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► To cite this version:

Emmanuel Lazega. Four and Half Centuries of New (New) Law and Economics: Legal Pragmatism, Discreet Joint Regulation and Institutional Capture at the Commercial Court of Paris. De Vries Ubaldus, Francot-Timmermans Lyana. Law's Environment: Critical legal perspectives, Eleven International Publishing, pp.179-204, 2011, 9789490947224. hal-01044405

HAL Id: hal-01044405

<https://sciencespo.hal.science/hal-01044405>

Submitted on 23 Jul 2014

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FOUR AND HALF CENTURIES OF NEW (NEW) LAW AND ECONOMICS

*LEGAL PRAGMATISM, DISCREET JOINT REGULATION, AND INSTITUTIONAL CAPTURE AT THE COMMERCIAL COURT OF PARIS*¹

Emmanuel Lazega

THE 'CONSULAR' MODEL FOR SOCIAL CONTROL OF ECONOMIC ACTIVITY²

Social oversight and regulation of entrepreneurial and commercial activities have always involved an unbalanced three-way competition for influence between the State, the business world (companies and their institutional representatives) and consumers. This struggle is growing more intense in a market society centred around organizations. External (i.e. State) regulation and market self-regulation (primarily by the business world) are usually studied separately in the social sciences, and this leads to a grossly oversimplified understanding of the social organization of business, and hence of market society as a whole.

1 A first version of this paper was published in French in the *Revue française de socio-économie* in 2009. Potentially controversial positions taken in this article are mine alone. They developed out of empirical research conducted with Lise Mounier and funded by the Mission de Recherche *Droit et Justice* of the French Ministry of Justice, by the *Cognitive* program of the Ministry of Research, and by the Institut Universitaire de France. I thank Sophie Harnay, Lyana Francot-Timmermans and Bald de Vries for constructive criticism.

2 An explanation of the term *consulaire* is in order. The *consulat* was a mode of urban government practiced in the Middle Ages in the southern part of the Kingdom of France by cities with a right to self-administration and self-defense. 'Consulatus' is formed from 'consul', meaning 'council'. The word referred to a community's ability to deliberate together in an assembly likewise called the *consulat*. Urban communities governed by a *consulat* could call themselves cities. All had markets and many had fairs. In a '*régime consulaire*' the community governed itself by way of consuls, who varied in number and by qualifications. Merchants organized into socially distinct guilds occupied an important place in the *régime consulaire*. On the basis of the *lex mercatoria*, they managed to negotiate with the State a kind of joint regulation of their business activities within the *consulat* framework: their local self-regulation was to be founded on the State's sanctioning power. The State, meanwhile, whose own administration was as yet embryonic, may paradoxically have seen this cooptation by local merchants as a means of further extending its central control over the country. A major component of the 'consular regime' is the *tribunal de commerce* or commercial court, whose content evolved over time.

Jean-Daniel Reynaud's notion of "joint regulation",³ here extended to a larger context,⁴ together with study of specific institutional forms of joint regulation – e.g., specialized professions,⁵ or the 'responsive self-regulation' studied by Ayres and Braithwaite – help correct this oversimplified view.⁶ France offers its own example of joint regulation, a complex system of cooperation between the State, local intermediate meso-level bodies and individual members of civil society, a system that has given rise to particular institutions such as chambers of commerce and two so-called consular judicial institutions, i.e. first level labour relations courts and first level commercial courts. These consular institutions involve specific ways of sharing the costs of control and regulation of markets and of using the experience and knowledge of work and the economy that lay judges possess.

Existing institutional solutions for social control of markets often differ by country and even within single countries. France's specialized commercial courts are partially in charge of settling disputes between economic actors and imposing a degree of discipline in matters of market entry, activity, and exit; they are the first judicial level for commercial litigation and bankruptcy cases. The longevity and resilience of this so-called consular institution – it has existed in France for four and a half centuries – makes it of particular interest for the study of joint regulation of markets. It is one of the only institutions to have come through the French Revolution virtually unchanged, while being regularly subjected – since its inception – to thoroughgoing critiques that threaten its existence. It is the perfect example of an intermediate institution whose existence is difficult to justify in theory – classic legal and political theory, that is – but that has always held its own in practice due to demand from both the State and at least some of the interested parties.

The French State has long shared its judiciary power with local business communities.⁷ From its inception, lay commercial court judges have been called '*juges consulaires*'

3 J.-D. Reynaud, *Les Règles du Jeu*, Paris: Armand Colin 1989.

4 E. Lazega & L. Mounier, 'Interlocking Judges: On Joint External and Self-Governance of Markets', in V. Buskens, W. Raub & Ch. Snijders (eds.), *Research in the Sociology of Organizations*, Vol. 20, p. 267-296, Elsevier, Den Haag, 2003a; E. Lazega & L. Mounier, 'Lorsque l'Etat se Retire du Contrôle de l'Économie, qui Prend le Relais?', in J. Crête (Ed.), *Hommage à Vincent Lemieux: La science politique au Québec*, Presses de l'Université Laval, 2003b, p. 155-178; E. Lazega & L. Mounier, 'La Régulation Conjointe des Marchés: Le Cas du Tribunal de Commerce de Paris', in B. Convert (Ed.), *Repenser le marché*, Cahiers Lillois d'Economie et de Sociologie, n° 41, L'Harmattan, Paris, 2003c.

5 E.g., business lawyers; but also professions such as accountants, consultants and *notaires*, E. Lazega, *Networks in Legal Organizations: On the Protection of Public Interest in Joint Regulation of Markets*, Inaugural lecture (Wiarda Chair), Faculty of Law, Utrecht University, 3 December 2003; E. Lazega, 'Les conflits d'intérêts dans les cabinets américains d'avocats d'affaires: concurrence et auto-régulation', *Sociologie du Travail*, Vol. 35, 1994, p. 315-36.

6 I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford, Oxford University Press, 1992.

7 *Supra*, note 1.

reflecting the fact that their power was granted by the State (historically, the king) and is founded on State sanctioning power. Commercial court judges, who readily identify themselves as representatives of ‘economic civil society’, are not paid for their services. Would-be candidates for the position must be sponsored by an employers’ association and, in Paris, preselected by a committee composed of members of the city’s chamber of commerce. Once selected, there voluntary, lay and truly judicial judges are elected by a body composed of sitting judges and employer association delegates to the local chamber of commerce, for a two- or four-year term (for a maximum total of fourteen years). In theory, the two consular economic institutions – chambers of commerce and commercial courts – are supposed to maintain close ties and refer to each other’s decisions.⁸ This institutional solution allows for three-way sharing of control costs by the State, industries and businesses, and the individual judges. However, the theoretical understanding also holds that each judge acts as an individual, without a specific mandate from any economic sector.

Commercial court judges and the other actors attach considerable value to their experience and knowledge of the economy in their task of implementing this form of social control. This understanding goes hand in hand with their *claim to make pragmatic legal decisions*. One of my concerns in this contribution is to relate this claim to Richard Posner’s theories (1993 and 1995) on the ‘experiential’ or ‘everyday’ pragmatism of judges – what could be called the (New) New Law & Economics or (N)NLE.⁹ I show that beneath ‘individual’ legal pragmatism, rooted in a judge’s everyday experience, there is a ‘collective’ legal pragmatism that carries with it neo-corporatist values and interests. This observation raises political issues that extend beyond the nature of the pragmatism operative in social control of markets and social control of business itself; namely, the issue of redefining the role and structure of intermediary bodies and the issue of the consequences of extending the consular model – i.e., delegation of State power – to semi-private institutions or independent administrative authorities, as the French State has shown itself increasingly inclined to do with its own version of New Public Management. In this sense, this contribution suggests

8 For a historical contextualization of this intermediate institution, see J. Hilaire, ‘Perspectives Historiques de l’Élection du Juge Consulaire’, in J. Krynen (Ed.), *L’Élection des Juges, Etude Historique Française et Contemporaine*, Presses universitaires de France, Droit et Justice, Paris, 1999; J.-P. Hirsch, *Les Deux Rêves du Commerce. Entreprise et Institution Dans la Région Lilloise (1780-1860)*, Éditions de l’EHESS, Paris, 1985; R. Ithurbide, *Histoire Critique des Tribunaux de Commerce*, LGDJ, Paris, 1970; J. Lafon, *Juges et Consuls à la Recherche d’un Statut dans la France d’Ancien Régime*, Paris, 1981; C. Lemerrier, *Un Si Discret Pouvoir. Aux Origines de la Chambre de Commerce de Paris, 1803-1853*, La Découverte, Paris, 2003, among others. On lay judge identity construction, see E. Lazega & L. Mounier, ‘Quête de statut social, partage des compétences et néo-corporatisme au Tribunal de Commerce de Paris’, in H. Michel & L. Willemez (Eds.), *La justice au risque du profane*, Paris, Presses Universitaires de France 2008.

