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“THE JUDICIAL INSTITUTION AS A SYMBOLIC SYSTEM”

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Abstract:

Lawsuits, and from a general point of view the act of judging, are fascinating phenomena's. Justice can often be found at the core of our passions as a sacred and ritual activity. As well as death rituals, judicial rituals are to be found in every organised society sharing links with the divine or sacred things. This deep rooted sacred element ensures the authority of the judicial institution and of its discourse. The judge represents God and is the only one to possess the power to announce the truth. The passage from tradition to modernity and post modernity characterized by the dominance of the principle of reason may weaken the discourse of the judicial institution. Because of its rationalization, it is now competing against other kinds of discourse and especially those of politicians. Just like other social institutions, the judicial institution is particularly confronted with the post modern problems of the meaning and representation.

Keywords:

Judicial institution, representation, discourse, post modernity, authority

Lawsuits, and from a general point of view the act of judging, are fascinating phenomena's. Justice can often be found at the core of our passions as a sacred and ritual activity. As well as death rituals, judicial rituals are to be found in every organised society sharing links with the divine or sacred things. This deep rooted sacred element ensures the authority of the judicial institution and of its discourse, the judge representing God and being the only one to possess the power to announce the truth. The passage from tradition to modernity and post modernity characterized by the dominance of the principle of reason may weaken the discourse of the judicial institution. Because of its rationalization it is now competing against other kinds of discourse and especially those of politicians. Just like other social institutions, the judicial institution is particularly confronted with the post modern problems of the meaning and representation. The institutions are disillusioned. The symbols of the past are losing their meaning. This emancipation from "*reli-gion*" could be emancipation from what links, which would represent a weakening of social ties and lead on society to anomia. The judicial institution will be considered herewith as a symbolic way to represent the community as it contributes to create a discourse on truth while it used to find its authority in sacred things and in the resort to a kind of religious dogma, it now seems to be

roating itself into a new dogma based on the "*social contract*". Although the French revolution moved the place where the dogma is asserted, and the state represents the absolute spirit that yields bad to reason... the King survives nonetheless through the role of president of the state and the judicial institution remains based on the idea of symbolic representation without insisting structurally on a real democratic vacation. This logic based on representation always allows to get "*the invisible parts out of a body*" (Merleau Ponty -1960). The judicial institution as an area of representation thus grants society, as a social body, the ability to complete itself thanks to the outside... The mirror of social representation drags out the invisible parts of the social body which can position itself in this area of representation. The judicial mirror allows society to become both stage and discourse (Legendre, 1999). From that prospective, the judicial institution appears in a compound relationship through the role played by the judge as a mediate between the individual and the community, as a reality which is not immediately accessible but which can be accessed "*mediatly*", it is used for this purpose (pierce, 1970) This prerogative of representation gives authority and legitimacy to the judge as a consequence of an accepted dogma. This right to act "*in the stead of*" doesn't imply supervision but independence on the contrary: it

accomplishes what the community can't do by itself. Therefore the judicial institution conveys the message of a certain community as well as its own message which is linked to the culture of the community and its organization. According to what Pierre Legendre said (1985 p. 185): *"The judicial authorities are in an institutional position of third party, with all it implies in relation to the general economy of reference in a society and for every individual"* Solving a conflict between private interests takes a collective dimension if efficient decisions are made for the parties involved and if more symbolic ones are also made for society. With the desincarnation of parties and facts into a juridical qualification, a lawsuit becomes an arbitration of values and acquires a symbolic dimension concerning society. The judicial institution has for objective the preservation of the meaning of *Reference*. In this objective which consists in preserving *Reference*, lawsuits appear as representations of a struggle between values and proscription, under the control of the instituted authorities. When legal proceedings begin, parties are disincarnated and facts are disqualified in order to display their representative role. The judicial ceremony then takes up a new meaning as a theatrical representation of concepts which are materialised by judicial struggles. The dramatization is not unrelated to the importance of proscription in an organized society. Judicial decisions replace divine sentences but keep the

same values which are universal and whose logic is guided by the *Reference*. The judicial system therefore conveys a message which is always based on a *"dogma"*. All the elements of the system contribute to the elaboration of this discourse. All the rituals, the symbols, the suits, architecture as a symbolic system... We will then analyse the judicial institution with a semiotical approach as a system of representation which stages the values and proscriptions of society (I) and also as a system which transmits meaning and values (II).

PART 1. THE JUDICIAL SYSTEM: A SYSTEM OF REPRESENTATION.

