

JUDICIARY AND PROTECTION OF THE RIGHT TO PROPERTY, FREEDOM OF TRADE AND INDUSTRY: FREEDOM CONTRACT AS A MODELS.

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Abstract:

Free economic systems define the establishment of many foundations aimed at allowing every person to freely carry out his economic activity by lifting all restrictions and barriers, not to mention the freedom to use property and money in the materialization of that activity. However, the consecration of these foundations and rules has witnessed important stages, to which a set of conditions and requirements have contributed to the surface, resulting in the contribution of jurisprudence in their development on the one hand and their protection on the other.

Keywords: jurisprudence, economic rights and freedoms, right to contract, freedom of trade and industry, initiative freedom, protection.

INTRODUCTION:

The judge is considered the second man in law after the legislator and this is due to the role he plays from a legal point of view. It plays the role of enforcer of the law in the event of a dispute, which is the traditional role of it. It also plays the role of the interpreter of the law in the case of ambiguity of the legal rule and the role of creating the legal base, which are exceptional roles for the judge, especially the last role of creating the legal base, because in this case the judge is looking to fill the void that the legislator may create in the event that it is not organized and stipulated on a particular issue, so we speak of the judge's jurisprudence.

The judiciary has played several roles in its various jurisprudence in formulating provisions and rules that have contributed in one way or another to helping the legislator to regulate issues related to social, economic and cultural life, to the extent that the judge has become a real source of the legal base that is indispensable. Perhaps one of the vital areas in which the judiciary has contributed significantly to the crystallization and interpretation of legislative texts is the economic field, where it testifies to its contribution to its important rulings and decisions in developing an important exit for economic issues and issues, most notably the protection of the economic rights and freedoms of dealers, which clearly affected the intervention of legislation, especially in France, after enshrined them as principles and rules on which the economic systems in those countries run. In particular, it is about the intervention of jurisprudence in the real protection of the rights and freedoms demanded by the economic operator in the market, such as the right to property, whether in kind or intellectual, freedom of contract, freedom of trade and industry, and initiative as major principles of the capitalist economy through different times that are still in force today.

In the midst of these data, it is necessary to ask the question about: What is the contribution of the judiciary in preserving legal texts aimed at protecting rights and freedoms in the economic field for the purpose of achieving legal and economic security?

In order to answer this question, a plan must be developed that revolves around: First: the place of the judiciary in the development of texts that include the protection of fundamental freedoms in the economic field. Second: The impact of the judiciary on the protection of property and freedom of contract in the economic field.



First: The position of the judge in the field of protection of fundamental freedoms in the economic field

Talking about the role of jurisprudence in protecting rights and freedoms in the economic field stems from a general basic idea, which is the role of the judge in making the legal base in general, i.e. his development of legal theories establishing the legal base. This is confirmed by the judicial rulings issued by the largest judicial authorities in various countries, particularly in the French judiciary, which is recognized for this role, in particular the role of the French Council of State and the French Cassation Court.

In this regard, it has been recognized that the judge is a real source of the legal base by virtue of the fact that the legislator cannot expect everything and all the realistic issues in society by virtue of the fact that he may be unable or deficient in finding appropriate solutions to some issues, so we are in front of the so-called legislative shortcomings. Thus, the judge preempts the legislator in setting a more realistic legal rule that allows the latter in the future to draw more just and realistic legal texts among individuals in society¹.

considering the economic field as the vital and fertile field in which the judge contributed significantly to filling the gaps of the legislator in determining realism and justice for the benefit of a special group of society that practices economic activity, which is the category of economic operators in terms of its dedication to what these dealers demand, which is the protection of their economic rights and freedoms, which later became actual legal texts enshrined by legislation in this field. This can be shown in terms of the judge's intervention in the protection of the fundamental freedoms of economic activity by crystallizing the basis for the protection of those freedoms(1) and the places of his interventions to protect fundamental economic freedoms(2).

1- The basis of the judiciary's intervention to protect economic freedoms: The judiciary has contributed significantly to the consolidation of economic freedoms, which were considered constitutional and legislative principles that cannot be attacked and violated in various countries that have adopted the concepts of a free economy. It is the role of the judiciary in contributing to the protection of freedom of initiative, freedom of trade and industry, freedom of investment and freedom of competition as fundamental freedoms in the economic sphere.

Economic freedoms, starting with freedom of trade and industry, freedom of initiative, freedom of competition and investment, have been considered freedoms of a special nature and the basis of free economic systems. Where they were originally enshrined by the constitutions and legislations of various countries as basic public freedoms added to the public freedoms enshrined in the field of human rights in general imposed by the logic of the free economy based on the need for the individual to leave his freedom to practice any economic activity he desires while respecting legal legitimacy.

