COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

The office of the judge, to say the law

According to a double etymology explained by Professor Bernabé, "to say the law" means both *jus dicere* and *jus dicare*. The judge's entire office, which is attentive to respect for the guiding principles of the trial and hands down a final sentence, is situated in the gap between these two "sayings". Here, linguists tell us that the process of an action is embedded in the first whereas the second is a state of affairs. The sentence, because it affirms a judicial truth, is always performative. This type of creation of rights, which has consequences for the lives of litigants, obliges the judge to show that he hears, understands and makes himself understood, in a threefold communication exercise. The judge's speech can then be observed in its transmission, reception and restitution.

As for the judge's word, Gabriele Schotten, judge at the Cologne judicial court, addresses the theme of the intellectual, legal, moral and material conditions of the judge's word, which constitute its credibility. The judge's word serves to construct the truth. In spite of the operative principle, the court must ensure that all aspects of the dispute have been raised, allowing the litigants to explain any neglected aspects. In practice, therefore, the judge is very active. A genuine discussion takes place between the parties and the judge who, before the hearing, summarises the facts and gives his assessment of a possible legal qualification which may be clarified or even set aside during the adversarial debates. The aim is to avoid "surprise" decisions, rendered on a point that has not been seen, while giving the parties an opportunity to react. The judge's words help the parties understand the judgment. Indeed, this discussion allows the conflict to be embraced as broadly as possible in order to form a common idea of the most acceptable solution, in conditions that exclude all doubt as to the judge's impartiality.

According to Fanny Malhière, lecturer in public law at the University of Burgundy, the judge's word, particularly that of the supreme judge, is intended to be heard by an increasingly large audience. What are the conditions that favour its acceptance? In order to say the law, the judge makes choices that must be justified after being discussed by the parties and between the judges. A decision will be better accepted if it has been rendered according to a fair procedure. Depending on the differentiated treatment of appeals, procedural safeguards may be adapted depending on the complexity or interest of the case. The way in which collegiality is organised and expressed through the judge's statement and the style of reasoning, albeit rooted in the legal traditions of each system, may evolve. The reasoning must serve to justify the decision rendered and not merely to affirm it. The changes made to the drafting of decisions by the French supreme courts, which are aimed at simplifying the reading and enriching the reasoning, tend to make the law more accessible, intelligible and legitimate.

Ian Forrester, honorary judge at the Court of the European Union, wished to point out some basic specificities of the jurisdiction he has occupied, thereby shedding light on the restitution of the judge's word. In this case, the question arises as to what level of deference – i.e. authority – is to be accorded to the decision of the court, given that 27 States are represented there, each with a different approach to the issue. Because judgments are unanimous, they appear to be an exercise in collective bargaining, prepared at several internal meetings. The judge-rapporteur proposes frequent, even constant drafting compromises. This is all the more true given the diverse languages of discussion and composition of decisions: the compromise is grammatical as much as legal or political.

The discussion continues. Gabriele Schotten explains the contradiction between the principles in German legal culture – the contradiction between the principle of dispositive justice and the principle of accurate and complete qualification of the facts by the judge. The solution lies in the discussion between the judge and the parties, the transparency of which enables the judge to remain impartial. Fanny Malhière clarifies the notion of collegiality, which is not only a competition of voices at the hearing, but more simply a discussion between the judges, invisible to the litigants. It is therefore necessary to indicate to the parties, particularly in the grounds, that the collegial exchange has taken place. Ian Forrester adds that in collegial deliberation, dissenting opinions, when admitted, opportunely enrich the discussion, show that the arguments are well balanced, and complement the decision of prudence by not destroying the merits of the losing argument.

As far as the moderator is concerned, this discussion as a whole evokes both Thomas Aquinas and Hannah Arendt. According to Thomas Aquinas, the judge cannot use the truth of the facts of which he may have knowledge outside the trial: any truth must emanate from the workings of the trial itself, in particular the discussion. In Hannah Arendt's view, authority is obtained neither by force nor by persuasion. Thus, the discussion – between judges, between the judge and the parties – which was debated throughout the round table, does not amount to a dialogue or an argumentative demonstration that would remove all authority from the judge and his decision, but rather to a *monstration* by the judge, *ex officio*, of appropriate gestures and words, capable of guaranteeing the validity and authority of the judgment.

Sylvie Perdriolle and Boris Bernabé