French Legal Origins: A Tocquevilian View

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Abstract

The consensus among legal historians is to consider that the French legal centralization began with the French revolution and was consolidated under the Napoleonic era. Tocqueville (1835) has proposed to analyze this process as the result of an increase in the aversion to legal diversity between citizens, which was indeed pervasive in the Ancient Regime. In this paper, we present a model of this Tocqueville’s idea, assuming that the choice of the optimal legal system depends on the degree to which political deciders care about legal equality between the citizens. We show that legal centralization can be preferred to the "Ancient Regime" situation if this aversion is sufficiently strong. In addition, we show that when the legal system is centralized, it is always optimal to allow some degree of judges’ discretion. This result is consistent with the evidence that the French codification was associated to a higher degree of judges’ discretion. This view contrasts with the interpretation of the Napoleonic codification as a mean to transform judges into automata.

JEL Classification: K40, N40

1 Introduction

There are many dimensions along which common law and civil laws differ in respect to their principles and their applications. Some scholars claim that these differences are not so important or that they vanish over time (Armour et al., 2009, Crettez, Deffains, and Musy, 2014). Others authors share different conclusions, notably by showing that the historical origins of countries’ laws are highly correlated with some current economic outcomes influencing welfare (La Porta, Lopez-De-Silanes, and Shleifer, 2008). For these authors, legal families have different foundations and objectives, and different ways to produce and apply legal rules and regulations. In turn, these differences affect the opportunities offered to economic agents and the functioning of markets. For example, the laws on corporate governance and shareholder protection influence the opportunities and the risks faced by
shareholders (notably minority shareholders) and then modify their choices. At a macroeconomic level, this creates variations in the size of financial markets and in the level of economic development. In this view, civil law systems are seen as more favorable to intrusive state intervention than Common law systems, both under the form of more important state ownership and heavier regulation. By showing that GDP per capita is lower on average in civil law countries, the tenants of this approach advocate policy measures that recommend to adopt common law legal systems, especially for developing countries.

The proper understanding of legal origins requires to understand why at some date, countries have chosen some specific legal systems rather than others. This requires to analyze the tradeoff that countries were facing at this moment, and why their choices have not been overruled later. One determinant aspect that distinguishes legal families has been the growing degree of centralization of judicial decisions and legal production. Several explanations have been provided to explain this divergence, focusing notably on the legal trajectories followed by France and England, which are the birthplaces of the different modern judicial families. For the tenants of the Legal Origins approach (the most famous paper being Glaeser and Shleifer, 2002), this divergence has begun in the 13th and 14th centuries, due to internal policy reasons. England chose to adhere to a system of jury, leading later to decentralized legal system based on judges, while at the same time France chose to let royal judges make judicial decisions, leading later to a more centralized legal system, based on the adoption of national laws. Johnson and Koyama (2014) propose an alternative viewpoint to explain French legal origins, arguing that the process of legal centralization began later, along the 17th century, with the gradual rise of fiscal needs of the French government due to the rise of the costs of wars. Arrunada and Andonova (2005) propose another explanation based on the French transition to capitalism and market economy in the 18th century. This transition was easier to realize in a centralized system rather than in a decentralized one, since the judges of the Ancient Regime belonged to the nobility and were opposed to liberal reforms, notably the introduction of free markets. The only way for the government to succeed to impose liberalization was to promote a fully centralized legal system, the State being the source of all legal innovations.

In this paper, we provide another expiation of the French legal origins. We develop a rational choice model that historically locates a clear rupture around the French revolution, when the French authorities had the possibility to choose an entirely new legal system. In our model, the driver of legal centralization relies on the will to impose legal equality for all citizens in the country, by abolishing the specific rights granted to the nobility and the clergy but
also by removing possibilities of local disparities in the production and application of legal rules, which were considered as local liberties under the Ancient Regime. The singularity of our approach is its full accordance with the history of French law taught by law scholars (see Section 2).

