



First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Recife, 17-21 September 2000

Final Report

THE INDEPENDENCE OF THE INDIVIDUAL JUDGE
WITHIN HIS OWN ORGANIZATION

This final report is based on the reports of 31 countries: Germany, France, Belgium, Portugal, Canada, Ireland, Brazil, Netherlands, Israel, Liechtenstein, Sweden, Austria, Cyprus, Estonia, Italy, Finland, Slovenia, Switzerland, Republic of China (Taiwan), Czech Republic, Iceland, Lithuania, Argentina, Slovakia, Japan, Denmark, Mali, Tunisia, Rumania, Greece, USA.

SUMMARY

1) The judge's independence as a decision maker.

a) In most, if not all Countries, a hierarchy of judicial decisions exists that allows judges' decisions to be challenged by means of filing appeal as long as the decision is not given by the highest instance. Therefore the question arises whether a judge can be compelled to change, for the future, his ruling on a particular matter after a higher court decided otherwise.

In many countries there is in general no obligation for the judge to modify his future ruling because of a different decision of the superior instance. If, however, a superior instance remands a decision (e.g. a Court of Cassation) to the lower court, the judge has to take over the ruling in this specific case (Taiwan, Slovenia, Finland, Italy, Netherlands, Germany, Portugal, Switzerland, Czech Rep., Austria, Liechtenstein, Lithuania, Greece, Rumania, Sweden). In France, Belgium and Tunisia the decision of the Court of Cassation is only binding when this Court decides a second time about the same appeal. In Brazil the decisions of all courts do not have binding effect for other courts even for the courts of first instance.

In other countries the decision of a superior court is binding for the lower courts also as to the future jurisdiction (Canada, Cyprus, Estonia, Ireland, Sweden, USA, Norway, Denmark, Iceland). In Israel the decisions of the Supreme Court are binding. The decisions of other superior courts are only guidelines. It is worth mentioning that sometimes the decisions of the Supreme Court are binding if this court decides in an enlarged body (Greece).

When the Court of the European Union (Luxembourg) has decided a question of law, the national judge is bound by this decision. He has to apply the interpretation of the community law which has been made by the European Court of Justice. On the other hand there is no obligation for the national courts to follow the ruling of the European Human Rights Court and change their future rulings. The national courts however, accept in general the ruling of the European Court of Human Rights.

b) Is there in any way taken account of the number of times the decisions of each judge (or bench) are reformed in a higher court?

In general the amount of decisions of a judge which are reversed by a higher court are not taken into consideration.

In Portugal however, the High Council of Justice assesses the work of the judges by way of inspections. Within this frame the inspector can take into consideration the amount of reversed decisions of a particular judge. In France, again within the frame of the assessment of the judge's activities, the

president of the tribunal can give a general evaluation of the work of a judge. He can draw the conclusion that a judge whose decisions are constantly reversed by the superior court is incapable of performing properly his work. In Taiwan every tribunal makes a kind of statistics about the decisions which have been reversed. In one case the tribunal has made an assessment of a judge whose decision has been reversed. The result of this inquiry might influence the promotion of the judge. In Slovenia there is a similar system.

c) Does anyone within the court organization (e.g. the court's chief judge) have the power to influence a decision to be taken by another judge?

No superior authority can influence a decision in a case, not even the president of a tribunal. The judges of a tribunal are equal in their jurisdiction.

When in Finland the president of the Court of Appeal thinks that a decision is beyond any reason, he can demand that the case is reconsidered. This time the case is judged by an enlarged body (the judges who have decided the first time plus 3 new judges, chosen by ballot, and presided by the president of the court).

d) Do judges or courts organize meetings or use other means to ensure a certain degree of coherence in the way similar cases are ruled? If so, describe the mechanism. To what extent eventual guidelines resulting from these mechanisms are binding for judges individually?

In general there are no formal mechanisms of this kind. However in some countries there are conferences of the divisional presidents when there are differences in the jurisdiction between two or more divisions of a tribunal in specific questions (France, Switzerland).

In all the countries the judges are not bound by the results of such concertations. They have more the character of a recommendation.

e) Does the court organization have the possibility to intervene if a judge gives obviously illegal or irrational decisions?

In some countries this is a question for the disciplinary organ. Besides the question of the individually responsible judge a decision which is obviously illegal will be reversed by the Court of Appeal (in all countries).

f) Does any form of quality control for the decisions of each judge exist within the court organization?

The way of appeal excluded, the decisions of a judge are not assessed because this would infringe on the principle of judicial independence.

In the frame of the assessment of a judge's capability (promotion), in some countries, the competent organs take into consideration the decisions of a judge.

In Sweden there is a so called "Justitieombudsman". Every citizen is entitled to demand an inquiry into a specific case. However, the ombudsman's report does not bring about a reversal of a judgement, but it may have liability and disciplinary consequences for the judge.

2) The management of the judge's work.

On the one hand, the judge is independent while judging. This independence is a condition for the impartiality of the decision. On the other hand he is part of a professional organization, a public service, that has to be managed.

From this viewpoint the position of the individual judge is not fundamentally different from the position of any member of another public service. This allows to say that:

- as to the process of the judge's decision making, all management interventions are excluded;

- for all other aspects of his work, the judge is not an independent entity within his court organization; he is, on the contrary, part of a hierarchic structure and, as such, subordinate to the authority and surveillance of the court management.

a) Is this idea compatible with your own court organization?

