges. In several countries these different methods are applied simultaneously that is to say the candidate is subjected to a competition and to a complementary training in a special school and to a formal apprenticeship. It is also possible to have what one might call lateral recruitment that is to say the appointment of persons to the Judiciary who had not been subject to a competition or any special training or a formal apprenticeship.
The second question is closely linked to the third question which was the object of a deep examination, that is to know who or what is the authority which decides upon the appointment and in this respect what considerations influence the authority in question in its choice.
The underlying problem is to discover whether political considerations are taken into account. It appears from this examination that several systems are in existence.

In most of the countries there is some authority or organ which decides upon the appointment of judges: either the Government or a Commission or a Council drawn from the Judiciary itself. In some countries judges are elected by the people or by Parliament. In most of the cantons in Switzerland it is the people or the Parliament which elects.
It is also necessary to take into account those countries which set up a competition for entry to the judiciary and where a final nomination is practically guaranteed to those who succeed in the competition.
In reality when the nomination is in the hands of the Government the influence of party politics is often, but not always, predominant. That system carries within it the drawback that the nomination is exclusively influenced by political considerations without having regard to the particular qualities of the various candidates. It is nevertheless necessary to recognise the advantage that exists in such systems in that in the result one is assured of a certain pluralism in the Judiciary. This pluralism could also doubtless be provided by competition but on the other hand that does not permit to take into account the human and psychological qualities of the candidates. In this case it is essential that the nomination should not be made until after a training period has provided an opportunity to discover or reveal these qualities.
In so far as the question of the appointment of a judge who has already been acting as such to other judicial functions apart from nominations made directly by the Government, such as has just been described, there are also countries where these appointments are made by special organs composed entirely or partially of judges appointed or elected by their peers for that purpose. While this solution has the advantage of withdrawing from the Government the direct appointment by the political parties and allowing for a consideration of the characteristics which is essential to the discharge of the judicial function nevertheless one may object that in certain cases this could lead to a certain conservatism harmful to the exercise of the judicial function.
In conclusion this exchange of views has shown that in several countries whatever the system adopted there does not exist any difficult arising out of this, either touching upon the exercise of political influence or the risk of excessive conservatism. In other countries, on the other hand, there have been complaints of political influence which throws doubt upon the credibility of the judges. One solution which appears to be satisfactory would consist of permitting the Judiciary whether directly or by the intervention of an independent organ composed of judges, or having a majority of judges, to give an advisory opinion but leaving the actual decision to the Government authority and placing upon the latter the obligation to give reasons for a specific decision when that has been taken in spite of an unfavourable opinion by the body of the Judiciary-

Part 3
The fourth question which was examined concerned the making up of the budget of the judicial power and the fixing of judicial salaries.
While it is clear that the fixing of the budget depends in every country upon Parliament, in some countries the judicial power can be concerned in the drawing up of this. In the majority of our countries Parliament and Government decide these matters without prior consultation with the judicial power. This solution was unanimously criticised by the Commission. The intervention of the judicial power would permit it to claim in a well informed way the material necessities which are necessary for the functioning of the Judiciary and, in an age where the role of technology is becoming increasingly large, one thinks in particular of the computer and modern machinery.
In the matter of the salaries of judges the members of the Commission were especially of the opinion that every possible effort should be devoted not to discourage entry to the judiciary of lawyers of quality which means that the salaries of the judges ought to be raised to a level comparable with those who exercise the other powers.