First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Dakar, 26th November – 1st December 1983

Conclusions

THE STRUCTURES OF THE JUDICIAL ORGANIZATION IN THE MEMBER-COUNTRIES OF IAJ

The First Commission had as its subject for study the organisation of the Judiciary in each of the countries taking part in its work.
Answers were received from twenty countries to the questionnaire which had been sent to them.
One of the questions related to the existence of a "judicial power", separate from the legislative and executive power. The Commission considered in depth the meaning of that expression. It is not in common use, and is even unknown, in a number of countries.
As a result of its discussions, the Commission concluded that the expression imported two fundamental, and closely linked, principles: first, that the Judiciary derived its powers from the nation (albeit that in some monarchies the symbol of the nation was the sovereign) and, secondly, that the Judiciary was totally independent; from which it followed:
(1) That it was the function of the Judiciary, to the exclusion of any other "power", to determine disputes between citizens and between citizens and public authorities. In performing that function, judges must be wholly independent and must be seen by public opinion to be so.
(2) That judge must be free of influences of any kind, whether direct or indirect. As to that, in particular, his independence must not be susceptible of being impaired, either in fact or in the eyes of the public, by problems concerning his position in the hierarchy or his promotion.
(3) That so much marked the independence of the Judiciary from the Legislature and the Executive. However, that independence could not be envisaged in the absence of indispensable interaction and indeed co-operation with those other two "powers". Thus, in particular, the supply of money for courts and tribunals necessarily depended on them. Similarly, the execution of judicial decisions depended on the assistance of the Executive.
The role of the judge was to apply the law and determine its effect.
In connection with that first question, the Commission considered a matter closely related to it, that is to say the period for which a judge should be appointed. That matter had also been broached by the United Nations in the draft of a "Manual on Guidelines for the Independence of Judges and the Selection and Training of Judges and Prosecutors" of which the text had been sent to the Secretary General of the I.A.J.
The discussion centred on articles 29 and 30 in that draft, the wording of which is in fact identical to that of articles 2.19 and 2.20 of the Declaration of the Montreal Conference on the Independence of Justice.
The fundamental question to which those articles give rise is that of the appointment of temporary judges. The appointment of temporary judges, either professional or lay, is a practice that prevails in a number of countries represented on the First Commission.
The question is not relevant in the case of countries where judges are elected.
The Commission thought it right to confine itself to considering the appointment of temporary professional judges. The questions that arise in relation to lay judges are too complex to be dealt with in this Resolution.

In the case of professional judges, a majority of members take the view that, as a matter of general principle, temporary appointment is wrong. It is acceptable only exceptionally where it is necessary for practical reasons and provided that both the appointment and any renewal of it are governed by rules subjecting them to control by the Judiciary so as to ensure that the decision is not taken solely by a political organ. The remedy against the risks inherent in that kind of appointment is accordingly to be sought by way of the method of appointment.

That is so, in particular, in the case of the temporary appointment of retired judges to sit in the courts where they formerly sat full-time.

The Commission is thus of the opinion that, whilst the principle stated in the United Nations draft must be generally approved, the practical necessities facing many States must nonetheless be taken into account.

The draft is therefore too rigid. However, whilst qualifications should be introduced into it, they should be precise in defining very strictly, in the way stated above, the method of appointment and of renewal of the appointment.

The Commission considers that the question of the appointment of judges for probationary period is different. One can allow that, in countries with career judiciaries, it should be useful to require a young person to give proof of his or her capabilities during a set period before being definitely appointed. There also, however, it is essential that the decision whether to reject or appoint a candidate should be subject to the control of a judicial body.