



First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Tunis, 24 - 25 October 1980

Conclusions

THE LIABILITY OF JUDGES

The liability of judges (and magistrates in general) can be considered from two points of view: as a criminal offence in the exercise of their functions (either under the general law concerning bribery or corruption) or in relation to some special rules concerning the administration of justice.

The Commission has not considered the problem of criminal or disciplinary responsibility; but the majority considered that judges can be made liable under rules of the civil law for any criminal offences, just like any other citizens.

As far as the question of liability for negligence is concerned, the views of members were divided.

Some considered that to make judges liable for negligence in the exercise of their functions would imperil their independence, since judges should not be constantly exposed to the risk of civil proceedings.

Moreover, in many cases civil proceedings against judges would involve in effect the retrial of the dispute between the parties.

In the opinion of other members, however, it would be inadmissible that negligence by a judge, who exercises functions which are no doubt high-powered, but which are nevertheless professional ones, and, moreover, which fall within the domain of the State (in its broadest sense) should not give rise to a right to compensation in favor of the victim.

However, at this point a distinction must be drawn: there could be no question of holding a judge liable for his decisions whenever these result from mistake of fact or law.

The only cases in which he could be held liable would be cases of gross negligence or cases of grave misconduct, i.e. wrongful acts or omissions which could not arise in relation to judges who carry out their duties in a normal and reasonable manner.

As an example of gross negligence, reference was made to excessive delay on the part of a judge in giving his decision.

The ways in which judges could be made liable from a civil point of view were also considered.

In principle no such liability could be considered unless and until all means of redress had been exhausted (subject to the possibility of holding the judge responsible for the ensuing costs). However, some members made the point that in some cases the consequences of a judge's negligence may be irremediable, such as orders or injunctions which cannot be remedied by an appeal. Even if they are to be considered as acts of execution by one of the parties, delays arising from the orders of a judge of first instance can cause irreparable harm.

If it is to be admitted that acts or omissions of judges can lead to claims for compensation by the victims, against whom should they make their claims?

Several solutions were considered:

1. Against the State alone which provides the service in principle and which ought to accept the consequential risks.
2. Against the judge alone, and not against the State.
3. Against the State, which in appropriate cases can have recourse against the judge.
4. Simultaneously against the State and the judge.

The majority of those members who favored the view that judges should be capable of being made civilly liable considered that only the third of these solutions was admissible. In such cases they considered that claims against the State must be brought before some body which exercises a judicial function.

In any event, however, any civil liability on the part of judges must never be allowed to impair their independence or lead to the retrial of the dispute between the parties, except in cases where a retrial is ordered expressly in the ordinary course of the law.