First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Sao Paulo, 6 - 9 September 1993

Conclusions

ACCESS TO JUSTICE

The problem of access to justice must be examined from two different viewpoints.
The first focuses on the principle that, under any democratic system, the principal role of judicial power is to ensure that the rights of the citizen are :respected and can be enforced in accordance with laws emanating from the legislature. The acting President of the Association emphasized this aspect of the matter in his speech at the opening of the session at Sao Paulo-
In order to give effect to this principle, which is enshrined in the constitution of many countries, the citizen must have ready access to the Judge. If this access is forbidden or made so difficult that the citizen cannot in practice enforce his right, the democratic and constitutional principle is not respected.
The second aspect of the problem which relates principally to civil law, using that phrase broadly, is that if access to justice is too easy, the Courts risk being overwhelmed by disputes which ought to have been resolved by means of conciliation. Once the judiciary is no longer able to rule on the lawsuits which are brought within a reasonable period, a situation arises which puts at grave risk the aforesaid democratic principle.
It is thus necessary to strike a balance which allows ready access to the Judge, but which does not generate so much litigation as to render the judicial function virtually impossible.
This is the starting point of the considerations which have brought the Commission to the present conclusions.
We have focused particularly on two problems. On the one hand, in civil matters, the cost of the procedure which has to pursued in order to obtain a judicial decision, and, on the other hand, the forms of that procedure.
So far as cost is concerned: the Commission reached the unanimous view that the cost of the procedure must not be such as to constitute an obstacle for some, let alone for the majority, of would be litigants. Should that be the case the democratic principle is in peril. It is true that in every country represented on the Commission there is provision for legal aid, but in most cases legal aid is only available to the least well off.
In relation to this question, there are three elements to the legal costs: the costs of bringing suit, the costs of investigating the merits of the claim and the costs of the legal representation of Plaintiff and Defendant.
Bringing suit usually requires the payment of a tax in the form of a charge for invoking the jurisdiction of the Court. So far as this is concerned the Commission has concluded, after examining the matter, that in most cases this tax is modest and does not constitute an obstacle to access to the Judge. Nonetheless it has been observed that it is not acceptable that seeking a remedy before the Judges should appear to incur the sanction of a tax.
In many countries bringing suit carries with it the cost of service of the plaint by the process server. It was generally considered that this formality provides the best safeguard of the rights of the Defendant. Nonetheless, in other countries postal service appears to function entirely satisfactorily and such a procedure results in a considerable saving of costs. There are also some countries where this mode of service is recognised but where it has been observed that the postal service do not always perform their function in such a way as to safeguard the rights of the Defendant. The reliability of the judicial process

suffers. But is it not the Judge's job to make sure that the Defendant's rights are respected and to insist on formal service if he considers that this is necessary?

The costs of investigating the merits of a claim were the subject matter of vigorous discussion. The most significant element in these costs is undoubtedly the costs of the expert's report. But the costs of hearing witnesses also merits consideration.

It was unanimously agreed that the costs of the expert's report are often very high and constitute, in consequence, a significant inhibition either to commencing proceedings, when such costs can be foreseen, or pursuing the proceedings to judgment.

An important point must be made at this stage. The procedures for investigating the merits of a claim differ considerably from one country to the next, with particular regard to the involvement of experts. It is not possible in this summary to develop, even in summary form, the various procedures. One can simply note that, under many systems, experts, even if commissioned by the Judge, will only undertake their task once the litigant has put them in funds, and sometimes substantial funds. Under other systems, where the expert carries out his commission without waiting to be put in funds, he can, when he makes his report, ask the Judge to make an Order for the payment of his charges and, where this is done, the Judge will not deliver a judgment until the expert's fees have been paid.

In some countries the experts are instructed by the parties, each party instructing his own expert- The credibility of such experts is open to attack and the Judge may well reject their opinions.

It is clear that the need for an expert report can prove a significant obstacle to access to justice.

A possible solution is the provision of legal aid. But often this is only available where the party's means are manifestly inadequate to cover the cost. Furthermore in some countries legal aid is only provided at the outset of proceedings when the lack of necessary funds may only be evident at the moment when the litigant is called upon to pay a hefty fee to the expert.

It was also emphasized that in some cases the grant of legal aid falls to be determined by a commission or other administrative body that is an organ of the Government. This appears unacceptable in as much as access to justice can be prevented or rendered more difficult by an organ which is not judicial.

A number of members pointed out that the problem of the cost of litigation can be partially catered for by insurance. It is true that insurance policies exist which provide specific protection against the risk of such costs. But such contracts require the payment of premiums and, for that reason, are not open to all.

On the same topic, access to justice was considered having regard to the effect of the assistance, sometimes obligatory, of a lawyer, usually an advocate. It is obvious that however useful, or even indispensable, such assistance may be, the cost involved can constitute a serious obstacle to access to justice. Under some systems parties are entitled to appear in person, or to be assisted by somebody who is not a member of the Bar. Thus it is that where employees' rights or social security are in issue, the employee can be assisted by a representative of his trade union or other professional organization. This shows that the legislator sometimes caters for this aspect of access to justice.

Legal aid can also provide the remedy where a party cannot afford the cost of legal representation. Nonetheless in some countries it is the youngest and least experienced advocates who are instructed to represent those on legal aid. For this reason this remedy is not always effective. There is also a tendency to require all members of the Bar to undertake legally aided work, according to a pre-selected rota.

Finally one should note that in most countries the choice of the advocate is made by an organ of the Bar. In other countries the legally aided litigant can make his own choice of advocate, provided that the chosen advocate is prepared to appear without fee.

These considerations demonstrate that cost can be a most important element when considering access to justice. Simplifying procedure, expediting the process, and abolishing or simplifying formalities is not necessarily enough to render justice more accessible. The provision of legal aid needs to be reviewed so as to ensure that every citizen, regardless of his means, is in a position to enforce his legal rights.

So far as formalities are concerned, it is clearly desirable that these should be as simple as possible and, in particular, that failure to comply with formalities should not result in procedural bars to the determination of the claim.

Nonetheless all have agreed that access to justice must not have the affect of unnecessarily overwhelming the Courts. In most of the countries represented on the Commission the weight of litigation is such that considerable delays are experienced before cases can be adjudicated upon. Such delays are also sometimes a decisive bar to access to justice.

Many participants emphasized the importance of mediation procedures which exist in their countries, or suggested that such procedures should be introduced and developed in most cases that can lead to litigation.

This important topic, which is capable of improving the course of justice and avoiding delays, deserved a much more thorough consideration than we were able to give it, both because of lack of preparation and because of lack of time. What is quite clear is that there is an urgent need to find effective cures for the delays to the course of justice which are currently being experienced.