9 R.A. Posner, *The Problems of Jurisprudence*, Harvard University Press, Cambridge (Mass.), 1993; R.A. Posner, *Overcoming Law*, Harvard University Press, Cambridge (Mass.), 1995.

the relevance of rethinking public action on the basis of a critique of the French consular system.

A PRAGMATIC INSTITUTION FOR JOINT REGULATION OF THE MARKETS

Private-sector business lawsuits in France are handled by courts of various sorts located in different cities, each with a clearly defined geographical jurisdiction.¹⁰ Article L.411-1 of the *Code de l'organisation Judiciaire* defines commercial courts as specialized first-level courts whose specific jurisdiction, as established by the *Code de Commerce* and the *Nouveau Code de Procédure Civile* (NCPC), is to rule on commercial disputes between merchants or companies, persons or legal entities – that is, between companies, but also for example between a company and an individual consumer engaged in contractual activity. Articles 631 and following of the *Code de Commerce* determine what kinds of disputes are to be brought before the commercial court (in cases where parties have not previously signed an arbitration clause). In general terms, the main types of suits covered by commercial court jurisdiction concern commitments and transactions between merchants or various kinds of businesses, commercial transactions of any sort between individuals, and disputes between partners in a company.¹¹ Furthermore, commercial courts are competent in bankruptcy proceedings (restructuring, liquidation) and more recently became so in bankruptcy prevention. Some restrictions apply to Commercial court jurisdiction with respect to work accidents, commercial property leases, brands and patents.¹² Many of the disputes handled by this court are quite routine; the largest mass of commercial court litigation in France, and perhaps in all countries, is made up of contract-related cases and debt collection. However, commercial court judges' work, though strictly defined and framed by procedure, can quickly become extremely complex due to conflicts between existing norms, instrumentalization of the court by business people who use the judges' decisions to renegotiate their deals, and a fairly high incidence of litigant 'bad faith'.

The Law of 16 July 1987, stipulates that judges are to be elected by an electoral college made up of consular delegates,¹³ sitting judges at the current commercial court, members

10 It should be recalled, however, that a disagreement can be settled by means other than a legal ruling: legal mediation, arbitration, out-of-court settlement and transaction, etc.

11 M.-F. Coutant, *Les Tribunaux de Commerce*, Presses universitaires de France, coll. QSJ, Paris.

12 There is little systematic information available at the national level on French commercial courts, their work and the kind of cases they handle. Unaggregated statistical data are not available because they are the property of the commercial court administration (the *greffe*), itself a private business whose official status goes back to the time of the Ancien Régime. Official statistics for each commercial court in France primarily concern number of disputes and bankruptcies handled, as well as time taken to expedite them.

13 'Consular' delegates are representatives of the *Chambre de Commerce et d'Industrie* for the districts they belong to. Candidate lists are drawn up by professional category and sub-category. Eligible voters include

of the chamber of commerce, and former members who have requested to participate. The official candidate list is established by a committee headed by a sitting judge. Judges have to be at least thirty years of age, registered to vote in the jurisdiction of the given commercial court and have either been registered for at least five years with the *Registre du Commerce et des Sociétés* (official registry of companies) or have worked as a senior manager for five years (CEO, general administrator, or other). Applicants who have themselves filed for bankruptcy or already served continuously as commercial court judge for fourteen years are ineligible. As mentioned, commercial court judges work on a voluntary basis; they are not paid by the State. They may be, at the same time, magistrates at the court and regular company employees. A judge's first term is for two years; subsequent terms are four year terms. Consular judges have the same powers and prerogatives as career magistrates. They must also comply with the conflicts of interests rules of the *Nouveau Code de Procédure Civile* or NCPC (Art. 339 to 341).

Consular judges justify this joint regulation system in several ways. First, it is claimed to be a faster, less costly means of rendering legal judgments than an arrangement using career judges. The business world incurs a greater part of the cost of settling its own disputes than it would in the traditional judicial system, and delays and waiting time are shorter than in France's regular first level courts. Speed is certainly an essential value in the consular regime.¹⁴ Second, career judges – State civil servants in France – are often thought of as inexperienced, not trained to grasp business problems and unable to oversee and, when necessary, sanction entrepreneurs' behaviour in an appropriate way, particularly where bankruptcies are concerned.¹⁵ Third, commercial law often pays no attention to the idiosyncratic traditional and customary practices known in French commercial courts as 'usages', i.e. practices based on the customs and culture of a particular industry or economic sector. Consular judges think that effective dispute resolution has to take into account these rules and conventions,¹⁶ which structure business practices differently in each traditional sector. Commercial court judges, understood to be experienced business men and women, are thought of as specialists in their professional area and therefore more likely (than permanent civil servants) to be familiar with such customs, know how to adapt them

businesses registered with the chamber of commerce in the given district, business owners registered with the *Répertoire des Métiers* and the chamber of commerce, etc.

14 The perverse effects of speed are hard to measure without access to un-aggregated docket data. Moreover, speed is particularly likely to be promoted as a value given that the commercial court is instrumentalized by companies for renegotiation of their contracts (as much as to obtain 'justice').

15 B.C. Carruthers & T. Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England and the United States*, Oxford University Press, Oxford, 1998, p. 431 report on similar ideas elsewhere.

16 O. Favereau, 'organization et Apprentissage Collectif: Un Paradigme non Standard pour Trois Théories Hétérodoxes', in A. Orléans (Ed.), *Analyse Économique des Conventions*, Presses universitaires de France, Paris, 1994.

quickly to the unstable, shifting world of business, and therefore how to innovate in matters of regulation.

French commercial courts thus give some visibility to certain aspects of the relationship between (exogenous) legal mechanisms and (endogenous) social mechanisms for social control of markets. Here the State does not sanction alone. It delegates to trade associations, companies, as well as private citizens – that are willing to incur part of the costs of control. In fact, these elected judges fulfil what is usually considered one of the core functions and prerogatives of the State. This rather special case of joint regulation may be thought of as an extreme form of ‘co-regulation’,¹⁷ understood as self-regulation by State-recognized industrial associations. Judges at the Commercial Court of Paris do not seem to think that taking account of business world ‘usages’ is the equivalent of representing corporatist interests. The media, the public, and even Senate committees,¹⁸ on the other hand, have long suspected that cooptation in the judge nomination process leads to the electing of judges who cannot then distance themselves appropriately from their initial professional milieu (e.g., the sector that sponsored their candidacy) and thus cannot detach themselves from particular interests. Litigants, meanwhile, are likely to think that decisions by such lay commercial court judges cannot be fully impartial, especially in small town courts. Their fear is that judges in these small courts will use their position to exert control over their own competitors.¹⁹

Generally speaking, the business world has certain expectations of modern commercial courts: speed and firmness, few appeals, a clean separation between personal patronage and legal decision-making, and as much neutrality as possible. In the case of France it is

17 P. Grabosky & J. Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*, Oxford University Press, Melbourne, 1986, p. 83.

18 A. Montebourg & F. Colcombet, *Les Tribunaux de Commerce: Une Justice en Faillite ?*, Rapport n° 1038, Commission d'enquête parlementaire de l'assemblée nationale, Michel Lafon, Paris, 1998.

