

Third lecture in the “Role of the judge revisited” series of lectures organised by the Court of Cassation, the Société de Législation Comparée and the University of Toulouse 1 Capitole, held on 14 December 2020.

What role do economic issues play in the role of judges?

Do the economic issues raised during disputes or underlying disputes impact and/or pervade the work of judges and, more generally, the attractiveness of the judicial institution? If so, to what extent and how can this be reconciled with the requirement for judicial impartiality? This was the subject of the third round table organised as part of the “Role of the judge revisited” series of lectures.

It was not so much a question of examining the role played by judges in updating the content of economic law or their proactive or passive role in legal proceedings involving economic interests, but more a question of examining how economic issues influence their reasoning, the grounds of their decisions and the very attractiveness of a legal system.

In order to determine the extent to which economic issues influence the reasoning of judges, Carole Champalaune agreed to give us access to the “engine room” of the work of judges. This research showed that economic issues influence judges differently depending on the role expected of them, determined by the purpose of their review (review of the internal or external legality of a decision issued by a regulator or a full review of a case (*plein contentieux*)). Additionally, a distinction arises between, firstly, the “economic concept”, which may be a “direct component” of the legal classification (as is the case in competition law), requiring judges to apply “methods” which may be reviewed by the Court of Cassation - thus creating normative economic concepts - and secondly, the economic issues at stake, which may be used as an “indirect tool” for legal classification purposes (for example, to classify an economic public policy law as a mandatory provision).

For example, an examination of the specific role of judges in reviewing decisions issued by regulators imposing sanctions or resolving disputes shows that the courts tend to favour solutions that allow regulators to play an “effective” role.

Lastly, Carole Champalaune presented the “tools” available to judges to help them understand and assess the economic issues at stake. These procedural tools include both conventional tools (written submissions of the parties, expert opinions) and also more innovative tools (*amicus curiae*) and judges can also make use of the procedures to assist them with the interpretation of overriding provisions (preliminary rulings, priority preliminary rulings on issues of constitutionality).

However, any examination of the role of economic issues in the work of judges cannot overlook the economic stakes of the role of the judge itself. Do judges have an “economic role”? And how can this be reconciled with the principle of impartiality? Marie-Anne Frison Roche examined these questions by discussing the expectations of an “*agora*”, treated as a “systemic litigant” and by challenging the assertion that there is a contradictory relationship between the requirement for attractiveness and the distance that judges should maintain and also the idea that impartiality is undermined by the need for an “*agora*” to “internalise” judges, thus trapping them.

However, Marie-Anne Frison Roche believes, instead, that an “*agora*” needs a judge who is “individual”, i.e. with a personality, a face and opinions, but who also maintains a certain distance so that the decisions taken do not come as a surprise, with these two requirements going hand in hand. This can be obtained by restricting how judges work by mechanisms regulating their “margin of discretion”. Their margin of discretion is reduced using a procedure over which they have full control but where they do not act alone. Implementing collective processes consolidates the impartiality of individual judges and this impartiality can be further extended by strengthening their sense of belonging to a “judicial family” (other types of courts, lawyers).

Moreover, individual judges need to apply a rational principle of consistency, both vertical and horizontal. Vertical consistency in that judges should follow what has been decided by others and the technique of the “decisive opinion” should be encouraged. Individual judges should only break away from this if they have “strong reasons” for doing so and according to the general rule of “comply or explain” (which is the very opposite of blind obedience). Horizontal consistency as judges should follow their own decisions: estoppel is likewise a rule of logic. Above all, however, the institution should build “doctrine” as much as possible, using any means, such as annual reports.

Judges need to remain human, diverse and individual and continue to listen, consider and adjust to specific situations, acting as part of a judicial family applying an institutional doctrine that transcends and supports them, but that can be transformed if there is a strong reason to do so, which must always be explained: it is this embodiment of impartiality that will make an economic and financial “*agora*” attractive. Accordingly, there is no contradictory relationship between “*agora*” attractiveness and judicial impartiality, as protected by procedures as part of an institution and a judicial family, and quite the opposite is true, as their interests in fact converge and they build on each other.