This is noted on the laws and legislations that foresee the recognition of these freedoms, such as the French law, which is recognized as a pioneering experience in the field of developing these freedoms since the success of the industrial revolution in it, which was also accompanied by the success of the French Revolution of 1889, which carried major principles, namely the independence of the judiciary. In the midst of this constitutional and legislative consecration, the judiciary intervened to work to protect these rights by working to balance the interest of economic operators in the use of these rights on the one hand, and the need to respect the law on the other. The existence of these economic freedoms in constitutional and legislative terms is considered for the economic operator real

¹For more details on the role of the judiciary in making the legal court, see: Sami daadiab mansour, *Realism in law*, Bairout, 2022.

guarantees, especially with the existence of great international interest under the umbrella of the United Nations in human rights, including rights of an economic nature, where they have settled in the human conscience and have become among the important provisions on which the system of government is built any State² in terms of talking about the rule of law.

Accordingly, it was necessary for the judge to intervene in the field of these economic freedoms by talking about a new and important term in the legal system in general, which is the economic role of the judge in order to protect these freedoms from all attacks that may be exposed to them. Here, we say that the intervention of the judge in the field of economic freedoms is through their protection, as the judge in general is the protector of individual rights and freedoms, especially the ordinary judge and at the lowest level of the administrative judge. This is shown in terms of the role of the judge being linked to the transformations that the free economic system has undergone in terms of its intervention to try to reduce the restrictions that may be imposed by the state through its authorities on those economic freedoms on the occasion of performing its basic function, which is economic control according to a concept that focuses on protecting the market and achieving economic public order.

2- Areas of the judiciary's intervention to protect economic freedoms: The areas of judicial intervention can be highlighted through its jurisprudence in matters of infringement of economic freedoms based on the interventions of the French Council of State as follows:

- In its various resolutions, the French Council of State has affirmed that the freedom of a person to practice any professional activity must not be accompanied by any restriction, barrier or legal regulation of any kind. As these economic freedoms are fundamental freedoms, this must be accompanied by not limiting their exercise through restrictions imposed by the legislator. Here, the legislator merely formulates economic policy under general and abstract rules, adhering to neutrality and leaving the details of those texts to practical applications. Even in cases where the legislator intervenes to regulate economic issues such as public utilities of an industrial and commercial nature, this should not be accompanied by prejudice to the freedoms that the economic operator possesses when dealing with him to operate these facilities in the name of the public interest. The French Council of State considered that the restriction of economic freedoms in connection with the performance of their role by public utilities of an economic nature must be flexible by balancing the use of those economic freedoms with the achievement of the objectives of those facilities³. In light of this trend of the French Council of State, the French legislator intervened to issue several laws in the field of economic development in France, including the Privatization Law of 1986 and the Competition and Prices Act of 1987. A special place has also been granted to the administrative judiciary, especially in achieving economic security through not only the consideration of legal issues, but also the economic analysis of the files submitted to it through the search for justice and fairness for economic operator
- The French Council of State considered that the protection of the economic freedoms of the economic operator must also be demonstrated through the presence of public persons in the market. Commercial activities in the market are originally left to private persons, and if there are public persons in the market, this must be done in special circumstances, especially in the event that private persons are unable or insufficient to satisfy the needs of the population and create a public

² Mouhamed mahmoud salama djabr, *The economic role of administrative judge in Egypt and France*, Ain shames University, 2014, P.30.

³ Mouhamed ali abed elsalam, *the role of board State in investigation economic security*, Daar el nahda el Arabia, Cairo. 2016, P.62.



benefit⁴. That is, the public interest justifying the intervention of public persons can be arranged especially in the absence of private activity⁵.

- The French Council of State, in application of the decisions of the Constitutional Council, stressed that the exercise of economic freedoms should not be absolute, but must be within an organized framework required by the public interest, without resulting in deviation or arbitrariness up to the lack of benefit from those freedoms. This was based on the role of the governing bodies of economic activity, which must work to balance their controlling role, which is to protect the market on the one hand, and to preserve all the freedoms enjoyed by the economic operator in the market, on the other hand.
- Finally, the role of the judge appears in particular in the field of protecting public economic freedoms when intervening in disputes related to the economic field, the subject of which is to prevent or abuse the economic operator from using these freedoms. This explains the intervention of the ordinary judge and the administrative judge in the consideration of cases of an economic nature, both in the field of competition through the protection of free and legitimate competition and in the field of economic activity through the recognition of the protection of freedom of trade and industry and freedom of initiative.