19 This deficit in legitimacy results in endless attempts to redesign this institution attempts that are in turn used by this institution itself to adapt to societal evolution – perhaps one of the reasons for its resilience and longevity. The French commercial justice system is thus evolving; the State has tried to be more present at the *tribunal de commerce*. Since 1981 the attorney general has had an office at the court and can partake in judges' deliberation, particularly in the case of bankruptcies (which are heard in closed chambers and may have a criminal dimension with important social consequences). In 2001 and 2002, attempts by the Socialist government to convince Parliament and the Senate to include permanent career judges on the court failed. Reformers presented this ‘mixing’ (of lay and career judges) as a means of improving control over controllers and thereby reassuring foreign businesses involved in lawsuits. It is interesting to notice that this reform actually produced a paradoxical situation: when the French State was more active and interventionist in the business world, the commercial justice system was not really supervised by the Ministry and its *Chancellerie*. In the 1980s, when the State began withdrawing from direct control of the economy it also began increasing its presence in the commercial courts and slightly the degree of oversight it had on these judiciary processes. To justify this change, the State declared that its primary goal was to reassure European and international investors who were demanding equitable treatment in the French system.

in the interest of entire sectors of the business world (represented by their employers' associations) to be represented at the courts, namely in order to defend the customs linked to their particular activities or professions. This means that, at least for some economic sectors, consular judges are more than judges; they are judicial, institutional entrepreneurs who represent the sensitivity of the employers' association that initially helped them get a seat on the court by endorsing their candidacy.²⁰ The judges themselves do not all share this view. In interviews with them they officially declare that once appointed they are independent, have no mandate from the sector they came from, are totally impartial. However, each judge is often consulted in connection with a particular profession or activity, making it difficult to fully dissociate competence from representativeness. They nonetheless see the system as a typical joint regulation regime where public institutions, business, and private citizens agree to share the costs of control.

The Commercial Court of Paris is significantly larger than other similar courts in France. The number of specialized chambers (nine out of twenty-one) is higher,²¹ as is the number of cases handled. Alone it handles 10% to 12% of all commercial litigation in France (not including arbitration). In 2002 it ruled on 101,201 cases. It is also different in terms of the variety of economic sectors its judges come from, and the economic importance of the parties (large companies with their headquarters in Paris). Commercial Court of Paris judges are almost all very highly educated (trained at the prestigious *Ecole Polytechnique* (X), *Ecole Nationale de l'Administration* (ENA), *Hautes Etudes Commerciales* (HEC), or *Institut d'Etudes Politiques* (Sciences Po), or sometimes have a PhD in law), but only half have had any legal training. The diversity of their business experience forms a kind of 'competence capital' that the institution seeks to make use of by way of a 'consulting culture' in which judges seek advice from each other intensively. Most judges are no longer working as business people or entrepreneurs in the traditional sense, but are instead senior managers or former senior managers of major companies. As one judge put it: 'This is the age of managers'.

Our empirical research consisted in three waves of in-depth interviews with all consular judges on the Commercial Court of Paris.²² The interviews made possible at least a partial

20 W.V. McIntosh & C.L. Cates, *Judicial Entrepreneurship: The Role of the Judge in the Marketplace of Ideas*, Greenwood Press, Westport (Ct.), 1997.

21 Specialized Commercial court chambers include, for example, Business law, International law, European Union law, Multimedia and new technologies, Unfair competition, Counterfeit products.

22 The first survey wave was conducted in fall 2000 using the list of 157 judges who had attended hearings during the second quarter of 2000; to this list another 10 persons were added: 'wise men' (retired judges advising sitting judges) and association heads. The second wave was conducted in 2002 on the basis of a list of 197 judges, including those from the first wave (either still on the courts or not) and all judges elected in fall 2000 and fall 2001. The third wave of interviews took place in fall 2005 and involved 234 judges, including

assessment of the transversal legitimacy constructed by this contemporary consular institution.

PRAGMATISM, CUSTOMS AND FAIRNESS-BASED JUDGMENT

With respect to procedure, consular commercial courts comply with general requirements of the NCPC (Art. 12). However, certain features of ‘practical’ commercial court procedure, observed ethnographically and taught by experienced business lawyers at the *Ecole de Formation du Barreau de Paris*,²³ allow for defining the legal context in which ‘pragmatic reasoning’ comes to acquire some of its meaning. ‘Consular’ judges reason a great deal in terms of precedent, but case law in these courts is actually quite opaque (as in all first-level jurisdictions in France). Very often, commercial litigation is not first and foremost a matter of justice but rather a means of renegotiating contracts, a process that instrumentalizes the court by seeking a decision that will later serve to restart these renegotiations. Commercial court judges therefore do not look well on lawyers who file suits without first having tried to settle the conflict out of court. These magistrates feel close to the parties: they like business people to come to the court in person, especially for the defence plea, as opposed to just sending in the lawyers. They prefer to avoid legalise and ask questions in ordinary, non-technical language; one effect of this is that lawyers are often quite concerned about their clients’ uncontrolled reactions during interaction with the judge. Commercial court judges also look for alternatives: they like accessory claims to be presented that will help them help the parties reach a compromise; they like finding that both parties are right, and explaining to the losers why they have lost.

That commercial court judges make extensive use of precedent renders their practice somewhat similar to that in Common Law. In practice, judges define their pragmatism as a particular attention paid by their decisions to their effects on the economy. What counts most, according to them, are the consequences that legal rules, precedents, decisions, and institutions have on the world of facts. Their decision-making is pragmatic in that it combines knowledge of the economy and management on the one hand, law and jurisprudence on the other. In practice this results in judgments that have produced their own synthesis of law, management and economics, further informed by common business-world customs, common sense, and a sense of fairness (*équité*). It is not easy to determine

166 who had participated in hearings in 2005 and judges from the previous waves, as well as all judges elected since 2002. With an average response rate of 90%, more than 500 interviews, including qualitative interviews, were conducted over time. Research reports are available at the Justice Ministry’s *Mission de Recherche ‘Droit et Justice’*.

23 School of the Bar Association of Paris.

the degree to which French commercial court judges rely on positive law compared to other decision-making criteria when passing judgment. Assuming it were possible to do so, it would be impossible here because there are no available docket data and unaggregated trial statistics available for this court. Still, these judges reserve the right to synthesize in this way, in the name of their ‘experience’ and ‘pragmatism’. And in their syntheses, we find at least two normative but non-legal components: reference to *usages* and a concern for fairness or equity (our translation of *équité*).

In speaking of their non-routine work, many commercial court judges stress the importance of equity-based judgment. Taking into account experience and custom in their deliberations is part and parcel, as they see it, of equity-based justice. Interestingly, the relative weight of equity-based judgments compared to law-based judgments seems to vary from one judge to another. For some it is obvious that judges should learn *not* to practice equity-based justice, as equity presupposes the use of reasoning and arguments that offer a foothold to external influences that reduce judges’ independence. For others, the specificity of the commercial court is precisely its inclusion of equity thinking: fairness can legitimately be taken into account despite the problems it raises. In the work of a pragmatic judge, decisions and rules have to be found that will produce relatively desirable outcomes. Those outcomes may be short or long term, systematic or singular. Pragmatizing law can mean all sorts of things, and efficiency can have all sorts of meanings. What counts is that criteria be practical and their specific content malleable.

The following quotations, all from interviews conducted with Commercial court of Paris judges, illustrate the importance many attach to reasoning in terms of equity:

You’ve got civil courts that have career judges who apply the law *stricto sensu*. For our part, we have to look into law and its economic effects. So you can’t have judgments that run entirely counter to the law, of course, but you do have to find an intermediate term. ... We’re judges, but commercial court judges, and we have to have a more economic view than a purely legal one. (Judge no. 72).

Justice must be rendered and we render law-based justice. We try to base it on law and equity, but that isn’t always easy to do. It’s obviously at the commercial court that you’ve got a better chance of getting justice based on law and equity. I think that point is increasingly likely to get lost, and with the reform they’re talking about, we’re moving away from many of the reasons commercial courts were set up to begin with. (Judge no. 101, interviewed in 2000).

One very important quality is good common sense – actually, that may be the most important quality. You’ve got to have a minimum of competence – if you’re not a jurist, you acquire it – but you’ve got to use good sense and be impartial. You have to forget equity somewhat, because it’s a natural tendency to judge in terms of equity. There’s an article in the Code that allows it when you don’t know what else to do. But you often have an equity-based opinion, and you try if possible to justify it. If you can’t, never mind. Sometimes we start drafting a ruling and we change the conclusions because the reasoning doesn’t hold up. I’m telling you, more than legal qualities – which you do need – what you need is a certain bent for analysis and synthesis, to be able to simplify the jumble of lawyers’ files – I once had them piled up as high as this table. You need jurist qualities, but in fact, often, it’s not a matter of finding legal arguments but arbitrating between the litigants’ own legal arguments. (Judge no. 97).

I think you have to know business to be able to sense where the real dispute lies, not the one they present to you. [...] I think that to be at ease in the circumstances you’re presented with, the circumstances of a legal dispute, you have to have lived through business life intensely. And at all levels. Not just at the level of CEO. You have to have experienced it, you have to have had a true business life. And that’s the strength of the tribunal de commerce: having people in it who are business people. (Judge no. 158).

