

## Claire Lemerrier

### Un modèle français de jugement des pairs. Les tribunaux de commerce, 1790-1880

#### Introduction

##### 1. Puzzles

This research is based on a simple puzzle. France is supposed to be a very State-centered society (and polity, economy), with a sharp divide between the private and the public and an early rationalized bureaucracy (which is supposed to include law and justice). In addition, the 19<sup>th</sup> century could be seen as the paroxysm of this tendency, as guilds, trade unions, and all sorts of « medium bodies » based on a common occupation were theoretically forbidden from 1791 to 1884. And yet France has had commercial courts since the 16<sup>th</sup> century: special courts with lay judges elected by fellow « merchants »; and the century that I study is arguably the moment when they were the less criticized, when they dealt with the most cases (considering the volume of the economy) and when they were considered as a model in many if not all foreign countries. What I wish to understand is therefore both the very long-term persistence of this institution (how it was adapted/was able to be reproduced as an institution in the sense of something that is taken for granted) and its special situation at this moment in time.

I define what I study not as commercial courts per se, but as a French model of peer judgement, as it was something that was considered as a model to be followed by many actors, and as what was to be followed was an ideal-type, not a specific, precise institution. The model consists in the simultaneous presence of four characteristics: there are only lay judges; they are, in principle, elected by peers on the basis of a common economic activity; they use a procedure that is specific and supposedly simpler than that of normal courts; but the special courts are an integral part of the official justice system (e.g. they are not spontaneously created by merchants, cases have to be brought to them, depending on the matter, judgments can be appealed, etc.). This definition does not apply to commercial courts established in some other countries, but it applies to other French courts, mainly the labor courts (conseils de prud'hommes) that were created in 1806. What I want to understand is how this model works, especially in relationship to French political and economic peculiarities (how it relies on them/how it contributes in shaping them), and particularly how it could survive the important political and economic changes of my period.

##### 2. References

My puzzle is all the more relevant because of the weaknesses of parts of the literature addressing the resolution of commercial disputes, namely the « legal traditions » school (that neglects the existence of commercial courts in the « civil law » context) and most of the discussions of « lex mercatoria » (that describes the emergence of a « private » law and of « private » but organized forms of justice or arbitration as a natural process). More generally, I discuss the representation of the public and the private as a simple dichotomy or a continuous scale, and I emphasize the need for a study of different forms of « co-regulation » that all mix « private » and « public » elements, but in different ways. I argue that the French model of peer judgement is part of a specific form of relationships that I call « putting the private in the State »: putting people that are legitimized as experts of economic activities because they are themselves merchants/bankers/even workers, etc. in official positions, as experts of these activities. This is different from other ways to articulate the private and the public, for example from sanction by the State of privately organized regulations (e.g. professional rules, arbitration awards).

To study all this, I mainly rely on two research traditions:

- a French brand of economic history that puts emphasis of co-regulation as opposed to the classical, Statist view of France (e.g. Jean-Pierre Hirsch, Philippe Minard, Alessandro Stanziani)
- law & society, broadly conceived as social science studies of law that emphasize law in action,

law consciousness, and how people and firms use law and courts; and especially its application to economic questions as presented by Edelman & Stryker.

As one of my question is that of institutional persistence, I also use (a bit loosely) the notion of institutional work as defined by Lawrence & Suddaby. I discuss in the introduction several possible mechanisms of institutional adaptation and reproduction, especially some that have been used in the handful of studies dealing with commercial courts (in the 18<sup>th</sup> century, by Amalia Kessler or nowadays, mainly by Emmanuel Lazega).

### **3. Research design**

In order to study this institutional work at various scales,

- I do not only concentrate on commercial courts, but I explore their connections with similar institutions (solving economic disputes) that are their competitors and/or that are modeled on them and in turn reinforce them: mainly the labor courts and the « chambres syndicales », ancestors of French employers association/business interest associations, for which providing collectively organized arbitration was an important task in the 19<sup>th</sup> century;

- I do not only study France. In Chapter 4, I use two foreign cases in two different ways. In both cases, I study failed attempts to import the French model in common law systems and I discuss why they were attempted and why they failed. In both cases too, I discuss an alternative: the development of private, but collectively organized commercial arbitration, and I point out the fact that what it did was not exactly what commercial courts did,

- I mix various sources and methods, always trying to be as systematic as possible (digitized sources have helped much in that way.

First, I study external discourses on the institution (e.g. in the Parliament, by lawyers, in newspapers, etc.), the way it was presented by those who defended it from the inside (e.g. in public addresses by presidents of commercial courts) and internal discussions among judges of the Paris commercial court. The latter source allows a very good understanding of how the viewed and tried to reform their procedure and local organizational routines.