In other words, the judge's intervention to protect fundamental freedoms is evident on the occasion of the existence of cases of an economic nature whose subject is economic freedoms, especially when the state or one of its administrative bodies is economic control, considering that its administrative decisions are the ones that can affect those economic freedoms. In competition cases, the jurisdiction belongs to the ordinary judge, and this is against the decisions of the competition authority in France.

Secondly: The impact of the judiciary on the protection of property and freedom of contract in the economic field

In addition to the judge's intervention in the protection of fundamental freedoms, he has contributed in one way or another to the protection of the property of the economic operator (1) as well as the freedom of contract for them through a certain method that must be clarified (2).

- 1- The judge's intervention in protecting the economic operator's property: Another issue that the jurisprudence has taken care of to intervene to protect it and that concern the economic operator is ownership as the real guarantee for the exercise of economic activity with comfort and reassurance through the dedication of what is known in economic systems in general, which is private ownership of the means of production. He must be free on his own property without any assault on him. In this regard, it is necessary to highlight the reasons for the intervention of jurisprudence to protect the property of the economic operator (a) and then determine the cases that intervene to protect that property (b).

A- Reasons for the judiciary's intervention to protect the economic operator's property: In this regard, we say that the reason that made the judiciary intervene to protect it is to consider it one of the basic rights of human rights in general, inspired by the results of the French Revolution of 1889 and the Universal Declaration of Human Rights of 1948. To intervene legislation to stipulate it within its internal texts, especially in civil laws, including French legislation within Article 533 of the Civil Code⁶.

This private property of the economic operator and of the ownership of real estate and movables is protected when he carries out his economic activity, whether it is related to investment or trade. Here, the state must not resort at any time to dispossession of property, especially by resorting to the method of nationalization, confiscation or expropriation for the purpose of public interest, unless

⁴Mouhamed mahmoud salama djabr, previous reference, P508.

⁵CE, May 31, 2006, Order of lawyers at the Paris bar.

Excerpt from: Mohamed mahmoud djabar, previous reference, p. 508

⁶ Civil Code, last modified on February 6, 2023.



this is justified, because this means the elimination of the freedom of the economic operator to practice his activity in his property and eliminate it in the market. Therefore, what the economic customer demands and in order to protect his property is a set of guarantees that must be respected, namely:

- Not to resort to usurpation or arbitrary expropriation in the event that private property is necessary by the state, such as expropriation for the purpose of public interest, such as the construction of major projects of the state or for a purpose of higher interest of the state.
- The necessity of compensating the economic operator fairly and equitably for the expropriation of his property is intended to reduce the damages resulting from his expropriation, in particular by compensating him for the profits he could have made in the market or allowing him to operate elsewhere.

As for the protection of intellectual property, the economic operator demands the preservation of his rights and the fruit of their intellectual production from all forms of aggression, such as imitation, forgery, theft or abuse from others. Based on these data, the use of this property is originally the right of its owners alone in all production and distribution processes of various types of goods and services offered in the market, making them acquire and acquire the markets, that is a legitimate right and it is customary because the private interest is legitimately contained in the possession of these rights.

B- Cases of the judge's intervention to protect the economic operator's property: In the midst of the aforementioned data, he witnesses the jurisprudence of the great role in the formulation of provisions for the protection of property, whether traditional property, which is the ownership of real estate or movables, and whether with regard to intellectual property:

- **Protection of traditional property:** This involves the intervention of the French Council of State by virtue of its judicial decisions in the following matters:
 - ✓ The concept of public utility evolved from an abstract idea to a qualitative idea through the emergence of the budget theory as follows:
 - ✓ French State Council intervention to emphasize the issue of the public benefit that merits the expropriation of the economic operator, in particular the ownership of the investor. Here, the Council emphasized:
 - The Council initially approved traditional control, which is to examine whether the case subject to expropriation falls within the cases specified by law or not. He has decided in this regard in many cases and worked hard to give his opinion, including the issue of the project to establish an airport in the village for the public benefit⁷.
 - The French State Council intervened to conduct a realistic search for the public benefit, taking into account the circumstances surrounding it and the expected benefit of the narrative of the removal of that public utility. Here, too, the French Council of State dealt with many issues, including the expansion of a horse ring in one of the villages overlooking the sea for the purpose of contributing to the tourism and economic development of that village⁸.
 - ✓ The French State Council intervened in the question of compensation for expropriation for public benefit and decisions on expropriation for public benefit. Where he stressed that the decision to expropriate property for the public benefit is considered as a decision of a special nature that is not included in the regulatory decisions or individual decisions as a decision of a mixed or dual nature.
- **Protection of intellectual property:** This concerns the intervention of French jurisprudence under its jurisprudence in the following matters:
 - ✓ Jurisprudence through the French Court of Cassation intervened in the issue of industrial designs by ruling on lack of jurisdiction in the case of a model with new elements made for industrial purposes

⁷CE, 13 mai 1964, Molby et Bedouet, A J 1965-45 note loborte, GA 1978

⁸Excerpt from : Mouhamed mahmoud salama djabr, previous reference, P607.



due to the failure to justify the imitation ruling by the plaintiff. Reproducing a work, even if by imitation, is not a mistake, but rather creates similarities in the psychology of the customers⁹.

