

Academic Year 2023/2024

Thinking about the Production of Norms by Judges - between the government by judges and the judge as mouth of the law

Xavier Magnon

The aim of this seminar is to examine the degree of a judge's power from a normative perspective. It will show that the function of judging is the expression of a power, the extent of which needs to be properly assessed in order to have a relevant vision that can better capture the reality of the phenomenon. The question is equally interesting politically, theoretically and in terms of positive law.

From a political perspective, the question of the judge's normative power invites various values around which our different contemporary legal systems have been built: rule of law, democracy, liberalism, constitutionalism, separation of powers. In these different value systems, which place should be given to the judge's power? The most significant illustration of the conflicts of value crystallised by the power of the judge can be seen in the counter-majoritarian dimension of constitutional justice, opposing the rule of law and democracy.

From a theoretical point of view, the various possible theoretical conceptions of the judge's normative power need to be highlighted and evaluated against each other. The theoretical issue is decisive because it makes it possible to establish the extent of the power to judge in any legal system. A certain number of so-called realist currents (American, Scandinavian but also French) are opposed to the normativist current, around the work of Hans Kelsen.

Finally, from the point of view of positive law, it will be necessary to illustrate, from a comparative law perspective, the choices made by legal systems with regard to the power of the judge. What are the legal norms that govern the exercise of the judge's normative power in these different systems? Should common law systems be contrasted with Romano-Germanic systems? Or, on the contrary, do not each of these two systems deal with this question of the judge's power in the same way?

These different points of view will make it possible to situate the place occupied by judges in our legal systems, to measure the extent of their power and to grasp the reality of this power.