Clearly we would need a greater number of respondent statements to conclude that commercial court judges systematically rule on the basis of equity,²⁴ especially in routine cases that require nothing more than a writ of execution. It seems reasonable to assume that unpaid bills are ordinary problems as they raise no legal issues and do not give any discretion to the judge; he or she has no choice but to make a law-based decision. Nonetheless, a simple unpaid bill can require complex interpretive work. And it may involve other problems of the sort pragmatic judges are ready to lend an ear to, thus resulting in a reading less committed to law. One lawyer admiringly relates the work of a presiding judge for whom he was clerking in one of the chambers in 2005:

A company was having leases of its closed-circuit surveillance equipment paid over a three- to four-year period. A small company leasing this equipment was paying quarterly. It forgot to pay. The surveillance company laid low for one, two, three, four payments, then sent notice: ‘Pay the four lease payments or contract terminated and summons to appear in commercial court’. At court it

24 J. Hilaire, ‘Grandeur ou Servitude de la Justice Consulaire: La Controverse de l’Équité’, *Justices*, No. 1, 1998.

demanded that the small limited liability company pay the rent for the entire duration of the contract. In this kind of case, it's David against Goliath. And the closed-circuit surveillance company comes back all the time with the same suit. I had to deal with that company five times in four months. The Goliaths win because they make sure they've got an armour-plated contract. Especially at the commercial court, where it's fairly simple, they just apply the contract, period: 'These are two professionals. They signed'. Even when the small company is very small. Consumerist thinking on consumer protection has not yet reached the commercial court. But it made the president mad. He said, 'I see you here all the time with the same old refrain, the same excuses for letting the lease run unpaid, then clobbering the small companies'. He brought in special arguments via moderation of the penal clause and managed to moderate the penalties initially provided against the party that isn't paying. A professional judge can do that by following jurisprudence, but he found a legal argument here against the standard solution, a solution he didn't approve of. The commercial court judge has his solution in his mind first, then he writes up his ruling. Only later do they find the famous syllogism! I don't see anything wrong with that.

As the judges see it, pragmatic judgment often involves individual sensitivity and experience. However, the second non-legal feature that commercial court judges are likely to take into account, namely the idiosyncratic conventions and customs referred to as 'usages', shows that pragmatism is not only an individual trait but is also associated with more fully collective business-world norms. The standard expression 'Usages are a source of law' (*Les usages sont sources de droit*) is cited so often by these judges that it could be engraved on the pediment of the commercial court. As mentioned, French business law often does not acknowledge these *usages*, that are based on traditional industry or commerce subcultures. *Usages* also serve as guidelines for business operations, particularly in contract matters, and they are recognized by the commercial courts. The *Guide Pratique du Magistrat Consulaire* (2001) defines a *usage* as 'a practice that, for a given profession and region, has obligating power for contracts'.²⁵ *Usages* may be local, national, or international (e.g., general sales rules for foundries based within the European Union). Some customs have been incorporated into law (e.g., commercial *usages* regarding sales); others into standard contracts (e.g., the York-Antwerp rules on ordinary losses in overseas transportation). While commercial *usages* may not run contrary to fundamental French business law, they may be exempted from compliance with *Code Civil* rules that do not pertain to public order (e.g., presumption of creditor or debtor solidarity in business operations and quarterly

²⁵ At p. 134.

interest capitalization on standard bank accounts). Usages that are not common knowledge have to be proved by the party citing them. A certificate delivered by the *Chambre de Commerce* or a recognized professional organization such as the *Association Française des Banques* validates a *usage* as common knowledge.²⁶

Usages in the sense thus defined are sectorial norms and recognized, technical specifications officially listed with the commercial court registry. Despite the fact that commercial activity is now highly formalized (written contracts) and that the afore-cited recognized but less formal norms are only exceptionally cited, the Commercial Court of Paris considers reference to norms outside positive law both valid and of value. And those recognized norms and specifications are not the only non-legal conventions and criteria that commercial court magistrates make use of in their legal decision-making, namely when they have a great deal of discretion for assessing the situation.

COMPARISON WITH POSNER'S LEGAL PRAGMATISM

One of the main arguments used to legitimate this consular institution, is pragmatism based on the combined competence and experience acquired by lay judges in the course of careers as entrepreneurs or senior managers. Interestingly, this type of pragmatism and its implications raise issues very similar to those being discussed, debated and theorized in the Anglo-Saxon legal worlds. Thinking of the French commercial court as a particularly interesting and paradoxical illustration of this Anglo-Saxon pragmatism sheds light on certain aspects of the French consular institution while clarifying some of the implications of the way it operates. Anglo-Saxon legal pragmatism, particularly the American variety, is a theory with a critical view of traditional definitions of law and judicial decision-making.²⁷ The classic understanding of law, especially in common law countries, is that it is based on *jurisprudence* or case law analysis; i.e., an analysis of universal, abstract legal fact, precedents, and rigorous argumentation that makes use of analogy in what are purely legal disputes. For many sociologists of law and legal pragmatists this approach is overly legalistic, naively rationalist and based on a misapprehension of how judicial institutions actually work. In legal pragmatism – because of law's eclecticism, which is in turn the consequence of its multiple objectives – the emphasis is on the need to take into account more than purely legal facts and on the understanding that law is an instrumental practice situated in an economic, political and social context, a practice with no immutable abstract,

26 Since 1982, the expert evaluation office the Commercial court of Paris has a section for registering professional usages. Professions have been called upon to register their usages and rules with this office. On 31 October 2000, 275 usages had been registered.

27 M. Brint & W. Weaver, *Pragmatism in Law & Society*, Westview Press, Boulder (Co.) 1991.

universal foundation, a practice linked to at least one and often several different perspectives. According to partisans of legal pragmatism, *jurisprudence* and case law analysis itself is characterized by pragmatism. Under these circumstances – the legal pragmatist argument runs – judges themselves cannot be thought of as purely rational individuals capable of foreseeing all the consequences of their decisions. To reach those decisions – to render justice – they make use of their personal abilities and sensitivities. Judicial decision-making thus seems rooted in the judge's experience and his or her attention to the given context, attention thought of as free of false *a priori* beliefs in universal legal foundations or bases. This is empirical *jurisprudence*: application of the experiential method to complex, uncertain contexts.

In a way, no one has better expounded the pragmatism to which commercial court judges in France lay claim than Richard Posner, judge and professor at the University of Chicago and a decidedly complex figure.²⁸ As a leading New Law & Economics (NL&E) thinker early in his career,²⁹ Posner endorsed the radical version of this school,³⁰ where the understanding was that (neo-classical) economics should dictate law. Utility maximizing became a synonym for justice. Econometric efficiency measurements were to replace the traditional legal principles that served as a foundation for judicial decision-making. Judgment was identified with – reduced to – a kind of calculation which, framed by restrictive formulas, would suffice to settle legal disputes.

Law, this argument ran, should draw closer to the demands of the economy as defined by neo-classical economists. However, over the 1990s, Posner shifted from radical positivism, for which economics should dictate law, to 'softer' pragmatism. It is this second Posner that can be used as a reference point here. We can characterize the shift toward pragmatism

28 This excessively brief overview of pragmatism and the evolution of Richard Posner's conception of judges owes much to S. Harnay & A. Marciano, *Posner et l'Analyse Économique du Droit*, Collection Le Bien Public (Editions Michalon), 2003; E. Krecké, 'Economic Analysis and Legal Pragmatism', *International Review of Law and Economics*, Vol. 23, 2003, p. 421-437; E. Krecké & C. Krecké, 'The anti-foundational dilemma: Normative implications for the economic analysis of law', in E. Krecké, C. Krecké & R. Koppl (Eds.) *Cognition and Economics*, Vol. 9, Elsevier, New York, 2006; and N. Mercuro & S.G. Medema, *Economics and the Law: From Posner to Post-Modernism and Beyond*, Princeton University Press, Princeton, 2006. These texts have guided me in my exploration of this literature.

29 The Law & Economics approach appeared in the late 1950s at the University of Chicago with the *Journal of Law and Economics*; it is generally referred to as 'old law and economics'. At the outset the main focus was areas of law explicitly linked to economic issues and research topics, e.g., competition, industrial concentration, tax and industrial property law. What is called 'new law and economics' in basic textbooks (an extension of economic logic to other legal areas) began in 1972 with the publication of Richard Posner's *Economic Analysis of Law*.