- ✓ The intervention of the French Council of State in extending its control over the texts related to the appellation of origin by virtue of a decision issued in 1986, in the light of which it insisted on a judicial decision to partially cancel a decree specifying the geographical scope of the appellation of origin .

2- **Judicial intervention in the protection of contractual freedom:** Another issue that has been approved by legislation to differ from capitalist countries is the freedom of contract as a right that cannot be infringed in any way in all areas in which it is concluded, including the economic field. In light of this, it is necessary to determine the justifications for the judge's intervention to protect contractual freedom and then his position on that protection.

A- **Justifications for the judge's intervention to protect contractual freedom:** The conclusion of the contract in general is subject to the will of the parties through the principle known in the theory of the contract in general, which is the principle of the authority of the will and contractual freedom, which prevailed for long periods of time and is still prevailing as a principle that is not eliminated as long as it serves individuals and society alike. The basis of this contractual freedom is that the will of the individual or person is the basis for concluding the contract in the manner he wishes, bearing the obligations resulting from it, as well as the responsibilities and risks freely and independently and in a manner that achieves justice and balance between him and the other person with whom the contract is concluded.

The right to contract freedom derives from the individual freedom enjoyed by individuals in general, and in particular the principle of the authority of the will advocated by the individualist doctrine in French law, according to which individuals are free to conclude their agreements and that individual freedom is a natural and sacred right and thus respect for contractual freedom derived from the will of the contracting parties¹⁰.

In this context, it has been confirmed from the legislative and judicial point of view and in many countries that contractual freedom imposes itself on everyone without exception, including the judge, by virtue of the fact that he is subject to the will of the parties to the contract in the terms and obligations contained in the contract, as it is not possible to resort to amendment or cancellation of the terms of the contract without ascertaining the will of the contracting parties, which was explicitly approved by the French Court of Cassation in one of its decisions of 2015. In this regard, it was stressed the need for the legislator to refrain from interfering with restrictions that hinder or limit the freedom of contract with unnecessary conditions and restrictions, unless this requires the existence of social interests that approve this, in which case the legislator must work to achieve balance in economic relations¹¹.

B- **The position of the judiciary on the protection of contractual freedom:** In light of what has been listed above, it becomes clear to us the importance of freedom of contract from an economic point of view, especially for the economic operator. This calls for intervention to protect it, which can be demonstrated in the event that the State intervenes to limit that freedom, either on the occasion of its performance of its market control role in terms of restricting the use and restriction of that freedom, or on the occasion that the State is contracted by public persons with the economic operator as follows:

⁹ France, Court of Cassation, Civil Chamber 1, October 4, 1977, 75-10473.

¹⁰ Belhadj elarbi, Contract theory in Algerien civil law, University publications office, Aleria, 2015, P. 56.

¹¹ Mouhamed ali abed elsalam, previous reference, P. 70



- The case of restriction of contracting by the economic operator: As the contract is the basis for the existence of the market in light of legitimate and free competition, this is offset by the possibility of subjecting that contract to restrictions imposed by the state through its specialized bodies in market control. Similar to the non-competition clause and the exclusivity or exclusivity clause¹².

For example, the distribution contract is based on the inclusion of a condition called the shortness clause through the refusal of the merchant who has the right to distribute the products of another merchant competing with the supplier merchant, while adapting this condition as an obligation to refrain from acting on the part of the distributor merchant¹³. If this condition is stipulated, it is considered from the perspective of competition law as a condition contrary to freedom of competition on the basis that it affects the sales of competing traders to the franchisor, as the holder of the distribution right is prevented from dealing with them. This forced the legislation to intervene to allow sometimes the application of this condition and other times to prevent it, and in the latter case, in the case of verification of the damages. of the administration of this condition, allows the competition regulatory bodies to issue a decision to prevent it.