The roots of the wish of a full legal equality among all citizens of the same country is the fruit of the philosophy of Enlightenments developed during the eighteenth century, notably by French thinkers like Voltaire. To them, inequality before the law was one of the most important weaknesses of the Ancient Regime, not only because it was costly (by preventing the creation of a national market), but also because it was in contradiction with the principles of logic that should be at the heart of the construction of a modern legal system. In old legal regimes like the Roman law, legal rules had to be discovered. In modern regimes, legal rules have to be rationally chosen. Since at that time French legal diversity was mainly inherited from history and hazard, and largely based on local customs, it could hardly be the rational expression of the will of the kingdom as a political entity. The importance of enlightenments was particularly strong in France and the hostility to the multiple legal inequalities explain that among its first political decisions, the new political power focused on legal equality. The importance of this concern was highlighted by the main commentators of the period, notably by Tocqueville, whose viewpoint was to attribute the French legal centralization (compared to the American system) do the specific weight given to equality concerns in France (Tocqueville, 1835).

The focus on the abolition of local adaptations of the law is important because it does not represent a universally shared form of legal evolution and in some sense represents a specific path of the French legal system, which was not followed before the French Revolution. Some other countries have chosen to allow for local differences in legal rules, while the existence of privileges has disappeared from all occidental countries over time. The preservation of some aspects of the local liberties allowed under the Ancient Regime was not ruled out of the discussions during the revolutionary period and other institutional functioning were proposed. Among the alternative constructions of the legal system being considered, one was proposed by an important group of deputies named “Girondists”. It was composed mainly of local dignitaries, who proposed (among other important points) a more decentralized system. These solutions were ruled out and this faction was eliminated. The whole revolution movement was paralyzed during the following years because of political instability.

The next legal step was conducted during the Napoleonic era, began in 1799. It culminated with the introduction of the Civil Code of 1804. Contrarily to some common belief, this
phase was not the primary source of centralization but rather the achievement of the process begun 15 years before. In many aspects, it is considered as a compromise between some legal aspects of the Ancien Regime and the legal wishes of the revolutionaries. A notable point was that the wish to control judges was softened during the Napoleonic era compared to the initial revolutionary decisions. We try to address this point in this paper by showing that in a centralized legal system, a full control of local judges’ decisions is not optimal, i.e. the code doesn’t need to be too precise. It means that within this views, the French Codification was not aimed to transform judges into automata. This contrasts sharply with the view developed notably by Glaeser and Shleifer (2002), who associate the autocratic regime of Napoleon with the wish to impose his desires to all legal decisions and to remove all their discretionary power.

The aim of this paper is to build a model of legal centralization able to reproduce the stylized facts we have presented about French legal history and to explain the revolutionary legal movement using the Tocquevilian assessment on the particularly strong desire for equality in France. We then analyze the process of centralization as the result of the changes of preferences of the political authorities at the moment of the revolution. We show that centralized legal decisions can be optimal if the desire of legal equality is sufficiently high (representing the revolutionary transition toward centralization), but at the same time, we show that a full control of local judges is not optimal in a centralized system (representing the Napoleonic return to some autonomy allowed to judges).

The paper unfolds as follows. In section 2, we propose a detailed summary of textbooks dealing about of the French history of law. In section 3, we propose a summary of the literature on the French centralization of legal decisions. In section 4, we propose a model of the French legal system around the revolution. In section 5, we analyze under which conditions the more decentralized project supported by the French faction of the Gironde was preferable. In section 6, we introduce judges in the previous model and analyze the optimal degree of discretion granted to this judges, in relation to the process of codification. In section 6, we compare our model and our results to closely related ones. We conclude in section 7.

2 History of the French Legal System until 1804

In this section, we summarize the French legal history concerning the legal organization at a macro level around the revolutionary period. We begin by presenting the ”Ancient Regime”
organization and the diversity of laws that was associated and we end with the codification of 1804, which represents the end of the process of uniformization and centralization of the legal system, with the prominence of the legislative body as the source of legal rules.

