

‘ADJUDICATING IN THE 21ST CENTURY’: RECENT REFORM IN THE METHODS OF DRAFTING AND REASONING OF JUDGMENTS FROM THE COUR DE CASSATION IN LIGHT OF PUBLICATIONS BY THE ‘COUR DE CASSATION 2030’ COMMISSION

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Introduction

Questioning the act of adjudicating in the 21st century invariably leads to a consideration of the evolution of our society: increased demand for justice, increased media coverage of public life, the introduction of digital workplace tools, and the internationalisation of law and justice. The transformations of a judge’s environment are numerous and pose new challenges to which the position must adapt. This article aims to explore the reforms undertaken and the discussions conducted by the Cour de cassation in recent years in an attempt to modernise its methods of work in order to respond to the stakes of the 21st century. Conscious of the responsibility imposed on it by its status as the supreme judicial court, the Cour de cassation has committed, over the last decade, to considerable reviews of its methods and functions. As the most important aspect of adjudication, the judgment from the Cour de cassation has seen substantial changes, including its form, and a rethinking of how it is communicated to the public.

A renewed judgment

The adoption of a new way of drafting judgments

In 2014, the Cour de cassation began to reconsider, on the initiative of the first president of the Cour, Bertrand Louvel, the format of its judgments, which at the time contributed, in its own words, to accentuating the difficulty of communication that exists between the court and society. As a result of this long process, supported by successive commissions, and convening all the representatives of the Cour de cassation, new judgment-writing rules were produced and have been in effect since 1 October 2019.

Abandoning the single sentence, introduced by ‘attendus’, the decisions of the Cour de cassation are now written in a direct style. In addition, the paragraphs are now numbered, and the composite parts of the judgment clearly identified: 1) Facts and procedure; 2) Examination of the pleas in law; 3) Operative part.¹ These structural and drafting changes are intended to facilitate the understanding and dissemination of the rulings of the Cour de cassation, and thus increase its influence, without leading to changes in its methods of reasoning or in the requirements of the ‘cassation’ technique.

¹ For a comparison of the drafting rules for Cour de cassation judgments before and after the reform, see Cour de cassation, *Le mode de rédaction des arrêts de la Cour de cassation change* (5 April 2019) <<https://www.courdecassation.fr/files/files/D%C3%A9cisions/Dossier%20de%20presse%20%27Le%20mode%20de%20r%C3%A9daction%20des%20arr%C3%AAts%20de%20la%20Cour%20de%20cassation%20change%27.pdf>> Accessed 2 June 2023.

The development of enhanced reasoning

The adoption of a new form of drafting judgments is accompanied by the development of an enhanced statement of reasons for the most important decisions, ie decisions reversing case law, deciding a question of principle or a new question, when the solution is of interest for the unity of the case law, or in the case of a request for an opinion of the Court. The ‘enhanced reasoning’ or ‘developed reasoning’ can be summarised by one principle: the judgment must be self-sufficient. In other words, the reading of the judgment alone must be enough for its complete comprehension, without a need to refer to the report of the ‘conseiller-rapporteur’, the opinion of the Attorney General, or their explanatory notice. The enhanced reasoning will highlight the method of interpretation used by the Cour de cassation, alternative solutions that were not implemented by the Court – when these were seriously considered, and precedents in order to make the development of the case law clearer, all while taking into account impact studies carried out where they played a decisive role in the choice of the solution adopted. In other words, the Cour de cassation no longer believes that the authority of a judgment is linked to a pithy statement of reasons setting out authoritative arguments. On the contrary, we believe in the power of demonstration and persuasion. The enhanced statement of reasons thus pursues an educational effect by promoting the understanding of decisions, while reinforcing legal certainty. It is a response to the phenomenon of the internalisation of law and justice by satisfying the European standards in this area that were developed, particularly by the European Court of Human Rights.