In light of these data related to the restriction of contracting in some contracts concluded in the market, the judiciary tried to justify the intervention of the state through its regulatory bodies to justify this, as well as the legality of some conditions that are included in some contracts concluded between economic dealers. This includes what the French judiciary has pronounced through:

- ✓ The French State Council affirms the legality of administrative decisions taken by economic regulatory bodies in the economic field if they are based on legality and appropriateness and justified by economic interest. This therefore includes decisions taken by those bodies on the occasion of their regulation of contractual agreements and relationships that impede competition or constitute a restrictive practice of competition.


In this regard, the Council stressed the need to maintain the economic public order on the occasion of taking administrative decisions by the economic control bodies by trying to devote a balance between the economic public interest and the rights of the economic operator. Here, in one of his judicial decisions, he recognized the legality of provisions that limit economic freedoms for the purpose of achieving economic interest.

- ✓ The French Cassation Court asserted that the requirement to prohibit the recipient from actively seeking customers was a legitimate legal requirement in the Interrent case involving the car rental company Interrent, which had a license to exploit the trademark in a specific area of Paris.
- **Case of contract by the economic operator with public persons:** The economic operator contracts with public persons within the framework of either contracts related to public utilities of the state of an industrial or commercial nature or within the framework of state contracts related to investment contracts. Here, the contractual freedom of the economic operator is affected by the possibility of these public persons exercising their public privileges to impose their conditions on the economic operator, which may not serve his desired economic interests behind the conclusion of these contracts, which imposes the need to protect him.

Here, we emphasize that from a legislative point of view, most of the legislation stipulates taking into account the interests of the economic operator on the occasion of the conclusion of this type of contract in its internal laws related to the conclusion of administrative contracts, such as contracts for the delegation of the public utility of an industrial and commercial nature, and in investment laws, including French legislation.

¹² Aisssaoui azdine, contract as a means of market regulation, *elmofakir journal*, Volume 3 number 2, 2008, P.213.

¹³ Lina hassan zaki, Cairo, Legal lawing for restricting competition in integradet distrubation contracts, Cairo, 2020, P.27.



It should be recalled - as we have pointed out above - that commercial activities in the market are originally left to private persons, and if public persons are found in the market, this must be done in special circumstances, especially in the event that private persons are unable or insufficient to satisfy the needs of the population and create a public benefit.

CONCLUSION:

What can be said through the role of jurisprudence in protecting economic rights and freedoms is that it is a pioneering role that has proven its effectiveness in capitalist countries, including France as a model, which depends on comprehensive economic liberalization in terms of giving priority to private initiative in stimulating trade, industry and investment, while keeping the state through its bodies organized and controlling the market while guaranteeing the various economic freedoms and rights enjoyed by the economic operator. Through the study, we found the great role played by jurisprudence in France, whether the French State Council or the French Cassation Court, which has become as models in European countries taken every time the issue of freedoms, economic rights and rights is addressed, and then that even many countries, especially developing countries, have recognized those economic rights and freedoms in their internal laws, and every time a dispute arises over economic rights and freedoms, jurisprudence is cited and the French judiciary is cited.

However, it should be noted that despite the progress made by the French judiciary in the matter of economic rights and freedoms, the jurisprudence in developing countries, especially in the Arab world, has not lived up to the required level in this regard. With the exception of perhaps the Egyptian jurisprudence, which has witnessed a remarkable development in this subject through many issues decided by the Egyptian Council of State related to economic rights and freedoms, such as the protection of property and freedom of competition, the jurisprudence in other Arab countries has not been witnessed by this role, including the UAE jurisprudence, despite the development of an advanced judicial system to adjudicate various disputes, including economic disputes, which may be the subject of the protection of economic rights and freedoms.

Therefore, in order to activate the role of judicial jurisprudence in the issue of protecting economic rights and freedoms, the subject of the study must take into account the following proposals, namely:

- 1- The need to raise awareness of the importance of the role of the judge in crystallizing and protecting economic rights and freedoms, taking into account the experiences that preceded the subject, especially the French and even Egyptian experience as a pioneering Arab experience in the field, through holding seminars and meetings in the field, especially in Arab countries.
- 2- The need to introduce the legal texts devoted to the protection of economic rights and freedoms, especially in Arab countries, including the United Arab Emirates, and then highlight the role of the judge in protecting them.
- 3- Trying to fill the gaps in the texts that know ambiguity in the issue of protecting economic rights and freedoms as prescribed in Western regimes in view of the great development they have witnessed. In particular, highlighting the role of the judge in this matter and not being satisfied with the role of jurisprudence in traditional matters in society.
- 4- Trying to generalize the idea of jurisprudence in Arab legislation, many of which lack a provision for this role. Through my studies, I did not encounter many Arab legislations on this subject, which made me refer in particular to the French experience.

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