Second, I pay much attention to personal trajectories, those of judges and of other people that were essential for peer judgement although they were not peers. Among the latter, I mainly concentrate on two groups: a small group of special lawyers (*agrées*) attached to each court, who enjoyed a quasi-monopoly and were essential for the institution; the « arbitres rapporteurs », who were a very special sort of referees/experts used by the commercial court not only to try and reconcile the parties, but also to do most of the investigation/discovery (instruction) work. I sometimes reconstruct very precisely the trajectory of one individual to use it as a symptom or an illustration, but I also tried to be more systematic in order to provide quantitative data in this respect.

Third, I studied a few thousands of judgements, mainly from the Paris commercial court, with complementary samples from a smaller French commercial court (in Beauvais), the Paris labor courts, and a complementary complete study of arbitration awards produced in private but collectively organized settings, in the Paris chambre syndicale of bronzemakers and in the New York chamber of commerce. This is mainly a quantitative study of parties and procedures, with some more in-depth analyses trying to understand how the lay judges judged.

All in all, my study is quite centered in Paris because this allowed me a systematic study and a mix of scales and sources, but I regularly discuss the applicability of the results to France as a whole. My feeling is that they often can be generalized, either because the Paris court was really big and influential or because others tended to copy its organizational routines.

### **Chapter 1**

This chapter uses one case where a defendant in the Paris commercial court complained because he suddenly discovered that his *agrée* was also acting for the plaintiffs. It is an opportunity to follow

one case and to present the peculiar sources, procedures, and actors that will be dealt with afterwards.

Part 1. underlines that even according to the Code, lay judges do not act alone, as other people who often have degrees in law play an important rôle in the procedure.

Part 2. presents the daily life of the Parisian court. As there were often 500 to 1,000 judgements per day, the parties were generally absent, and the *agrées* who represented them, as well as the judges, did not speak long. While many cases could be judged quickly as they ended up with default judgements for unpaid debts, others still needed a discovery process. This arguably very important step happened in routinely established ways, without formal witness examinations, etc. Most of the cases were either prepared by a lone judge who discussed with the parties (between formal days of hearing) or by an « *arbitre rapporteur* » who performed the same task without being part of the court.

Part 3. shows that, although part of these peculiarities is due to the very heavy caseload in Paris, similar routines were established elsewhere, so that, all in all, « peer judgement » had not much to do with direct interaction between peer-juges and peer-parties, as it included many elements of systematization, representation by lawyers, and intervention of non-elected agents (the *arbitres rapporteurs*).

## **Chapter 2**

This chapter establishes and discusses the fact that commercial courts were practically never criticized in 19th-century France.

Part 1. first shows that political discourses were more or less unanimous in praising them, as they could be legitimized in various ways (e.g. modern and democratic, because of the election / traditional, because of their early creation and link with guilds under the Old Regime) and they were considered as efficient from the criteria of cost (they cost nothing to the State) and delays and appeals rates (similar or lower than those of normal justice). Governments of all sorts also used their expertise when commercial law reform was under way. More interestingly, lawyers (law professors, normal judges, etc.) did not much criticize them, contrary to earlier and later periods. I argue here that commercial courts (and other lay courts) were instrumental in the professionalization of French judges and *avocats*, as they were used as a counter-model so as to make them look as experts in law, but that this boundary work did not imply a de-legitimization of lay courts until the 1880s. They were considered as fit for their special part of law and justice. It is only when commercial law professors tried to professionalize and thus to show that commercial law was also something legal and technical that some of them argued (unsuccessfully) for the suppression of commercial courts.

Part 2. shows that the creation and, in the eyes of most contemporaries, huge success of labor courts can also be seen as an extension of the French model of peer judgement, as they were explicitly modeled on commercial courts and interacted with them in many ways. In addition, labor courts were presented as a return to the pure sources of the model (even simpler procedures, lower costs, less lawyers, etc.), which could have challenged actual commercial courts but finally mostly reinforced them – at least until the 1880s, when labor courts began to face criticisms and to become associated with the workers movement.

## **Chapter 3**

This chapter discusses « *chambres syndicales* ». While illegal (as associations of people of the same trade), they were quite active in Paris, mostly from the 1840s on. I argue that they could have become competitors for commercial courts, as many of their founders wanted to create a cheaper, more private and more peaceful way to solve disputes inside each trade. This however did not happen. On the contrary, « *chambres syndicales* » were, in a way, captured inside the French model of (official) peer judgement. What happened was that commercial courts (mainly in Paris, but it is a

very important case) used them in the role of « arbitres rapporteurs ». The parties went to the official commercial court; the court sent them to the chambre syndicale, that was collectively appointed as an « arbitre rapporteur ». If the chambre court conciliate the parties, the case was closed. Else, the chambre wrote a report and the commercial court judges decided (often following the report).