30 R.A. Posner, *Economic Analysis of Law*, Boston/Toronto, Little, Brown and Company 2003 ((6th edition, original: 1977); R.A. Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication', *Hofstra Law Review*, Vol. 8, No. 3, 1980, p. 487.

found in some of Posner's 1990s works as new (new) law & economics or N(N)L&E. Though the distinction is an oversimplification, one can call the Posner of the first (positivist, neo-classical) period Posner I, and distinguish those views from the thinking of the second-period Posner, the author of *Problems of Jurisprudence* and *Overcoming Law*,³¹ whom I will call Posner II. This distinction between the two Posners is not a 'registered' one.³² Posner's about-face (his straying from the path, some would say) is sharply contested in current economic analysis of law, including at times by Posner himself – a kind of Posner III. This is not to claim that N(N)L&E marks the beginning of an entirely new approach or movement. Rather it is a critical source for understanding how economic analysis of law is applied in such courts as the Commercial Court of Paris. Richard Posner belongs to a rich, heterogeneous tradition of American pragmatists, the most recent being, among others, Daniel Farber, Thomas Grey, and Margaret Radin;³³ a tradition whose philosophical genealogy (Charles Pierce, William James, John Dewey and more recently Richard Rorty) and legal genealogy (Holmes, Brandeis, etc.) need hardly be retraced.³⁴ In his 1993 and 1995 works, Posner II stressed 'the primacy of consequences in interpretation'.³⁵ The main principle continued to be judges' evaluation of the effects of their decisions on the functioning of the economy. What counts most in this view are the consequences of legal rules, decisions and institutions on the world of facts (close econometric measurement of efficiency is no longer the point).

Posner II regrets that economic analysis of law seems to have eschewed legal formalism only to apply neoclassic economics principles that are just as formal and artificial – in sum: to have taken mathematical calculation for its foundation and dismissed the world of experience just as fully as legal formalism had done, no longer providing accessible instruments for judges or lawyers, no longer guiding them in their everyday decision-making. This positivist approach has not won much credence among judges. It has also been sharply criticized on theoretical grounds by, for example, Sunstein.³⁶ Posner II shifted

31 *Supra*, note 9.

32 Posner II had several purposes in writing *Overcoming Law*, among them defining common law against the European tendency to regulate by law and codified legislation. I am more interested here in his critique of neo-classical positivism – a kind of self-critique.

33 D. Farber, 'Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century', *University of Illinois Law Review*, 1995, No. 1, p. 163-190; T.G. Grey, 'Holmes and Legal Pragmatism', *Stanford Law Review*, Vol. 41, 1989, p. 787 and T.G. Grey, 'Freestanding Legal Pragmatism', *Cardozo Law Review*, Vol. 18, 1996, p. 21; M.J. Radin, 'The Pragmatist and the Feminist', *Southern California Law Review*, Vol. 63, 1990, p. 1699.

34 On this subject see also M. Dickstein, *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, Duke University Press, Durham 1998 and B.Z. Tamanaha, 'Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Socio-legal Studies, and the Fact-Value Distinction', *American Journal of Jurisprudence*, Vol. 41, 1996, p. 315.

35 Posner 1995, p. 252.

36 R.C. Sunstein (Ed.) *Behavioral Law and Economics*, Cambridge University Press, Cambridge (Mass.) 2000.

the foundation for 'pragmatic' legal decision-making toward the judge as a person and his or her everyday experience, a form of legal pragmatism that relies heavily on the more general American pragmatism of the early twentieth century by scholars like John Dewey.³⁷ Posner II continues to favour legal theory that will serve as a framework for judges called upon to make law-based decisions and apply the law. He has not given up on the idea of positive jurisprudence.³⁸ It is just that legal decision-making in this understanding is no longer based on either scientific or legal logic but on the judge's experience. For Posner II, a judge's reasoning – good reasoning – is necessarily subjective, tacit, based on convictions derived from routines or personal experience (practical wisdom) acquired in the course of his or her career.³⁹ Indeed, pragmatic reasoning requires an ability to adapt to ever-changing materials (either legal or another kind, namely economic), a quality that knowledge and familiarity with the law does not develop and that seems to require a mixture of judgment and intuition, as well as prudence, detachment, imagination and common sense. So judges' reasoning, in this understanding, is no longer founded on positivist economic science. In *Overcoming Law*, Posner claims that pragmatism is the best normative and positive theory of the judiciary role. The theory of pragmatism rejects the idea that law is anchored in fixed, permanent principles and applied through logical operations based on those principles, asserting instead that it should be used as an instrument to social ends. Pragmatism amounts more to common sense and an everyday sense of what is reasonable than to a body of doctrine.

For Posner II, judging implies both a sense of logic, such as when the judge takes the economy into account, and common sense, which encompasses norms, customs and beliefs. Economic science in this understanding is not the normative instrument to be used in the field of law but rather one source among others of legal learning. Posner II rejects the idea of a complete, self-contained explanatory system – i.e., what he claimed economic analysis of law to be when NL&E was first developed. Though in this theory a veil is thrown over the utilitarian criterion of maximizing wealth, efficiency remains an implicit value. Calculation is still in part the relevant mode for pragmatically apprehending the law. It is not because Posner II no longer openly declares that the effects of legal rules should be assessed in terms of efficiency that the efficiency criterion – albeit a different type of efficiency criterion, a subdued one, from the perspective of Posner I and NL&E, a criterion that absorbs components of limited rationality and legal subjectivism, with experimental pragmatism becoming another name for, or an ersatz of, the 'efficiency' of the wealth-maximization criterion – has disappeared. The shift from Posner I to Posner II cannot be

37 A. Ogus, *Costs and Cautionary Tales – Economic Insights for the Law*, Oxford, Hart Publishing 2006.

38 Krecké 2003.

39 Posner 2003.

understood to undermine or disqualify all of Posner I's prior works; i.e., all of standard NL&E, including the economic analysis of law idea.⁴⁰

Posner II's legal pragmatism is of interest precisely because it remains economic, that is, implicitly founded on efficiency logic, despite the fact that this may no longer be the efficiency logic operative in the wealth-maximization criterion. Comparing the N(N)L&E approach with the approach of French commercial court judges is therefore heuristically relevant because there is obviously an economic dimension to French commercial court activity. Underlying commercial court decision-making is an 'efficiency' criterion in that in the experience of commercial court judges, pragmatism involves adding economic and management competence to law.⁴¹

I assume responsibility for this debatable comparison while acknowledging the 'novelty' of Posner II. The shift from Posner I to Posner II is of interest here because it represents a change in the author's understanding of judicial pragmatism. That change seems to have led to his notion of 'experiential' pragmatism, which is quite similar to the notions of pragmatism expressed by the judges observed here at the Commercial Court of Paris. The French commercial court overtly makes use of a kind of pragmatism in socially controlling markets and dealing with disputes between entrepreneurs. Indeed, certain characteristics of the way this legal institution operates suggest that it makes widespread use of N(N)L&E-type pragmatism. Though Posner II is from a very different legal background than French commercial court judges, his thinking corresponds closely to the 450 years of consular, lay judge experience: judges in this institution have always sought to bring together law and the demands of the economy and management as they define those demands in their role as business practitioners. French commercial court judges are business men and women sponsored, as explained, by employers' associations and paid nothing for their services, men and women who pride themselves both on their beliefs in the vital importance of markets and entrepreneurship for society as a whole, and about their legal pragmatism, i.e., applying their knowledge of the economy and management (first-hand knowledge that career judges do not have, they say) and business world usages, common sense, and a sense of fairness in their task of rendering justice. In theory, these magistrates simultane-

⁴⁰ Harnay & Marciano 2003.

⁴¹ Harnay & Marciano 2003. For them, Posner's shift from Posner I to Posner II is perhaps not so fundamental or radical. Specifically, it would seem that 'soft' Posner (II) is in fact a 'hypocritical' version of 'hard' Posner (I), the Posner of standard NL&E. This is consistent with the idea the Posner I and Posner II are continuous, an idea that sociologists of economics and law would need to examine with respect to judges' practice rather than exegesis of NL&E or N(N)L&E texts. One obvious example is an economics of law analysis of bankruptcy in which economic calculation would clearly have an important role (despite the fact that different aims may be involved).

ously take into account law, efficiency (as defined by economists and managers), the consequences of their decisions, and the satisfaction and support of their particular public.