The purpose of the judicial institution is not limited to the preservation of public order, it is also meant to preserve the meaning of *Reference*. As an authority which used to be legitimate thanks to the dogma found in sacred writings and has been so through the dogma of the *"social contract"* since Enlightenment, the judicial institution is among the system having the power to proscribe any offence against the symbolic order. According to Pierre Legendre (1983, p.51) *"The dogmatic function in a society consists in founding and staging the biological function of reproduction. It is about supporting the human cause with the use of institutions by finding meaning to life and death"*. The dramatization of the judicial struggle takes its full meaning: a meaning of collective vocation. The judicial

“staging” organizes the representation of value struggles and cultural proscriptions to the community; lawsuits are the technical “stagings” of the third party’s discourse in an effective way for the defendant and a significant one for society. Indeed the real objective of representation is to put to light what can not be put to light by itself. Paradoxically, it entails an impossibility to appear immediately which however is likely to be overcome by the mediation of the staging. This representation is imposed by the impossibility of immediacy; a deficiency of the represented and then “*implies a system of echoes between the absentee and the present, the obscure and the clear, the close and the far*” (Laupières, p.22, 2001). Past facts are represented by lawsuits, as well as the struggle between values and the affirmation of proscription. Individuals are neglected to the benefit of symbolic garments. Facts are not personalized and as a result they can receive a juridical qualification. The parties then incarnate juridical qualifiers and become nothing more than the symbols of what isn’t there and what can’t be there: what society approves and disapproves of. The individual becomes “*accused*”, “*implicated*”, “*plaintiff*”, “*defendant*”, “*victim*”, “*criminal*”... but is not an individual to justice anymore. The facts find their juridical qualification; “*crime*”, “*fine*”, “*contract*”... thanks to the mediation of law, facts are requalified and parties are disincarnated. Individualities are put aside

in a certain limit depending on the principle of what is called in France “*personnalité des peines*”, and an increasing individualization since it is associated in the proximity. Judges occupy a central position, they represent the third party. The authority and the power of the community that are given to them due to the authorization they obtain from the state. This position is accompanied by signs of this authority whose origins are dogmatic. The signs of this authority are to be found in sacred things. The judicial compound itself, owes a lot to its sacred heritage. According to Jean Carbonnier (2000) “*any hearing place in archaic societies is isolated from the ordinary world*”. Thus, the judicial area is symmetrical according to an axis defined by the position of the president and clearly reminds of the trinity. In the Christian symbolic order, that is where the mystery is set. (Feuillet 2004). The president is the farthest from the entrance in order to show its distance with the secular world. The actors then take their part in this real ceremony. The duration of the hearing is sacred time. The ritual has a strict rhythm: the hearing starts with the entrance of the president, a highly symbolic moment when justice settles in and which follows the bailiffs calling out “*the court*”. The audience defendant, lawyers rise up in sign of respect as chatter and talks become silence. Until the court leaves; the audience is directed by the judge, and within judicial compound, we can readily differentiate the

profane from the men of law who are lost in a universe both impressive and impossible to understand. This element of holiness that we can find in most of the institutions of the republic allows us to support this idea that revolutionary antidogmatism was in fact the rise of a new dogma based on a social contract and in which the state and reason replaced the sacred.

Thus, even if its vocation is not to represent any divine justice, the judicial institution never completely separated itself from its sacred origins. The whole judiciary stage then becomes a symbolic representation. The judge represents the Republic, whereas he used to represent God or the King in earlier times, and all men of law are integrated into this judicial system. Lawsuits are only the struggle between representations. That is to say the representation of reality based on different perceptions but also the representation of proscription regarding the community.

By the use of "*distorting mirrors*", the judicial representation stages values, proscriptions, and becomes the media of a new message from the community. By taking a collective dimension and setting into a temporal dimension, the conflict becomes a source of fulfilment for society (Simmel, 1995) through the evolution and adaptation of case law. The conflict doesn't unilaterally have a pernicious or disastrous role but it is ambivalent. It is then the role of the judicial institution to

position itself as a mediator and to enable society to improve thanks to the conflict and thanks to its mediation to the benefit of the community and the meaning of Reference. This general answer given to litigation therefore is the only acceptable one; it shall consequently have a collective impact.

Law ruling has two values, a practical one which is worthy for its application to the parties related to a litigation and a collective value in an assertion of values or an arbitration between these values. The judge holds a position of special importance as a third party in the conflict of private interest and as a legitimate authority representing their republic.