Part 1. explains what chambres syndicales were and that accessing the commercial courts and reforming them was one of their main aims. More generally, while they existed despite of a contrary law, they were very much shaped by the legal system in that they were modeled on chambers of commerce and commercial courts (official « medium bodies ») more than on the old guilds.

Part 2. explains more thoroughly the role of arbitres rapporteurs generally. I show that judges had to use them, due to the case load, but also because it allowed much flexibility in the rules of evidence and very low costs. They failed to use a large number of voluntary merchants in this role. They hence used two alternatives. On the one hand, many arbitre rapporteurs were paid for this task and some of them made a living out of it, acting in dozens of cases each month; many of them were lawyers. On the other hand, chambres syndicales were collectively used. Each solution created problems of legitimacy for the court, as it somehow delegated the task of peer judgement. They however persisted in the long term (until the interwar period).

Part 3. shows that the possible alternative to the French model of peer judgement that could have been private, collectively organized arbitration barely existed. Many people did not even know that arbitration was authorized and noone attempted to make compromissory clauses legal. I however study one exception that, in fact, tends to prove the rule: the case of Parisian bronzemakers, whose arbitration board actually treated a dozen of cases each year, independantly of the commercial court. I show that this worked because of very peculiar circumstances and only for a specific sort of cases (of intellectual property). The arbitration board was a way for bronzemakers to discuss among themselves about the definition of fair competition; it was not supposed to be a private court for all sorts of disputes.

## **Chapter 4**

This chapter uses a narrative of English debates about creating commercial courts based on the French model, and of various practices and discourses on arbitration at the New York chamber of commerce, in order to illuminate the French case.

Part 1. shows that some English merchants advocated for « tribunals of commerce » at a time of legal reform (and initially found some support among lawyers) because they felt excluded from courts, that were either far away, expensive and technical or limited to matters of a small amount. They however ultimately failed both to present unitary demands of merchants and to convince lawyers. I argue that this can be understood because some things lacked in England that were present in France (which illuminates path dependency, in the sense that some pre-existing factors made the reproduction of commercial courts easy, while it was difficult to « import » them without the whole institutional system that they were embedded in):

- the absence of a common identification to « commerce », with more perceived and institutional differences than in France between bankers, merchants and traders;
- the absence of other institutions putting « the private in the public » and of a model of « voluntary public service of economic expertise » of the sort that existed in France;
- the absence of a familiar relationship to law among merchants (commercial courts created the familiarity that in turn allowed their persistence);
- not common law per se, but some aspects of procedure that seemed particularly difficult to change (rules of evidence / non existence of the French model of « expert » as distinct from the expert witness).

As commercial courts were not created, other attempts to create something between ad hoc arbitration and official courts were made (e.g. arbitration organized by chambers of commerce), but

not with much success before the end of the century. The English model of commercial dispute resolution ultimately came to rely on a complementarity between superior courts and arbitration by business interest associations, that is in no way natural, but represents an alternative to the French model of hybridization of the private and the public.

Part 2. discusses the successive organizations of arbitration at the New York Chamber of Commerce, that had a peculiar tradition in this respect. It shows that New York merchants seemed to have a much easier access to justice and more familiar relationship to law than e.g. their Liverpool counterparts. Collective arbitration was not so much an alternative to access to justice as something that repeat players in courts could also, in addition, create and use. Much like Parisian bronzemakers, New York merchants mainly used it to decide in a few cases each year, as a way to debate rules of competition and to publicly show their stance on this topic. At some point, in the 1870s, they however attempted to transform their board into something more official and more inspired by continental European model, but this failed (although the new court was funded by the State of New York for a few years). Although the story was quite different from the English one, in the end, the US model was also based on an alternative between official courts and organized arbitration, not the creation of hybrid, lay commercial courts.

## **Chapter 5**

Chapter 4 showed that what is very specific in the French model of peer judgement is that special courts are universal in their own way: while they address specific matters (and hence parties), they are universal inside the limits of commerce, dealing in the same hearings with cases big and small and various sorts of parties – and therefore reproducing a sense of « commerce » as something different from agriculture, professions, etc., and uniting bankers, merchants, all sorts of entrepreneurs and even, to some extent, workers, despite of their differences.

Chapter 5 explores this idea on the basis of my data on judgements and trajectories of judges and, to some extent, agréés and arbitres rapporteurs.

