Comparative perspectives on the office of judge

English summary of the first conference of the "Thinking the office of judge" conference cycle at the Court of cassation
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While the notion of the "office of judge" must be upheld for the legitimacy of its longevity and the potentiality of its development, "thinking" necessitates, according to Sylvaine Poillot Peruzzetto, an analysis of the new context in which it is situated. The European framework shakes up the hierarchy of norms, but also imposes the dialogue between judges and proposes the creation of a European sphere of justice. Globalisation, which also calls for comparative law to be taken into account, introduces soft law norms whose operation escapes the classic criterion of hierarchy. The evolution of democratic societies places the citizen at the centre of the search for justice. Global challenges question judges. Social sciences study the role of the judge in building their ruling, as well as the scope of these rulings, and are interested in representations. The algorithmic analysis of rulings requires thinking about the role of the judge in selecting data and designing algorithms.

This change in context requires an analytical method which, in order to open up a critical sphere, requires dialogue between judges and academics, a comparative approach and – today's conference is an illustration of this – a multidisciplinary approach.

Boris Bernabé, professor of law at the University of Paris-Saclay, approaches the office of judge based on their reason, the object of the "*juridictio*", and the actor. While the term office is already well established in Cicero's *De Officiis*, a reasoned code of actions, of possible behaviors in conformity with absolute values, it allowed the canonists of the 13th century to affirm the active role of the judge, by distinguishing the mercenary office, in the service of the action carried out by the parties, from the noble office, which allows the judge to sentence crimes and to act on their own, for example by providing a lawyer or by raising a plea based on equity. As for the definition of "*juridictio*", linguistic studies show that in Latin two verbs qualify "to say": *dicere* is the action, which lasts, and *dicare* is a statement; in other words, law has two elements: the whole process that precedes the decision, the movement, and the decision that decides, the moment. With regard to the person who must choose the actions and guarantee both the movement and the

decision, Aristotle held that a good judge must be educated in all respects, assuming the importance of transmission.

He illustrates his point with the parable of the judgment of Solomon. Before the decision, through a long process, the two women set out their arguments and then, as the Hebrew tradition dictates, Solomon seeks the conciliation of the parties and announces an extreme decision that leads one of the women to renounce her rights. Solomon's concrete knowledge and experience of society overturns our conception of the role of judge: he does not seek absolute truth, but, through conciliation, a truth that is socially acceptable to the community.

Wanda Mastor, professor of law in Toulouse, referring to the representation of justice in the USA, shows that the figure of the judge is in itself very important, as illustrated by the death of Judge Ruth Bader Ginsburg. Judges must represent the American society and their candidacy is considered according to predefined categories (man or woman, white, black, Latino, etc.), religion, beliefs, convictions. While Supreme Court justices, like federal judges, are appointed by the executive branch, the majority of state justices are elected, campaign and participate in public debate. A good judge is a judge who is action-oriented, pragmatic, experienced and often a former lawyer.

Two theories clash on the role of judge: to apply the law or to create it. The first leads the judge, through an act of knowledge, to seek the pre-existing meaning of the applicable law and their decision is expressed as a truth. In the second, which developed in the United States in the 1920s in the wake of the dominant formalist trend and the hypocrisy of the syllogism, interpretation is the fruit of the judge's will. Thus, the American realists and the school of Sociological Jurisprudence have highlighted the creative power of the judge: in handing down their decision, judges make choices. Social and economic considerations, the consideration of fairness, the intuition or the subconscious of the judge are all non-legal parameters that enter into the decision. Nevertheless, on both sides of the Atlantic, the approaches converge and the French judge is not constrained by the figure of the robot judge. In spite of the syllogism, the brevity of the decisions, the absence of affirmed pragmatism, their hostility towards dissenting opinions, the French judge, in fact, is concerned with the social, economic and moral consequences of their decisions.

Julie Allard, professor of philosophy of law at the University of Brussels, on the impact of algorithms on the act of judging, talks about the impartiality of the judge and our representation of justice.

There are two opposing views on the effective use of these new tools. According to the technophile vision, which sees science as an answer to the chaos of the world and proposes a response to arbitrariness, algorithmic analysis will relieve the judge of repetitive tasks, provide encyclopedic knowledge, avoid disparities in jurisprudence and hazard, respond to the imperative of legal security and promote alternative dispute resolution. According to the skeptical view, algorithmic analysis reduces conflict to an automatic and impersonal treatment when the litigant is looking for an interlocutor, limits justice to a decision when it proposes to the parties a process

made of necessary steps before the decision is taken, invites conformism by removing from the debate the fundamental moral problem of how to establish the norm.

Regarding the theoretical presuppositions of cyberjustice, she argues that the anxiety, which is as old as the West, about human finiteness justifies the use of mathematics as a key to social harmony. The idea of disembodied justice, blind without a body, as Plato used to say, blindfolded, of justice insensitive to the person of the judge, to that of the litigants, is moreover an ideal taken up by Montesquieu and Beccaria, the father of syllogistic reasoning. Algorithmic analysis and the return to the robot judge leads to an anthropological change based on the philosophy of social utilitarianism. Applied to justice, the justiciable would be a strategic rational player who obeys a single logic of interest. Lastly, she wonders whether governance by data does not seek to circumvent all decision-making and all recourse to authority.