2.1 The French Legal System During the Ancient Regime

The French legal system during the whole Ancient Regime period was unambiguously characterized by a very important legal disparity within the country. The first type of disparities was called "privileges" and the differentiation was among different social groups. The society was divided between the nobility, the clergy and the rest of the population (the Tiers), each of them having different duties, notably from a fiscal viewpoint, since the taxes were supported only by the Tiers. We can refer to these differences as vertical since the specific rights of the nobility and the clergy were clearly giving them a better situation than the Tiers.

The second type of disparities was among the different geographic areas of France (the Provinces). The growth and the consolidation of the French kingdom was progressive and each new province entering the kingdom was given the possibility to keep some of its previous traditions, laws and institutions. Local Parliaments (whose number was 14 in the second part of the XVIIth century) were giving justice at an intermediary level, formally in the name of the king but in reality with some independence from him. A decision made by a given Parliament was in application into his area of influence but other Parliaments were not obligated to apply this decision. Another source of diversity was the belonging to different legal families in different parts of the kingdom: Roman law was the legal inspiration in the southern part of the country ("pays de droit écrit"), while several customary laws were the basis of legal decisions in the northern part ("pays de coutumes"). Figure 1 (coming from Le Bris (2015)) summarizes this diversity.
This resulted in the co-existence of different sources of law in the Ancient Regime, the main ones being royal ordinances at a national level, jurisprudence and lawmaking from local Parliaments (using the procedure of "arrets de reglements") at the provincial level, and customary law at a local level (Carbasse, 2014). The local customs were numerous. According to Le Bris (2015), about 80 general customs and 380 local customs were in force within the Old Regime France. The Parliament of Paris judged in last resort cases according to 50 different customs. We can refer to these differences as horizontal since they were reflecting local disparities in the legal rules and their applications, due to different local preferences and history.\footnote{Of course, it is not easy to differentiate clearly these two kinds of differences since some local disparities were indeed reinforcing some legal inequalities between citizens.}

This situation of large diversity was recognized from a long time but was accepted. For example, in the end of the XVIth century, Montaigne observed that each specific case was leading to a specific law, creating a legal inflation: “we have more laws in France than in the rest of the world put together” (Montaigne, 1595 (2009)). However, he didn’t conclude that this situation should change. Legal diversity concerned every aspects of life, including for example the age of the majority which was different depending on the area. The notion of French Law became a legal discipline only during the sixteenth century. It was only in April 1679 that the “Edit de Saint Germain en Laye” created the teaching of French Law.
and French jurisprudence as academic disciplines. This French legal diversity went along (or as a result from) a great diversity in the organization of the social life and even in the languages used, many regions having a specific regional language, and inside them, several local dialects (“patois”) were co-existing. In 1789, Mirabeau was remarking that France was indeed an “aggregate of divided people”.

2.2 Fighting Legal Disparities: The Role of Enlightenments in the French Legal Evolution

The acceptation of legal diversity began to change during the period of the Enlightenments. For important philosophers of this period, laws weren’t natural but should express the will of the nation as a whole. They made very strong statements against all forms of legal inequality present in the Ancient Regime, both vertical and horizontal. The most important contestation was about the existence of privileges, which were implying that people were not equal. Local differences were also contested because most of the time, these differences were only reflecting inheritance of the past and were then unfounded from a rational viewpoint, as stated in the following quotation of Voltaire:

\[
\text{Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? When you travel in this kingdom you change legal systems as often as you change horses.}
\]

Things were even more complicated since administrations and rules were overlapping and a single individual was possibly living under up to five or six different jurisdictions and powerful people (notably nobles), were able to pick up the most profitable one for them (Coquard, 2014).