If Posner II's 'experiential' pragmatism can be considered an approach to judicial decision-making or justice-rendering, and if responses from representatives of France's system for jointly regulating markets – that is, commercial court judges – resonate with this approach, then the French commercial court logically becomes an institution emblematic of both the joint regulation specific to consular regimes and the 'experiential' legal pragmatism operative in the work of economic judges, a pragmatism in which the value of efficiency has not necessarily become obsolete. For consular judges – judges who, clearly, have been practicing and exploring the principles of N(N)L&E for the last 450 years – usages are a source of law when chosen by an experiential judge who wishes to go beyond routinely applying decisions reached in earlier cases or strictly applying existing legislation. As Krecké sees it,⁴² the more modest vision of Posner II represents a gain in realism and common sense yet also results in a loss of NL&E theory consistency and assumed predictive ability.

From a sociological perspective, the detour by way of Posner II pragmatism sheds light on the main limitation of consular judges' pragmatic theory, namely that it is defined as purely individual. In fact, as already suggested by the inclusion of usages and sectorial norms, these judges' individual pragmatism and experience are rooted in decidedly *collective* representations. If we examine the attributes, careers, reasoning and motivations of French commercial court judges we find that they reach their decisions within an *institutional context* that values their pragmatic reasoning, or certain dimensions of it, to varying degrees.⁴³ Whereas a N(N)L&E judge is an individual who decides alone, the judges observed at the Commercial Court of Paris act within a context of conflicting conventions and collective representations.

As soon as we take the organizational apparatus and institutional framework of these judges' work seriously, their pragmatism takes on a new, collective dimension. In the next section I present characteristics of the social control of markets in France that illustrate

⁴² Krecké 2003.

⁴³ E. Lazega & L. Mounier, 'Polynormativité et contrôle social du monde des affaires: le cas de l'interventionnisme et de la punitivité des juges du Tribunal de Commerce de Paris', *Droit et Société*, Vol. 71, 2009, p. 103-132 ; E. Lazega & L. Mounier, 'La rhétorique des professions libérales au service de la privatisation de l'État : le cas des juges consulaires du Tribunal de Commerce français', in D. Demazière & Ch. Gadéa (Eds.), *Sociologie des groupes professionnels: Acquis récents et nouveaux défis*, Paris, La Découverte 2010 ; E. Lazega & L. Mounier, 'Le régime consulaire de contrôle social des marchés et ses soutiens institutionnels: Le cas du Tribunal de Commerce de Paris au début du XX^e siècle', P. Fridenson (Ed.), *Marché et concurrence: droit et institutions*, Paris, IGPDE 2011, in press.

the importance of analyzing legal institutions' *collective* actors and *collective* pragmatism. Comparing Posner II attitudes to French commercial court judges' makes it clear that pragmatism without a theory of organizational and social structures and of representations and conventions cannot stand as a convincing theory of social control of markets, particularly when it comes to accounting for the neo-corporatism and institutional capture that may be observed in consular institutions.

THE PRAGMATIC INSTITUTION AS A TARGET FOR LEGAL ENTREPRENEURS

Courts are not static institutions that make a-temporal, purely rational decisions.⁴⁴ They are highly valued territorial institutions that generate much in the way of competition and conflict outside the courtroom.⁴⁵ This is particularly true of courts whose judges are themselves business men and women sponsored by employers' associations, selected to represent extremely diverse sectors of the economy, and elected by the chamber of commerce of their jurisdiction. Given that this form of joint regulation – by the State, intermediate bodies and private citizens – presupposes the coming together of heterogeneous actors from different milieus, it can reasonably be seen as a kind of 'governance' of the market with business as the key player.

In the case under study here, a case of structured interests trying to shape the consular commercial court, judges can be thought of as both official third parties who represent the general interest and apply legal rules and procedures in dispute settlement processes *and* non-official potential surveillance and influence 'levers', who represent their economic sector and are likely to advocate settlements that will not hurt those particular interests. As levers they can have either a direct effect on legal decisions or an indirect one should they succeed in influencing other judges on the court. Under these circumstances, one implication of pragmatism as defined by N(N)L&E – and regardless of the consistency of its positions – is to make this institution for social control of markets even more sharply contested a territory than usual. Collective sensitivity and corporate interests borne by individual sensitivity can be expressed legitimately thanks to the notion of pragmatism; pragmatism, then, serves as a kind of 'foot in the door' for the collective and the corporations. The most clearly visible example of this strategy is *domination by banker-jurists* (i.e. bankers with a law degree). According to standard justifications of this joint regulation

44 W. Heydebrand, & C. Seron, *Rationalizing Justice: The Political Economy of Federal District Courts*, SUNY Press, Albany 1990; S. Wheeler, K. Mann & A. Sarat, *Sitting in Judgment: The Sentencing of White Collar Criminals*, Yale University Press, New Haven, 1988.

45 R.B. Flemming, 'Contested Terrains and Regime Politics: Thinking about America's Trial Courts and Institutional Change', *Law & Social Inquiry*, Vol. 23, 1998, p. 941-965.

system, judge selection should produce widely diverse representation of existing economic sectors, particularly in major commercial courts such as Paris's. At the time of the study, the sectors represented by the judges, sectors in which they were working or had worked, were indeed highly diverse. And in complex cases, the court might indeed access information on a particular area of the business world by turning to judges from that particular area. Some sectors and/or companies, however, invest more than others in legal entrepreneurship and take on a greater part of control costs because it is in their interest to do so. In theory, any employers' association can present candidates for consular judge positions to fill the vacancies left by 10% annual turnover. Analyses show that while not all these associations present candidates, some do so more systematically than others: 29% of judges were from the banking/finance sector. Every year this sector puts up several candidates to the commercial court.⁴⁶

The financial sector is clearly overrepresented at the Commercial Court of Paris, in both absolute and relative terms. In 2000 it seems to have accounted for 3% of the occupied population in France,⁴⁷ and 5.1% in Paris, where service industries are overrepresented relative to the provinces.⁴⁸ That year, financial services accounted for 5.3% of the total value added to the French economy.⁴⁹ These descriptive indications suffice to show that the 29% of judges from the finance sector are indeed potential levers for that industry and that the influence they may exert on other judges represents a threat to the court's independence.

Traditionally, this is a highly litigious sector.⁵⁰ For obvious reasons, a significant proportion of commercial court work concerns the financial sector, and this motivates that sector to invest in legal entrepreneurship – e.g., to limit its risks in cases involving high credit levels.⁵¹ The following example illustrates the sector's interest in assuming a larger-than-average

46 For example, in 2003, 21 of the candidates were sponsored by the *Association Française des Banques* and 5 by the *Association Française des Sociétés Financières*. The financial institutions employing active judges in the Commercial Court of Paris included BNP-Paribas, 7 judges; Suez, 4; Société Générale, 4; Crédit Lyonnais, 4; and Crédit Commercial de France, 4.

47 Source: *Enquête Emploi 2000*, Institut National de la Statistique et des Etudes Economiques (INSEE), CD-ROM version.

48 Source: INSEE, monthly journal No. 202 (Oct. 2001), *Ile-de-France à la Page*; 'Gros plan sur l'emploi francilien en 1999'.

49 Source: INSEE, *Comptabilité Nationale 2001*. In 1998 there were 1,237 lending institutions in France, for a total of 25,428 cashiers and 714,730 clerks.

50 R.E. Cheit & J.E. Gersen, 'When Businesses Sue Each Other: An Empirical Study of State Court Litigation', *Law & Social Inquiry*, Vol. 25, 2000, p. 789-816.

51 Here is where the lack of non-aggregate statistical data on commercial court rulings becomes an impediment to research into the consular system for social control of markets. More generally, the Ministry of Justice has very few figures on the work of commercial court judges.

part of the costs of control of the French business world. In 1985, the Socialist government changed bankruptcy laws to give priority to the battle against unemployment, a change obviously consistent with the interests of employees rather than creditors. The new law required judges to rule on whether the companies in question could survive if they were better managed.⁵² If the judges decided that a company – and its jobs – could be saved, they were to appoint an administrator to manage it. If they decided it could not be saved, they were to order its liquidation. Banks and financial institutions were often creditors in these cases and so risked losing enormous sums as soon as the new law was passed. For nine years, the French financial sector pressured politicians to change the law.⁵³ In 1994 a lost vote in Parliament seems to have moved the sector to switch strategies and to try instead to increase the number of ‘its’ consular judges in charge of making insolvency-related decisions. In 2006, 21 years after passage of the bankruptcy law, the banking sector finally managed to get it changed in its favour.