In 2020, as a continuation of the reforms undertaken, the current first president of the Cour de cassation, Chantal Arens, and the public prosecutor of the Court, François Molins, set up a commission named ‘Cour de cassation 2030’ in order to carry out a prospective review on the future of the Cour de cassation over the next decade, by identifying, in part, the challenges faced in the judicial environment, whether they be institutional or international in nature and by formulating proposals to address these. The result of a year’s work, the report issued by the Commission in September 2021 contains 37 recommendations aiming, on one hand, to reinforce adherence to the authority of the Cour de cassation – which involves restoring confidence in the decision-making process, promoting dialogue between judges and opening up to outside views – and on the other hand, to continue to reform the working methods of the Cour de cassation in order to better meet the expectations of the trial courts, litigants and society as a whole.² In order to increase confidence in the decision-making process, the report proposes the introduction of an ‘open interactive procedure’ for ‘landmark cases’, as the commission calls them, with a public hearing, allowing for the involvement of third parties, external authorities, experts and *amicus curiae*. This hearing and its audience would be recorded and streamed online.³

Another example, with regards to improving deliberation and reasoning, is the Commission’s proposal to introduce separate opinions in judgments. This process, well known to Anglo-Saxon judges as the practice of dissenting judgments, would be adapted to the specifics of the French judicial culture. This is to say that where the deliberations reveal the existence of a minority opinion alongside the majority opinion, the majority could accept the inclusion of

² Cour de cassation, *Le Rapport de la Commission de réflexion sur la "Cour de cassation 2030"* (July 2021) <<https://www.courdecassation.fr/la-cour-de-cassation/demain/cour-de-cassation-2030>> Accessed 2 June 2023.

³ *ibid* annex 1.6.

paragraphs in the judgment setting out the minority opinion or even an anonymised text setting out this opinion at the end of the judgment.⁴ Giving more space to the reasons for a decision means that more time must be devoted to deliberation and drafting the judgment, which is likely to have an impact on the time taken to deliver a decision. In this respect, the question arises of the resources available to the judge(s) and the team surrounding him or her. The ‘Cour de cassation 2030’ commission thus proposes the creation of a support service for judges, inspired by the ‘Justices’ Clerks’ model or the teams available to judges in the ECHR⁵. The development of enhanced reasoning goes hand in hand with a modification of the traditional structure of judgments and their drafting, while preserving the rigour of legal reasoning and its precision. Aware of the practices of our foreign counterparts and anxious to preserve the legal authority of our decisions, the Cour de cassation is endeavouring to invent what could be described as ‘a model of improved concision’.⁶

A reimagined communication

The evolution of society in the 21st century, and its digitisation in particular, is changing the role of the judge. There is no justice today without communication about justice. The increasing media coverage of public life requires judges to accompany their decisions with adequate methods of communicating them. ‘Judging well’ is necessary, but no longer sufficient.

In 2018, the European Commission for the Efficiency of Justice (‘CEPEJ’) developed a guide on courts’ communication to the public and the media, in order to highlight the need to implement a genuine judicial communication strategy.⁷ Noting that ‘justice is often poorly known and understood and that the public’s trust in justice depends on its understanding of judicial activity’, the CEPEJ invites courts to develop a general communication strategy in order to define the messages that the judiciary want to convey to the public, to disseminate information about judicial activity in its entirety, and to consider the use of all available means of communication.⁸

Various communication measures have been adopted in recent years by the Cour de cassation to improve the general understanding of its workings and decisions. Press releases are published on the website of the Cour de cassation for certain cases or when required by current judicial events.⁹ The creation of a Twitter account for the Cour de cassation shows a choice to diversify and modernise its means of communication.¹⁰ Since 2019, ‘letters’ from the chambers periodically offer a selection of commented decisions, in a language accessible not only to lawyers, but to all citizens.¹¹ These letters enable the chambers to explain the

⁴ *ibid* annex 1.5.

⁵ *ibid* annex 1.12.

⁶ Didier Guérin and François Cordier, ‘La réforme de la Cour de cassation et la matière pénale’ (*Gazette du Palais*, 4 October 2016) 79.

⁷ European Commission for the Efficacy of Justice, ‘Guide on Communication with the Media and the Public for Courts and Prosecution Authorities’ (Council of Europe, 3–4 December 2018) <<https://rm.coe.int/cepej-2018-15-en-communication-manual-with-media/16809025fc>> Accessed 2 June 2023.

⁸ *Ibid*.

⁹ Press releases available on Cour de cassation website: <https://www.courdecassation.fr/toutes-les-actualites?date_du=&date_au=&thematique%5B0%5D=1363&items_per_page=10&sort_bef_combine=created_DESC> Accessed 2 June 2023.

¹⁰ <<https://twitter.com/courdecassation>> Accessed 2 June 2023.

