First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Crans - Montana, September 1991

Conclusions

METHODS OF PREPARING THE JUDICIAL DECISION

The subject studied by First Commission was entitled "Methods of preparing the Judicial Decision". Twenty six countries participated in the work of the Commission by submitting preliminary reports based on the questionnaire which had been sent to them.

To facilitate the examination of the subject it was proposed to the members that their examination should be approached under different headings. It should be pointed out that only civil procedure was considered.

The first heading dealt with the following question - "who determines the facts which serve as the basis for the judgment in the suit".

The answers to that question could be summarised as follows: - as a general rule it is the parties to the proceedings who submit to the judge the facts upon which they rely to support their claim or their defence. This is the rule in the accusatorial procedure.

Nevertheless in several countries it is considered that the judge can of his own motion invite the parties to adduce other facts in addition to those they have put forward. It is not always so as when the parties by common consent expressly prohibit the judge from taking into account other facts or when the parties let it know that they consider that the facts which they have adduced are to be deemed to have been established.

Furthermore in numerous countries it is considered that there are certain matters which require wider powers for the judge. This particularly so in family law where the interests of children are in issue. In such a case the judge of his own motion ought to intervene to protect those interests.

This is but one example. There are other cases such as non contentious proceedings, and even in matters of labour law, which require that the judge should intervene on his own authority to discover all the factual elements which by their nature will influence his decision.

The second heading dealt with the settling of the methods of proof to establish the facts adduced.

Several members thought that it for the parties themselves to decide at the time what facts they intend to prove and the methods of proof they will adopt. Other members considered that the judge ought to decide what facts are decisive for the resolution of the proceedings and the methods of proof to be employed.

In this latter case the decision of the judge can be appealed, either before the substantive decision or when that is given; and nonetheless, in the event of an appeal before the substantive decision the hearing of the substance of the case can continue.

It was also disclosed that in several countries the judge can call on experts to sit with him when the matter is too technical and cannot be tried without expert opinion. This solution is criticised even in the countries which adopt it.

The examination of the third heading permitted the Commission to specify in detail who decides the legal basis upon which the judgment must be given.

For many members this question is exclusively for the judge and not for the parties. Even if the parties have indicated that the legal basis upon which their claim is based e.g. whether the claim is based on contract or tort, it is for the judge to discover the legal basis which appears to him to be the one appropriate to the decision in the suit. The judge is even obliged to supply the legal basis if it is lacking.

For other members this question is one for the parties. But if the parties have nothing to say on the subject when formulating their claim it is the judge who must, by virtue of his position, discover the legal basis upon which his judgment will be grounded.
The present question is also of great interest in private international law.
For many members it is for the parties to decide what is the applicable foreign law and to produce the proof of its content and of its interpretation. For other members if the parties have not decided upon the foreign law which is to govern the legal acts to be done it is for the judge to discover that and to make himself familiar with it. In regard to this it should be recalled that the European Convention of London of 7 June 1968 permits the countries which have adhered to it to obtain information on the relevant laws in force and on their interpretation.
Finally the fourth heading which had been considered at a session concerned the method applied by the judge when be establishes the proven facts and when he must decide if these facts meet the requirements of the law.
With regard to this many solutions were considered such as a strict application of the law or to seek the fairest and most reasonable solution within the limits permitted by the law, or to seek to resolve the questions, which had not been expressly provided for in the law (lacunae) by an interpretation of the law.
With regard to this it was pointed out that the solution adopted by the judge must satisfy several conditions, such as the impartiality which is guaranteed by the law, the credibility of the decision and its foreseeability.
In conclusion the judge must furnish himself with the maximum amount of information on the juridical plane by an examination of the *travaux préparatoires*, by the legal writings and by the case law, in such a way as to avoid that his personal opinion alone, which might be influenced by his training, by his social and economic background and perhaps by other external factors, does not put in question his reputation for independence an essential element of credible and impartial justice.