Part 1. discusses the accessibility of the commercial courts of Beauvais and Paris and the labor courts of Paris. While there were distinct repeat players in these courts, mostly bankers recovering debts, what is striking is the diversity of the parties, in terms of gender, location, economic activity and status (individuals / different sorts of societies). These courts were indeed quite accessible, both in terms of costs and in terms of other sorts of factors enabling access; it was even truer for labor courts, but commercial courts were distinctly more accessible than ordinary courts. Agréés played an important role here, both because they had to charge fixed rates for simple cases and because they enabled one-time players to master at least some of the implicit rules of the court.

Part 1. also shows that the judges, while they were described as peers, were always a bit higher on the social scale than most parties. However, there were deliberate attempts to maintain some diversity among judges, both in terms of trades and in terms of attitudes towards commercial justice (with an almost strict alternance between presidents of the Paris court leaning toward « more law » and presideants leaning toward « less law »).

Part 2. further discusses the mechanisms enabling this diversity to be maintain (hence legitimizing and stabilizing the institution) and judges to find successors, while the role was extremely demanding. Election was therefore in fact more a symbol than a reality, as there were generally not more candidates than positions available. Symbolic or indirect rewards for accepting election were present and actively maintained, both in terms of e.g. medals and in terms of access to preciously systematic information on the credit of various fellow merchants. I detected three main types of trajectories of judges, all probably necessary to maintain the institution as a whole: representatives of trades that spent only a few years in the institution, men who invested in it and for whom becoming president of the commercial court was a big achievement, and bankers, who played an important role at key moments while always being a minority. I also emphasize the fact that many of these judges knew something about law even before being elected and that even more

of them considered themselves as real judges, which sometimes led the next generation to become lawyers. I also show the often understated importance of lawyers working with the court, as employees (*greffiers*), *agrés* or *arbitres rapporteurs* – and explain why French lawyers working with firms and/or commercial courts would deserve a more thorough study.

## Chapter 6

This chapter finally tries to confront clichés on the way of judging that was supposed to be specific of lay, peer courts: more conciliatory because judges knew how the parties thought; based on expertise in the trade and/or the application of « trade customs »; and « informal ».

Part 1. draws on a typology of judgments at the Paris commercial court and labor courts to emphasize that, as they were universal in their domain, hence faced with various cases, they in fact offered a wide menu of procedures that allowed to treat all cases in the same place, but in very different ways. What was important for these courts was to offer these many ways, not to treat all cases in a conciliatory, expert or informal way. I then discuss who chose in this menu: my analysis does not imply that the parties faced a wide choice of possible procedures. The choice was tightly controlled by the judges and *agrés*, thus probably favoring those parties who knew enough about the implicit rules of the court to still have their say.

Part 1. also explores practices of conciliation, showing that they took place in the shadow of a future judgement, and hence that the institutional position of the judge was more important for conciliation than the fact that he was a merchant himself. It then discusses a very formalized, and very important in terms of volume, part of the judgements: judgements about unpaid debts or wages, that were quasi-automatic (even when delays were granted). What is however important is the way the judges had to not openly admit that automatic character, in order not to undermine their own legitimacy; and the fact that they fought to retain simple, small cases in their jurisdiction, despite of that automatic character, probably signalling their will to remain the courts of the whole of « commerce ».

Part 2. discusses the question of expertise and trade customs. It shows that the legitimacy of peers could be threatened by a tension between their peerness as merchants generally and their peerness as specialists and practitioners of one given trade (as the court could not, in fact, have judges for each trade). They dealt with this problem by becoming meta-experts: there was not a judge for each trade, but they were able to find an *arbitre rapporteur* in each trade. I also argue that, far from « applying trade customs », they could be influential in defining such customs, but that it was mainly the parties who invoked customs, not the judges. In addition, a detailed discussion of two *arbitres rapporteurs*' reports shows that their style was not solely determined by the fact that the author was either a merchant or a lawyer.

Part 3. finally discusses the fact that commercial courts and labor courts could or could not, and did or did not, influence the evolution of jurisprudence as applied to economic matters and hence the economic practices themselves. I first show that their judgements were included in jurisprudence as defined by the lawyers, at least on some topics. I then show that Parisian labor courts actively tried to influence the practices, in the case of apprenticeship, in the sense of promoting a traditional modern of the small firm, and might actually have had some influence. However, generally speaking, the courts that I studied did not use the openly substantial (political/religious) motivations that Amalia Kessler found for the previous century. Their explicit reasoning tends to use a sort of homo economicus model to determine the plausible intentions and actions of the parties. I still consider that the existence and procedures of special lay courts could have contributed to the reproduction of the peculiar French economic trajectory, with a long-standing importance of small or medium-sized firms and partnerships. This is not as much based on an explicit promotion of this model by the courts as on their organization, low cost, and cooptation system, that limited the place of board members of large corporations among the judges while somewhat equalizing access to justice for small and large firms.