¹¹ Cour de cassation, ‘Les lettres des chambres’ <<https://www.courdecassation.fr/kiosque/les-lettres-des-chambres>> Accessed 2 June 2023.

meaning and scope of the decisions they issue. Therefore, the summaries of the judgments are accompanied by short comments that help to place them in their context, particularly in terms of case law. More understandable case law contributes to both legal certainty and the quality of appeals before the courts. In the same vein, since the end of 2021, the social chamber of the Cour de cassation has been producing a regular podcast in order to help the public keep track of its decisions and decipher important judgments.¹²

In order to aid this communication, a new website was set up in September 2021.¹³ It includes an English version,¹⁴ and a number of decisions are translated every term in order to ensure the dissemination of the case law of the Cour de cassation to a non-French-speaking public.¹⁵ Echoing the conclusions of the CEPEJ, one of the main thrusts of the recommendations made by the 'Cour de cassation 2030' commission is the implementation of a communication strategy enabling the Cour de cassation to make itself better known, but also to be better understood. In its report, the commission stresses that 'it is a given that, in modern democracies, the judicial communication space cannot be limited to the parties and the legal community. It should necessarily and legitimately extend to the public space'.¹⁶ Without claiming to be an exhaustive presentation of the report, some recommendations can be mentioned:

- Filming and broadcasting public preparatory sessions and hearings in certain cases. Since the adoption of Act No. 2021-1729 of 22 December 2021 on confidence in the judiciary, court hearings may be recorded and broadcast to the general public for reasons of public interest of an educational, informative, cultural or scientific nature.¹⁷ The Cour de cassation benefits from an autonomous regime authorising the broadcasting of hearings on the day of the recording - as it already does for the colloquia and conferences it organises. The request for recording is addressed to the first president of the Cour de cassation, who ensures that it meets the public interest objective and that the project is compatible with the proper administration of justice and the serenity of the proceedings.
- In order to increase confidence in the decision-making process, it is proposed that an 'open interactive procedure' be introduced for 'landmark cases', as the Commission calls them, with a public preparatory session prior to the hearing, allowing for the intervention of third parties, external authorities, experts and *amicus curiae*. This preparatory session and the hearing would be recorded and broadcast on the internet.
- The creation of a Cour de cassation Web TV in order to allow the immediate broadcasting of content and to develop an autonomous and proactive communication for all citizens.
- The creation of a forum for dialogue with the legislature in order to improve their understanding of our decisions and to improve the law-making process.¹⁸

¹² Cour de cassation, 'La Sociale Le Mag' <<https://www.courdecassation.fr/kiosque/podcast>> Accessed 6 June 2023.

¹³ Cour de cassation, <<https://www.courdecassation.fr/>> Accessed 6 June 2023.

¹⁴ Cour de cassation (English version), <<https://www.courdecassation.fr/en>> Accessed 6 June 2023.

¹⁵ The translated judgments of the Cour de cassation are available at Cour de cassation, 'All the News' <<https://www.courdecassation.fr/en/all-the-news?thematique%5B0%5D=1676>> Accessed 6 June 2023.

¹⁶ (n 2) 79.

¹⁷ République Française, 'LOI n° 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire' <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044545992>> Accessed 6 June 2023.

¹⁸ Article R. 212-64 du Code de l'organisation judiciaire, which was modified by decree, 30 August 2019: République Française, 'Article R. 212-64 du Code de l'organisation judiciaire'

- Providing the Cour de cassation with a spokesperson. Initial steps have already been taken in this direction, in particular by attaching the communication department of the Cour de cassation to the first presidency, rather than to the research and documentation department. The proposal also echoes the recommendation made by the 'Conseil supérieur de la magistrature' in its 2021 annual report to create a spokesperson function within the national courts.¹⁹

Conclusion

The media and social networks are becoming increasingly important in the public arena. Whether one approves or regrets it, the courts must take this phenomenon into account in order to adapt to it and respond to the growing demands of communication.

<https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071164/LEGISCTA000032461957/2020-07-25>

¹⁹ Conseil Supérieur De La Magistrature, *Rapport D'activité 2020* <http://www.conseil-superieur-magistrature.fr/sites/default/files/rapports_activite/csm - rapport_dactivite_2020.pdf> Accessed 6 June 2023.