COLLECTIVE PRAGMATISM AND INSTITUTIONAL CAPTURE BY A DISCREET CO-REGULATOR

The financial sector expends great quantities of resources in commercial litigation and bankruptcies. Consequently, it is willing to invest in the regulatory process and it is in its interest to try to structure the court in a way that will increase the influence of its norms and practices rather than those of other sectors. Its priorities (e.g., keeping the value of assets high or low depending its position and exposure, eschewing both excessive financial support and sudden breaks in lines of credit, high sensitivity to the repercussions of business failures on the economy at large) are therefore likely to be promoted with insistence as ready-made solutions in this kind of commercial courts, to be permanently taken into consideration there in connection with all kinds of legal disputes and bankruptcy cases.

The fact that this pragmatic institution is a target for legal entrepreneurs creates a risk that, in the consular context of joint regulation of markets, Posner II and (N)NL&E’s ‘experiential’ pragmatism will be informed by collective pragmatism and permeated with corporate norms. In (N)NL&E, learning and experience are necessarily purely individual. But as Durkheim showed as early as 1898, individual representations are structured by collective

52 A. Guérault, H. Lamotte & B. Du Marais, *Les Garanties et le Crédit aux Entreprises* (Rapport du Conseil National du Crédit), Éditions de la Banque de France, Paris 1993.

53 On the position of the *Conférence Générale des Tribunaux de Commerce* on the law of 1985, see Rey (2001), to be read from the distanced perspective of Commons (1924). A recent President of the Commercial Court of Paris from the banking world, she had decisive impact in shaping France’s new bankruptcy and business insolvency prevention bill (2007) – just as the President of the Commercial Court of Paris wrote the French Code of Commerce in 1807.

ones, especially when reframed in institutional contexts where authority arguments are carefully distributed.⁵⁴ When judges share their experience and skills, when they follow rules, they make use of collectively constructed foundations. The problem thus exceeds that of purely individual reasoning about fairness (*équité*). When French consular magistrates explain that their discretion (for example their *pouvoir souverain d'appréciation*) and their moral duty to judge are legitimately grounded in their individual experience and knowledge of the economy and management, not exclusively in the law, their 'individual sensitivities' are in fact echoing collective, sectorial criteria and norms, and using them to adapt codified law to ever-shifting economic and business realities. Efficient dispute settlement cannot ignore the entire world of informal conventions that variably structure business practices.⁵⁵ Clearly we are back to the 'collective sensitivities' – i.e., shared conventions – that underlie individual ones,⁵⁶ sensitivities that characterize not merely isolated individuals but all individuals from a given occupational and economic sector.

Institutions of joint regulation thus appear to be the locus of a struggle to exert influence upon the construction of their shared frame of reference, which is required if their members are to be able to describe and interpret facts in a stable way. In this 'epistemic' and regulatory competition between sectors, the banking and finance sector (often, but not always formally organized to do so) is in a position to promote its own, readily identifiable occupational sensitivities, its own collective representations, customs, justice criteria and conventions. Empirical research brings to light a relationship between career, sector, and the sensitivity commercial court judges draw upon in deciding cases in which they have a great amount of discretion. For example, judges who are both legally trained and members of the banking and finance world tend to be more interventionist than all commercial court judges taken together in cases of conflicts between boards and minority shareholders.⁵⁷ In such disputes they are more inclined than other judges to decide in favour of the board. They are thus less hostile than other respondents to judicial intervention in the internal affairs of a company. On the other hand, they tend to be much less interventionist than their colleagues in disputes between parties to a contract on a given market, i.e., inter-organizational cases.

54 E. Lazega, *Micropolitics of Knowledge*, Aldine-de Gruyter, New York 1992.

55 E. Lazega & O. Favereau, 'Introduction', in O. Favereau & E. Lazega (Eds.), *Conventions and Structures in Economic Organization: Markets, Networks, and Hierarchies*, Edward Elgar Publishing, Cheltenham 2002, p. 1-28.

56 Lazega & Mounier 2009.

57 E. Lazega, 'Disciplining a combat tank manufacturer? A tale of lay judges handling punitive claims for moral damages in business', in N. Doornbos, N. Huls & W. van Rossum (Eds.), *Liber Amicorum Prof. Dr. J.F. Bruinsma. Rechtspraak van buiten: Negenendertig door de rechtssociologie geïnspireerde annotaties*, Amsterdam, Kluwer 2010, p. 169-176; E. Lazega, L. Mounier & P. Tubaro, 'Norms, advice networks and joint economic governance: the case of conflicts among shareholders at the commercial court of Paris', in M. Ugur & D. Sunderland (Eds.), *Does Economic Governance Matter? Governance Institutions and Outcomes*, Cheltenham, Edward Elgar 2011, in press.

Lastly, they are less 'punitive' than their average colleague with respect to awarding so-called 'moral' damages resulting from unfair competition of the sort that may disrupt (supposedly natural) market operations.

In contrast, the reverse is observed for judges coming from the building sector. The latter are likely to be less interventionist than their colleagues in intra-organizational cases opposing the board to minority shareholders. They are much more interventionist than the other judges in inter-organizational litigation between parties to a contract on a given market. This contrast is confirmed by banker-jurists' less punitive attitude (compared to judges from the building sector) concerning claims (by companies) for punitive damages, for example in connection with bidding processes in public works. Moreover, young judges tend to be more interventionist and punitive than older ones with regard to markets and companies alike.

By systematically sending high numbers of senior managers with legal training to the Commercial Court of Paris, the financial sectors have achieved epistemic domination of that court. The simultaneously individual and collective sensitivities of judges from these sectors who hold a law degree (banker-jurists) are of particular interest in this study because they are key players in the skill- and experience-sharing that characterizes the community of commercial court judges. For example, in our examination of the advice network among judges, exchanges of ideas and opinions that may be assumed to shape judicial decisions, the influence of banker-jurist judges was indeed measured and established. The advice network developed by these lay judges and its effectiveness in setting the premises of decision may be said to reflect strong coordination between organization structure and organization member rationality.⁵⁸ Observed regularities in advice seeking and exchanges among commercial court judges show 'who is ready to listen to whom' when problems have to be framed and a decision reached.

Domination by bankers with a legal education is not necessarily well tolerated at this court; banker-jurists' social integration into the court is weaker than that of judges coming from other sectors, precisely because the banking sector has so many representatives: having such a strong presence or 'position' (in Flemming's sense) may be resented by others, and

58 Lazega 1992 and E. Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation Among Peers in a Corporate Law Partnership*, Oxford University Press, 2001. See also E. Lazega, C. Lemerrier & L. Mounier, 'A Spinning Top Model of Formal Structure and Informal Behaviour: Dynamics of Advice Networks in a Commercial Court', *European Management Review*, Vol. 3, 2006. p. 113-122; E. Lazega & L. Mounier, 'Networks of institutional capture', in B. Vedres & M. Scotti (Eds.), *Social Networks and Public Policy*, Cambridge University Press 2011, in press; E. Lazega, L. Mounier, T. Snijders & P. Tubaro, 'Norms, status and the dynamics of advice networks', *Social Networks*. 2011 in press. Electronic version <<http://dx.doi.org/10.1016/j.socnet.2009.12.001>>.

even sometimes prove counterproductive in terms of influence. At the time of our study, the financial sector was indeed perceived by judges from other sectors to be either defending its own corporatist interests or trying to replace the State once the latter began withdrawing from direct control of the economy⁵⁹. As a response to this reaction, one judge, himself a former banker, dismissively declared: ‘shopkeepers hate bankers’. Another indicator of this tension between representatives of the finance sector and the others was the fact that the former were nearly systematically elected with the smallest number of votes at the Chamber of commerce.⁶⁰

RETHINKING PUBLIC ACTION ON THE BASIS OF A CRITIQUE OF THE CONSULAR REGIME

The Commercial Court of Paris, a consular but truly judicial first level court, is an institution of joint regulation of markets – joint in the sense that the State delegates and works together with business, its representatives (in the chamber of commerce) and members of civil society. Business world experience and economic expertise, two characteristics of the consular regime for the more than four centuries it has been in existence, have proven a strong argument in favour of having consular judges render justice in commercial matters. The complexity of the tasks performed by commercial court judges, as much in matters of insolvency as in general or specialized litigation areas, points to the considerable skills and variegated experience – legal, economic and managerial, among others – applied in this type of institution.