All decisions of justice are given in the name of the people and bear a collective message which transcends the facts. The judicial decision making process translates the collective vocation of judicial message. The rulings of the Supreme Court "*Cour de cassation*" are sometimes used to recall or assert a rule and convey a message which shall outweigh the importance of a decision in the consequences it has upon the parties. Some decisions sometimes seem to be distant from the original litigation so as to reassert the values and principles of the community.

For example, the condemnation of old people accused of crime against humanity has for only useful purpose the remembrance of some values. In other cases, the judge has the possibility to acknowledge the guilt of a defendant while

exempting him from a sentence; those are the effects of the individualization of sentences which allow *“justice”* to convey a clear message about the respect of values as well as reducing the decision whose consequences would have been unfair.

PART II. THE JUDICIAL SYSTEM; DISPOSITIVE OF TRANSMISSION.

The judicial system as a system of representation following the meaning given to it by Régis Debray, is a system which expounds the dogma through time. The transmission is spread like a communication, a sharing of meanings, values and knowledge between different spatiotemporal spheres optimized by an individual and collective body which is integrated into the collective memory. The judicial system transmits its values and knowledge in an enduring way through privileged venues (courthouses, hearing rooms...), rites (the hearing process), pieces of clothing (Lawyer, magistrates robes) a language, and a culture. As a consequence, the judicial institution, transmits because its functioning includes *“beyond and below word, a lot of other sources of meaning: gestures, places as well as words and pictures, ceremonies as well as intellectual and moral ones”* (Debray, page 9, 2000). Imagining places of identification, the courthouse, the hearing room represent the institution and its values. The study of the symbols and

the architecture strongly evoke the transmissions operated by the judicial institution itself. Symbols have two roles: to contain and unveil; their role is not to show or make some kind of stylization of judicial ideas; they are signs of permanence they resist without words, where verbalization could concept enduring universal ideas. *“They have to be there and talk to everybody, to initiated people as well as secular people in a vital communion for the reinforcement of collective values”* (Ferreira Da Cunha, 1995, p. 106) while language is perverted by time because of inevitable variations of meaning symbols curved in stone or metal keep the authenticity of a message. However, symbols can suffer differences in aesthetic interpretation when they are work of art. Nonetheless, the judicial system follows this interpretation in as much as it brings together a multiplicity of signs whose meaning is close. By the way, the several representations of the judicial institution which are to be found in literature (Maurice, 1997), Show that there is a uniform interpretation of the meaning of the signs of the organization; For example, the allegory of *“justice”* represented by a blindfolded antique goddess who holds a sword and scales, almost unanimously possess the symbols and the qualities of sovereign power. The scales evoke judgment and equality for most civilizations, as well as the blindfold represents impartiality and the sword means both truth and strength.

Courthouses then find their solemnity in the adoption of an architectural paradigm which is an inspiration found in Corinthian temples. This kind of architecture translates best the ideas of stability, strength, permanence, and sobriety that the judicial institution advocates. The choice of noble and unalterable materials belongs to this search for inviolability. The edification of courthouses didn't obey utilitarian restrictions but was prescribed by magistrates themselves. A true judiciary aesthetic trend appeared during the classic age, at first to separate "*justice*" from "*justiciables*" for the people can be brought to count justice referring to divine intervention, it needed to get as far as possible from "*justicables*". Court houses were then surrounded or even isolated within cities by public places, thus avoiding the proximity of businesses... Temple inspires fear and hold people back. In the 19th century, these buildings made a massive entrance into cities. Their objective is not to settle conflicts anymore but to impose fear and respect of justice in an enduring "architectural language" "Everything that seeks prestige and authority needs grandeur: we feel like the "*justiciables*" of a more imposing justice and this way, architecture brings its essential element which is necessary for the respectability of judged things" (Leniaud quoting Julien, p. 18) The example of Roman basilicas with their flights of stairs, columns and fundaments eventually imposed itself to incorporate the

seriousness of law and the solemnity of justice. Nowadays, the construction and modernization of courthouses obey to functional requirements to the detriment of symbols and of enduring things. Nowadays, proximity is considered a quality. All public policies tend to add more proximity even as far as hinting at a return to formerly declining occupations. Cabinet hearings multiply where magistrates and lawyers don't wear their robes and where every symbolic distance is erased.

Kafka's expression considering judges as the "*small civil servants of justice*" will soon lose its derogatory value. A decline of symbolization cankers the judicial institution which is going through both a structural and communicational crisis.

This crisis is not different from a post modern crisis which leads to subordination of enduring things to more ephemeral ones and is accompanied by a loss of legitimacy of the figures representing authority: that is to say, in education, politics, medical sciences.

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