Since laws had to represent the will of the nation, such an inefficient overlapping of rules was a non sense. The criticism of legal diversity made by the enlightenment was then clearly differing from previous criticisms made for example by Montaigne, 1595 (2009), whose viewpoint was to consider that some natural law was ruling the society and that this natural law could be in opposition with the desires of the society, without implying the need for any legal change. In the same vein, if difference between natural laws and actual laws were undesirable, a global change in existing rules wasn’t necessary too (Ubrecht, 1933 (1969)). Philosophers of the Enlightenments were on the contrary thinking that every
set of rules has to be rationally decided and then that they should not differ among local areas, except for well specified reasons. Laws should be thought as unique rules applied to everybody and they should even precede the uniformization of the preferences of the society if some initial diversity was existing (Carbasse, 2014). Voltaire again summarized this point in his article on Civil and Ecclesiastical Laws (Voltaire, 1765): “One weight, one measure, one custom.... Every law should be clear, uniform and precise.”.

People belonging to the same kingdom were not only facing different laws, but in addition were also facing different applications of the law. The reason was the important discretionary power granted to judges in the determination of sentences (Lovisi, 2011). This point was especially important for penal law and was also denounced as unfair because the inequality of treatment was linked to the social status of people, in part because judges were themselves belonging to the nobility. By consequence, for some philosophers of the Enlightenments, to ensure an equality of treatment between citizens, sentences and incriminations had to be determined by a national uniform law, not by local judges.

2.3 Legal Transformations during the French Revolution (1789-1804)

By allowing the possibility of a complete redefinition of legal rules ordering the French society, the revolution that began in 1789 allowed to build intentionally a whole body of coherent new legal rules, rationally determined by the representatives of the nation. For Sieyes, the will of the Nation was perfectly represented by the National Assembly. This was a clear rupture with the monarchy, since in the Ancien Regime, the third estate was not represented at all. The official reference was still the absolute monarchy, even if in practice, the power of the king was diminishing.

In accordance with the principles issued from the Enlightenments, legal egalitarianism was the foundation of the process. Among the first legal decisions was the abolition of feudalism and the old orders, rules, taxes, courts and privileges left over from the age of feudalism (during the night of August, 4th of 1789). The abolition was not decided on pure economic ground, but rather on philosophical ground. It was soon followed by the proclamation of the Declaration of the Rights of Man and of the Citizen, another founding act of the French Revolution, which begins with the assertion that “Men are born and remain free and equal in rights”. All “vertical” legal differences between citizens were abolished.

In the following step began a process conducting to a centralized legal system, accompanied by the will to remove any discretionary power granted to judges. To strengthen this process,
the creation of a civil code containing all civil laws applicable to the whole nation was stated in the Constitution of 1791, but the promise was not be kept by the revolutionary assemblies, despite three tentatives made by Cambaceres. His first try in 1791 was stopped after three months because the Nation was beginning a decisive war against monarchist European countries. Un-expecting a prolonged phase of wars, the government wanted to wait until the end of the war before enforcing the Code, in order not to add supplementary internal dissent to external threat. Two laws were however kept from Cambaceres propositions, notably the introduction of a full equality of children in concerns of inheritance. After the fall of the government, another try was made in 1794, without more success. The last attempt in 1796 was less ambitious concerning the egalitarian ideas of the revolution, because the royalist faction regained power at that time and rejected any codification (Lovisi, 2011).

A less ambitious but more successful attempt was realized in September of 1791 with the creation of a penal code, in an attempt to correct the inequalities of treatment observed in penal cases. This code was incomplete, concerning only crimes, municipal and correctional police laws about fines and offenses, but it was the first French legal text adopted under the name of Code. Its main point was the statement that sentences had to be equal for all, depending only the importance of the offense (Lovisi, 2011, p. 281). Fixed sentences (with a fixed basis and contingent possibilities to raise the sentence) were established in order to constrain the discretionary power of judges. After the fall of Robespierre in 1794, the Convention of 1795 replace this penal code by a code of offenses and sentences.

