



First Study Commission
Judicial Administration and Status of the Judiciary

Meeting in Yerevan, 7 - 11 September 2008

Conclusions

THE RELATIONSHIP BETWEEN THE EXECUTIVE AND THE JUDICIARY IN A DEMOCRATIC SOCIETY:
THE QUESTION IS - WHO SHOULD BE MASTER?

- 1.) Although many countries' constitutions or constitutional laws adopt the principle of the "separation of powers", in fact, in a democratic society, it is inevitable that there should be constructive interaction between the executive, legislative and judicial powers of the state.
- 2.) However in a democratic society based on the rule of law there naturally is a tension between the executive, which is controlled by elected politicians and the judiciary, which is (generally) not elected but which, in all cases, rightly guards its independence from political interference.
- 3.) It is dangerous for either the executive or the judicial power of the state to predominate over the other. In the first case it can directly threaten judicial independence. In the second it may lead for calls to curb judicial powers and so can indirectly threaten judicial independence and the rule of law. In either case the rights and freedom of the people would be endangered.
- 4.) Examples of situations where the balance between the executive and the judicial powers is in danger that were cited in discussion were: (a). direct or indirect refusals of the executive to acknowledge and act upon decisions of the judiciary, and (b) a misuse of the media by the executive against the judiciary.
- 5.) The structural independence of the judiciary is essential. A lack of such independence may influence the independence of the individual judge and therefore infringe a fundamental right of the people to have a fair resolution of their disputes.
- 6.) Proof of structural independence of the judiciary requires an examination in the country concerned not only of the relevant legal regulations but also the factual situation. In some countries the strictly legal position is amelioration by current practice. However, principle effectively observed rather than mere practice is a much safer foundation for an enduring balance between the executive and the judicial powers.
- 7.) The following aspects of the structural independence of the judiciary (amongst others) have been identified: selection and composition of the Council of the Judiciary, selection and appointment of judges, promotion of judges, selection of presidents of court, physical safety of judges, salaries pensions and other entitlements of judges, distribution of cases, transfer of judges, termination of office of judges, disciplinary procedures against judges, training of judges, drafting and spending the budget of the judiciary, internal management of courts.
These aspects also refer to public prosecutors in countries where they are part of the judicial system.
- 8.) The answer to the question "Who should be master in a democratic society?" is neither - there should be a balance between the executive and the judicial powers, each respecting the power of the other in the respective domains according to law.

Topic for next year: Ways to identify and classify criteria, objective and subjective, by reference to which the independence of the judiciary may be assessed?