First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Seville, September 1992

Conclusions

THE REASONING OF JUDGMENT

The questionnaire was addressed to twenty nine countries. The Chairman received twenty three replies from the following countries: Germany, Argentina, Austria, Belgium, Canada, Denmark, Spain, Finland, France, United, Kingdom, Greece, Luxembourg, Malta, Ireland, Iceland, Liechtenstein, Morocco, Norway, Netherlands, Portugal, Sweden, Switzerland, Tanzania and Tunisia. in addition, the delegates from Israel and Senegal took part in the proceedings of the Commission.
The questionnaire had nine questions. Having examined the replies, the Chairman suggested that the discussion be limited to the. following three matters:

1.- Since in the majority of the countries represented the obligation to give reasons was created by constitution or by regulation, the essential question was whether or not their obligation was a general principle of law, applicable in all jurisdictions.
In general, the answer was- yes.
Many delegates pointed out that in the case of a decision of a jury, mostly in criminal matters, there was no provision for reasons being stated. Opinions varied as to the basis of this important exception but the majority of delegates agreed to state that this situation is not compatible with the existence of a general principle of law. At the same time it must be accepted that in most cases it would be difficult to obtain from a jury which sits alone, there being no judicial member of the jury, any statement of the reasons for its decision.
With this important exception, the general principle of law of giving reasons for jurisdictional decisions must be applied to all decisions of this kind, either of administrative or arbitral organs, which are not part of the judicial system, such as administrative act which decide issues which are subject to review, decisions in disciplinary matters (barristers, doctors, etc.).
During the discussions the question of legal terms used in such decisions was debated. In general, the delegates agreed that decisions should be stated in language as simple as possible so as to be understood by the parties involved. One has to ban the use of all words from other languages, particularly ancient and dead languages. But it would be impossible not to have recourse to standard legal terms.

2.- The second and third questions were taken together. The second question concerned the form of reasoning in decision making, the third related to the differences which characterised on the one hand the Common Law and on the other the Civil Law.
In so far as the form of the reasoning is concerned it was observed that the judge often commences by verifying that the facts have been established and then proceeds to ascertain the applicable law. It has been observed that it doesn't conform to the usual form of syllogistic reasoning.
Yet in certain countries, notably in Italy and in Portugal, most often before dealing with the proofs the Judge adopts a pre-trial procedure to establish the law applicable to the effect that if the preliminary question is decided he can then proceed to a full examination of the evidence.
This question was discussed in the light of judicial proceedings in common law countries and in civil law countries, especially in the light of the importance which is attached to previous decisions in similar cases, that is to say the case law or the "jurisprudence" of those countries.

The discussions demonstrated that in common law countries the case law is built up progressively on the basis of concrete cases, while in the civil law countries the applicable legal ruling is most often developed on an abstract. basis in a way that the Judge could apply it to all possible cases.

4. - In so far as it varies in the common law or the civil law it is the superior courts which principally make the definitive rulings of law, such as a Court-of Appeal or a Supreme Court and above all the Court of Cassation. Certainly in common law countries the decisions in previous cases are binding, but one must acknowledge that in civil law systems while decisions of the Court of Cassation are persuasive they are not legally binding on all other Judges. A change in the jurisprudence of the Court of Cassation is unusual and the same may be said of the common law system.
In each system the certainty or the stability of the law is the guiding principle.
The essential difference between the two systems resides in the way the rules are developed. In the common law countries it is progressive and pragmatic on the basis of concrete cases. In the civil law countries the development is abstract to start with but is progressively fashioned by the Judges to apply to the concrete case which is before him.