The failure to introduce a Civil Code despite the will to control the decisions of judges resulted mainly from very important initial internal dissensions among French representatives, external threat and the absence of a sufficiently strong government to impose a full new body of law. It was only with the rise of the Napoleon Bonaparte’s political power at the end of the 1790’s that more favorable conditions were present to impose such a code. The Civil code was then successfully created in 1804, a date which can be considered as the culminating part of the process engaged in 1789. This Civil code fulfilled the egalitarian aspirations of the revolution by consolidating previous laws and creating new ones. Every local area in France was ruled by the same set of legal rules. As stated by Allison (2000): “Codification of the law was a demand of the revolution answered by Napoleon” and “the logic inspiring it is a clear body of law for all Frenchmen”. The distance between the French legal system and the English one increased much more during this period than during any other period of history.

One important feature associated to the introduction of the Civil Code was the decrease
in the will to control judges compared to the early revolutionary period (which contradicts the idea that the Civil Code was created to transform judges intro automata, as stated by Glaeser and Shleifer, 2002). This change was mainly pragmatic since a full control of judges was in practice too difficult to realize (Carbasse, 2014). What remains durably was the combination of statutes and a non-strict but existing control on judges, with some control exerted by higher courts.

3 The Law and Economics Literature of French Legal Origins

Several paper share the idea that understanding French legal origins is important, but none of them share the same conclusions about these origins. Following the seminal work of Glaeser and Shleifer (2002), several papers have proposed alternative motivations and historical periods of transition to explain why France has chosen a more centralized legal system than other countries like England. Most of them propose arguments that make centralization coming from the wish of an authoritarian central sovereign (French kings or Napoleon). Associating centralized systems with authoritarianism has strong implications when considering the consequences of legal origins (La Porta, Lopez-De-Silanes, and Shleifer, 2008). Paradoxically, these explanations are not consistent with the standard presentation of centralization in France made in textbooks (see section 2). We present briefly the main ideas and the model of the papers studying French legal origins.\footnote{Two related papers studying public decisions in federalist system (Loeper (2011) and Loeper (2013)) share some concerns and common elements to the model we present in that paper. Loeper (2013) compares centralized and decentralized policy choices assuming that the preferences of region’s representative agent are as follows:
\begin{equation}
U^i(x) = -(x_i - \theta_i)^2 - \frac{\beta}{N} \sum_{j \neq i} (x_i - x_j)^2.
\end{equation}
The utility of agent $i$ depends on the average distance between its region’s choice ($x_i$) and other regions’ choices. Therefore, he does not care about the distance between the choices of two arbitrary regions and then the uniformity of legal rules in the country as a whole. By construction, in Loeper’s setting agents do no care about inequality before the law. In his model, the Nash equilibrium is:
\begin{equation}
x_{dec}^i = \frac{\theta_i + \beta \bar{\theta}}{1 + \beta}.
\end{equation}
Loeper (2011) shows that in this setting "unitarian centralization is never socially better than decentralization" (Proposition 3 in Loeper, 2011), in contrast with the results we present in this paper. Loeper (2013) also studies a more flexible federal coordination mechanism where regions vote for an interval in which there are free to choose their preferred policy, which is different representation of public decisions from the ones we assume in this paper.}

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3.1 Coasian Bargaining in the Medieval Kingdom: Glaeser and Shleifer (2002)

Glaeser and Shleifer (2002) consider that France and England had common legal roots building on customs and natural law until the 12th and 13th centuries and began to diverge thereafter. These common roots were built around the Frankish inquest, which can be considered as the ancestor of the system of jury and was initially present both in France and in England, where it was imported by the Norman kings. The successors of Norman kings used it for all sorts of purposes, fiscal and judicial (Henry, 1935). The system of jury was developed in a more modern form in England during the 12th century by Henry II and strengthened later by King John with the Magna Carta (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land”). In addition to this system, which was more and more functioning as a check to the royal power, a policy of independence of the judges was also pursued (Glaeser and Shleifer, 2002).

