

The role of the judge and systemic cases

Three judges agreed to work on a hypothesis, namely “systemic cases”. Christophe Soulard, President of the Criminal Chamber of the Cour de cassation, Fabien Raynaud, member of the Conseil d’Etat and François Ancel, President of the International Commercial Chamber of the Paris Court of Appeal, agreed that this category of cases existed and required special treatment.

Marie-Anne Frison-Roche began by explaining the term “systemic cases”. Through and beyond the diversity of litigation, situations that contain a system are referred to judges in the upper and lower courts at both the national and supranational levels for a decision. The existence of a system is established either by the facts put forward by the parties, or by the claims made by each side, with the decision having an impact on the system. The systems found in a systemic case are themselves diverse: examples include banking, financial, climate, digital, energy or health systems. Several interactive systems may be present. The case is referred to the judge, who must take the system, including the techniques by which it is governed, into consideration in their response. They must be familiar with these and take them into account. What are the features of a systemic case? How should it be treated in procedural terms? How should it be judged specifically?

Fabien Raynaud explored the subject by pointing out that the Conseil d’Etat is familiar with this type of case because the state itself is a system and disputes are therefore often systemic. Changes in society are prompting an increasing number of litigants to refer systemic claims to it, for example in connection with the climate. The first challenge is therefore for the judge to identify this aspect. This is made easier by the procedure, as the issue comes out during the preparatory stages. The Conseil d’Etat has developed the concept of a preliminary investigation in court and preparatory sessions to identify systemic cases so that those that appear small at first glance but which have a large systemic component, such as cases involving urban planning and development, are brought to the fore. It then becomes necessary for the court to compile a series of cases, for the dispute to be examined by a larger bench than was originally intended, for experts, including but not limited to amici curiae, to be approached, and for a preliminary investigation to be carried out so that a decision can be handed down, either as a one-off or as part of a series, which takes the system at issue into account.

Christophe Soulard followed by describing a similar method developed by the Criminal Chamber of the Cour de Cassation. Above all, he agreed with Fabien Raynaud on the importance of identifying a systemic component in unusual cases that would justify special treatment. He gave a number of examples, emphasizing that the facts must be the starting point given that systems are a factual element of cases. Cases become systemic in nature when they give rise to divergent case law, insofar as they produce systemic disruption. This applies to

cases that, taken together, cover a wider phenomenon, for example, the situation of victims of terrorist acts. Other examples are unusual disputes whose solution will have an impact on systems, for example, the status of legal personality in respect of criminal liability in the case of a merger. The speaker explained how the role of the judge is adapting to these cases. By reaching a quick decision, which is why the Cour de Cassation has established the observatoire des litiges judiciaires to monitor court proceedings. By providing immediate, specific guidance to judges in the lower courts. By organizing themed hearings, on the basis of upstream identification of cases. By informing lawyers and advocates general in advance about work carried out upstream, during the preliminary investigation session.

François Ancel agreed with his colleagues that above all, judges should identify those cases that are systemic in nature out of those referred to them. Taking the term case in its physical sense, he proposed singling out originally systemic cases involving an entire system, particularly in relation to the climate. Undoubtedly, the state is the natural regulator but if the matter is brought before a judge, they cannot shirk their responsibilities. Other cases are systemic when they are treated in court in a way that confers a systemic effect on them. The point these two types of systemic case have in common is that they force the judge to “step outside the dispute” to consider the system, but knowing that they cannot overstep the boundaries of the original application by ruling on the basis of general provisions, which the general scope of a system could lead them to do. It is therefore wise to be prudent. Like the previous speakers, he believed that the judge must identify a systemic case and that open data could help with this. A change to judicial procedure could result in such cases being referred to more senior benches in each chamber. More practically again, the judge must have the appropriate tools to understand and resolve systemic cases, such as opinions, and not only the reasoned opinions of other courts but also technical opinions provided by experts and amici curiae, and reference to comparative law. Furthermore, the speaker pointed out that mediation has a clear role to play in resolving systemic cases, and that the technique of pilot decisions is particularly well suited to them, as is an enhanced statement of the reasons underpinning a judgment. As a result, the role of the judge itself is evolving towards a “role of utility, efficiency and sustainability”.

According to this conference, which was in some sense experimental in being led by three senior judges, the role of the judge hearing a case involving a system is a dynamic one, whose fundamental focus is the future of the systems in which we live.

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