Commercial court judges do use a great variety of means for finding the information and advice on which to base their arguments and decisions. But one argument cited by judges in major commercial courts to justify the traditional *consular* operation of commercial justice in France is that extremely diverse kinds of competencies are thus represented in these institutions: judges are in a position to draw on the experience of colleagues in different specialties from all the sectors of the economy. Court judges are identified within the institution by their specialized knowledge and expertise, so that their colleagues know who to consult on what. Knowledge is thus ‘distributed’, and shared. From this it follows apparently fairly ‘naturally’ that the consular institution should make use of the varied experience of its judges and should attach value to pragmatism in justifying its existence.

59 A trend related to the rise of neo-liberalism and New Public Management in France in the 1980s.

60 The judge elected with the fewest votes is called the ‘*culot*’ (cul means ass in French *argot*). Until very recently the ‘*culot*’ was subjected to ritual hazing from his peers during his first year (made to carry the chamber president’s briefcase, to remain silent at the weekly meeting of his particular chamber, to try to amuse the colleagues during meals, etc.). Since recent ‘*culots*’ were all bankers, this ethnographic detail gives an idea of how they are sometimes perceived by non-bankers.

In sum, studying cooperation at the Commercial court of Paris, a consular, pragmatic institution for jointly regulating markets, brings to light close ties between (New) New Law and Economics 'experiential pragmatism' and 'everyday pragmatism' theses and French commercial court judges drawing on their knowledge of the economy and management to make equity-based rulings on economic disputes and bankruptcies. However, exposing how this pragmatic institution is remote-controlled by the financial sector and its criteria likewise exposes the fact that beneath 'individual' pragmatism anchored in the individual judges' everyday experience there is a 'collective' pragmatism permeated with neo-corporatist values and interests. This, then, is the nature of the legal pragmatism characterizing the French consular regime for social control of markets. It raises questions on how to protect the general interest,⁶¹ how legal pragmatism becomes operative, and how N(N)L&E thinking relates to the work being done in the rising number of institutions to which the French State has begun delegating its powers.

The pragmatism put forward approvingly by actors in this institution and by the N(N)L&E is individual pragmatism. However, at the scale of a consular institution such as this commercial court, pragmatism acquires a political dimension. Given commercial court judges' identity; given the way they are recruited and how they learn on the 'job'; given the existence of interests, customs and collective representations that are characteristic of the specific professions and industries those judges come from; given the processes for resolving normative divergences and controversies within this institution; pragmatism in it is necessarily permeated by neo-corporatism whose existence and power threaten court impartiality. Moreover, as attested by the socially constructed resilience and 'irreversibility' of the Paris Commercial Court's institutional design, that neo-corporatism extends beyond mere promotion of collective pragmatism and sensitivities. Once collective pragmatism has been instituted, once it has opened the door to exogenous influence from sectorial norms, it becomes difficult to separate the pragmatic judgment of an individual judge from the corporate regulatory interests he or she necessarily represents to some degree. And what of the astounding longevity of an institution for jointly regulating markets where business directly participates in running a part of the State apparatus? Clearly that longevity cannot be fully explained by the individual pragmatism of its judges and its willingness to accept the neo-corporatism of individuals seeking to exert influence in it. Observation of how this institution operates and its relations with its environment shows that (1) it provides services to the public authorities (commercial court magistrates are not paid; they process

61 E. Lazega, *Networks in Legal Organizations: On the Protection of Public Interest in Joint Regulation of Markets*, Inaugural lecture (Wiarda Chair), Faculty of Law, Utrecht University, 3 December 2003.

bankruptcies without compromising politicians in case of mass lay-offs;⁶² they implement industrial policy that the Ministry of the Economy does not wish to implement openly;⁶³ they train young graduates of the *Ecole Nationale de la Magistrature* in the intricacies of the business world; etc.); (2) it is supported by a highly integrated inter-organizational system (made up of the *Chambre de Commerce et d'Industrie* and employers' associations); 3) it is subjected to no more than superficial (statistical) monitoring by the Ministry of Justice, and this state of affairs allows it and its administration, the *greffe*, to maintain the opacity of its decisions and the ways in which it handles conflicts of interest.

Moreover, the institution can only be captured by a discreet co-regulator because it has been supported for centuries by the social milieu that has been constructed around it: commercial court judges are the primary recruiters of new judges; they are also often likely to be candidates' relatives or friends.⁶⁴ Lastly, legal pragmatism goes together with a professional rhetoric that proves extremely useful in conveying the notion that 'consular' judges and the institution as a whole are independent,⁶⁵ a rhetoric that includes (a) emphasizing the complexity of the tasks to be performed and the management of uncertainty that is involved; (b) developing an elitist approach to cooptation in the election of the judges; (c) claiming that working as a lay judge for the consular commercial court is a disinterested public service; (d) pointing to collegial competence sharing; and (e) ensuring that the organization (*Conférence Générale des Tribunaux de Commerce*) is perceived as an organization that represents and oversees its members, i.e., an organization that for the judges themselves fulfils practical and symbolic functions very similar to those of an official professional association, such as the Bar; when in fact their activity does not actually correspond to a profession.

In the different legal systems, where the appearance of a conflict of interest is taken as seriously as a full-blown conflict of interest, this type of institutional capture can be avoided. In a legal culture where situations that look like conflicts of interest are always blamed on individuals, not on the institution and its structure, this kind of neo-corporatism raises political problems. But the consular model and pragmatism constitute a political option that is never debated in the public arena. In this regime for social control of markets, a

62 In a way, consular judges do the 'dirty work' of both public authorities and the market economy. By putting their expertise and experience in the service of the general interest, they put to sociologists a very specific variant of the general question raised by Everett Hughes (1962), that of 'good people and dirty work'.

63 Lazega & Mounier in Fridenson (Ed.) 2011.

64 A.M. Falconi, K. Guenfoud, E. Lazega, C. Lemerrier, L. Mounier, 'Le Contrôle Social du Monde des Affaires: Une Étude Institutionnelle', *L'Année Sociologique*, Vol. 55, No. 2, 2005, p. 451-484.

65 E. Lazega & L. Mounier, 'Polynormativité et Contrôle Social du Monde des Affaires: Le Cas de l'Interventionnisme et de la Punitivité des Juges du Tribunal de Commerce de Paris', *Droit et Société*, Vol. 71, 2009, p. 103-132.

part of the State administration – and hence of government – operates in pragmatic mode, self-perpetuates in neo-corporatist, elitist fashion. Viewed this way, the existence of this kind of institution itself begins to seem incompatible with the definition of impartiality in Article 6 of the European Convention on Human Rights. The consular regime of joint regulation of markets involves appropriating the power of part of the State apparatus in a way that exceeds simple privatization of public services. In this sense, the issues it raises amount to new questions, to be added to those raised by political sociology and political science in the 1980s. Consular-type public action is spreading today. It is now operative in arbitration and is affecting the ‘regulatory State’ that has already gone some way to have independent administrative authorities carry out some of its own core functions. Research on this kind of institution suggests that the field of critical legal studies might benefit from more systematic research into organization and structure of such institutions, namely by paying more attention to the complex balance of ‘joint regulation’ that they advocate, to the complex forms of State privatization that they represent, and to who wins and who loses in each kind of ‘balance’ of power that is achieved in them.

Lastly, these observations strongly suggest that privatization of State functions is not ‘disinstitutionalization’ but rather a gradual replacement of statutory institutions with institutions that operate on the consular model. This points to the importance of rethinking public action on the basis of a critique of such consular regimes, as much as on the basis of a sociology of professions.⁶⁶ Furthermore, sociologists of the economy and the law are much more attentive today to the norms surrounding institutions such as commercial courts than are specialists in law and economics.⁶⁷ It is important to mention that in this sociological approach research on the notions such as self-regulation, co-regulation and joint regulation in connection with the economics of institutions, conventions, and regulation, goes far beyond the usual divide between hard law and soft law. Hypotheses and methodologies that can be promoted by such an economic sociology of law have yet to be further developed. In this area much remains to be done.

⁶⁶ Lazega 1994; Lazega 2001.

⁶⁷ Ayres & Braithwaite 1992; Lazega 2003; and R. Swedberg, ‘The Case for an Economic Sociology of Law’, *Theory and Society*, Vol. 32, 2003. p. 1-37.