At the same period, France left this system and moved towards a model of judge-inquisitor under the control of the king. This change was introduced by Philip Augustus and Louis XI and resulted paradoxically from the weakness of the French’s crown relatively to the important lords (“grands feodaux”) at this time. Glaeser and Shleifer argue that for historians of legal systems such as Dawson (1960), the choice between judges controlled by the sovereign (royal judges) and judges who are not (juries) “is central for the initial divergence between the French and English legal systems in the 12th and 13th centuries and explain many persistent differences between civil and common law”. The subordination of judges to the French king was later strengthened by Louis XIV and Napoleon, this time in order to reinforce the power of the sovereign. They summarize the Napoleonic project about judges as to transform them into automata.

The model they propose to support this story builds on a Coasian bargaining between the king and the nobles. The set of possible choices for the legal system comprises royal judges (centralized justice) and jury (decentralized justice). The best system of adjudication is determined by considering the potential sources of inefficiency of each one: the degree of local violence and corruption that local lords can use in the system of jury (A); the arbitrariness of the decisions of the king in the system of royal judges (D), since royal judges reflects at least partly the preferences of the king. Centralization is chosen when the
cost of royal arbitrariness is lower than the cost of local corruption. For a given crime of importance \( D > 0 \), the utility of a punishment is \( \beta D - A \) for the community of nobles and \( D + \theta R \) for the king. The jury and the royal judge differ in the crime that they punish or not, and the authors show that there exist a threshold of \( A^* \), such that for higher levels of local violence and corruption, a decentralized justice is less efficient than a centralized one. Since local violence was more limited in England (because there were fewer wars in England and local lords were weak compared to the king’s power), decentralized justice (implemented via the use of jury) was preferred. In France, local lords were at least as powerful as the French king. Consequently, royal justice was perceived as a lesser evil than the use of juries, because strong lords were able to manipulate or exert coercion on. Glaeser and Shleifer (2002) then obtain a paradoxical result: a strong monarch chooses to decentralize legal decisions, while a weak one centralizes them.

In addition, they illustrate the thesis of Von Mehren (1957) that codification is a complement to legal centralization. In their model, codification is understood as the existence of ”bright line rules” that imply automatic decisions of the judges when a sufficiently high level of offense is made. The purpose of such rules is to enable sovereigns to control judges by constraining their decisions. From that, they conclude that “It is not surprising, in this regard, that centralized civil law systems were often championed by the great autocrats, like Napoleon”. From this viewpoint, the introduction of the Civil Code by Napoleon is not the concluding act of the French revolution and its egalitarian aspirations, nor a way to make adjudication less complex, but rather a return to autocracy and control of the judiciary power by the State.

The problem of their approach is that it is very loosely supported by the facts. As presented in section 2, the French legal system was not centralized and uniformed until the French revolution. The dates of the 12th and 13th centuries as representing ruptures in the French legal system are not at all put forward by historians of law. La Porta, Lopez-De-Silanes, and Shleifer (2008) recognize this point but conclude that it is not so important, since ”regardless of whether the revolutionary or the medieval story is correct, they have very similar empirical predictions”, notably that in both cases, a civil law system exhibits lesser judicial independence than a common law one.
3.2 From Fiscal Capacity to Legal Centralization: Johnson and Koyama (2014)