This idea is shared by various countries. The heads of the courts, responsible for the court administration, have to account for the administrative work and have to follow the principle of the hierarchical subordination when a question of court administration is concerned (France, Germany, Slovenia, Czech Rep.).

In other countries, especially in those of the Common Law tradition, a distinction is made between the so called civil servants and the judges. Thus there is an existing tension between the court administrators, who are responsible to the Executive, and the judges, who are independent and form a separate Branch of government (Canada, Ireland, Cyprus). In Ireland judges are in no ways incorporated into a hierarchical structure. In Sweden there is a national administration of the courts which is responsible for the budget of the courts.

Nevertheless we have to stress that the notion of the "distinction" of the judicial status, the judge as a "civil servant" in the field of judicial administration on the one hand, as a "public servant" (independent) in the field of jurisdiction on the other hand, is sharply criticised because the judiciary is one of the three powers in the state. In France there is a tendency which wants to dismiss the judge from the administrative work in favour of civil servants ("fonctionnaires"). In Austria where the competence of the judicial administration is with the so called (judicial) "divisions of personnel" ("Personalsenat") the judges complain of the fact that the most important elements of judicial administration, budget, personnel, equipment, do not fall into the competence of the independent judicial divisions. In the Czech Republic the judges disapprove of the idea of the judge as a civil servant which they consider to be a dangerous relict of the communist time. The judge is a part of the third power. Therefore arises the demand that the judicial administration falls into the competence of the judges only. In some countries the High Council of Justice is supposed to fulfil this demand.

b) Who decides on the organization of the court's and the judge's activities?

In many countries the organization of the work in the courts is made by the courts themselves, either by the president or by the plenary assembly of the court or by a special judicial body. When this is made, it is up to the individual judge to handle the progress of a trial. In some countries the judicial organization is fixed by law (sometimes even the dates of the trials).

In the Czech Rep. it is the minister of justice who, sometimes by the presidents of the courts, directs the administration of the tribunals, which is criticised by the judges associations.

c) Does the hierarchic structure of the court organization permit to control the quality of the judge's work on aspects that are not related to his independence?

In some countries the judge is in no way subordinated to a quality control as to his decisions (Switzerland, Germany, Finland).

In other countries the presidents of the courts or special judicial organs evaluate the quality of the decisions of the judges. In some countries the minister of justice can initiate an evaluation (in the frame of a disciplinary action).

d) Is the workload of a judge determined in advance?

In some countries the amount of work is not determined in advance. In other countries there are quotas. In Germany the ministers of justice of the Länder have fixed average quotas for cases to be handled with. However when a judge fails to handle all the cases there are no consequences. In

Slovenia it is the High Council of Justice who fixes the quotas. In Taiwan this falls in the competence of the Judicial Yuan. In the Czech Rep. the ministry of justice fixes the quotas, which however has a recommending character (guidelines).

e) If not predetermined, is the quantity of work done by a judge controlled afterwards?

Sometimes the amount of work handled by a judge is not controlled or only controlled by the judges themselves. In many cases it is the president of the court who looks after the good performance of the court.

Sometimes it is an other judicial or administrative organ (Sweden), sometimes an extra judicial organ (the minister of justice and the High Council of Justice in Italy and Rumania).

CONCLUSIONS

1. Judicial independence is independence from any external influence on a judge's decisions in judicial matters, ensuring the citizens impartial trial according to law. This means that the judge must be protected against the possibility of pressure and other influence by the executive and legislative powers of state as well as by the media, business enterprises, passing popular opinion etc. But it also implies guarantees against influence from within the judiciary itself.

2. The extent to which courts of first instances are bound to follow decisions of Court of higher instance differs from country to country. This is a function of the tradition and evolution of the different legal systems and is not considered to affect the independence of the judge.

3. The proper administration of the Judicial system must create and ensure the conditions necessary for judicial independence. This includes appropriate remuneration and security of office. However, the judge and the judiciary as a whole have an obligation to ensure the effective handling of the workload and the management of resources. Among the matters which could compromise the independence of the judge are an excessive workload, insufficient resources for the fulfilment of the judge's duties, the arbitrary imposition of quotas and assignment of cases, procedures and criteria for promotion. Where a judge's work is evaluated, it must be done in a manner which does not undermine his independence. For example it may be dangerous to evaluate the work of a judge by reference to the percentage of decisions which were reversed on appeal.

4. It is crucial to judicial independence that changes to a judge's decision may only be made by the judiciary itself, normally by appeal. Administrative measures of quality control, whether from without or within the judiciary, must not take the place of appeal or give that impression. Otherwise the way would be open to influencing the judiciary.

5. As regards the relationship between the judges on the one hand and the presidents of courts, the Superior Councils of Justice where they exist and the ministry of justice, on the other hand, it is essential that such a relationship is properly structured and regulated so as to ensure that the independence of the individual judge is not affected. In this context it should be emphasised that presidents of courts must be judges. Furthermore the administration of the judiciary should always be carried out by the judiciary itself or by an independent authority with substantial representation of the judiciary, at least where there is no other established tradition of handling that administration effectively and without influencing the judicial function.

TOPIC OF NEXT YEAR:

The Appointment and the Role of Presidents of Courts.

Recife, 20th September 2000