Johnson and Koyama (2014) explore the idea of Besley and Persson (2011) that legal capacity can come along with fiscal capacity (and more globally with state capacity). When the French monarchy began to centralize its fiscal system at the beginning of the 17th century, in response to increased needs to finance wars, it had an incentive to reorganize and harmonize legal rules across French regions. Local deviations to the rule of law could be very important at that time. Johnson and Koyama (2014) choose to illustrate such local deviations to the general principles of the rule of law by using the large number of witch trials (more than 2000 documents trials over the 1550-1700 period), organized as judicial responses to satisfy local preferences. Since witch practices such as diabolism did not leave any physical proof of evidence, witch trials were clearly following legal procedures outside of the rule of law (relying on torture and personal abilities to detect witches). Considering the number of witch trials as a proxy for the lack of legal development, they show that the increase of legal capacity during the 17th century was associated with a stricter interpretation of legal procedure imposed by the French central authority on all local authorities. While France was not fully centralized at the end of this process, according to the authors, the foundations for the 18th century centralization were laid.

In the model they build to support their conclusions, they assume a country composed of two different regions. When there is no legal centralization, the local court of region $i$ accommodates the local demand of this region, which depends on the decision of the local
court of the other region. Namely, if \( s_j \) is the decision of the region’s \( j \) court, the local demand of region \( i \) is written \( \omega + \beta s_j \). In a decentralized equilibrium, the court of region \( i \) makes its decision by solving the following problem:

\[
\min_{s_i} = \frac{1}{2} (s_i - \omega - \beta s_j)^2 + \frac{1}{2} (s_i)^2. \tag{3}
\]

With legal centralization, a national court control the local accommodations. This court solves the following problem:

\[
\min_{s_1, s_2} = \frac{1}{2} (s_1 - \omega - \beta s_2)^2 + \frac{1}{2} (s_1)^2 + \frac{1}{2} (s_2 - \omega - \beta s_1)^2 + \frac{1}{2} (s_2)^2. \tag{4}
\]

Noting \( s^l \) the choice of the court under Nash equilibrium and \( s^c \) the choice of the court under legal centralization, we can see that:

\[
\frac{(1 - \beta)\omega}{\gamma + (1 - \beta)^2} = s^c < s^l = \frac{\omega}{1 + \gamma - \beta}. \tag{5}
\]

The centralized solution is always better because it internalizes the externalities and among its set of possible solutions, it can always reproduce the decentralized solution. The solution \( s^c \) is also the value of the law when its is chosen to apply uniformly across regions. This results from the assumption that there is no heterogeneity across regions.

### 3.3 The Road to Market Economy: Arrunada and Andonova (2005)

Arrunada and Andonova (2005) contest both the chronological construction of the previous arguments and the reasons leading to centralize legal decisions. For them, the divergence between France and England began with the industrial revolution in the 19th century and the wish of the French authorities to adapt to the new economic and legal framework suited for the good functioning of capitalism and free markets. The introduction of the Civil code by Napoleon in 1804 is seen as the tool to realize these ambitions.\(^3\) They recall that “the proper functioning of a market economy requires that freedom of contract be protected effectively”. An evolution was necessary and at the difference of what happened in England (where the judges and the Parliament were much more favorable to the market economy, see Arrunada and Andonova, 2005, p. 233), France was not able to introduce such legal

\(^3\) This argument is consistent with the larger historical analysis of the French revolution as a “revolution bourgeoise”, in which bourgeoisie was the leading corps of the revolution.
changes spontaneously. At the beginning of the 19th century, French judges were still the product and defenders of the Ancient Regime. Accepting to continue to grant them judicial discretion would have represented a threat for the development of a modern market economy, since they were mainly opposed to principles such as free market and equality of contractors. A centralized change impulsed by the State was then necessary and a civil law system seemed to be the more appropriate response in this context. Centralized judicial production, rather than limiting this freedom of contract, was on the contrary necessary to protect it. It was also important to accompany this by a restrain in the judicial rule making discretion remaining to the judges, in order to avoid local opposition to this new order. They do not present a model to accompany their argumentation.

3.4 Summary of the literature on French legal origins

The different views offered for French legal origins in the literature can be summarized in the following figure. The facts and mechanisms presented in these articles are only marginally supported by the history of french law presented in section 2, which situates the French deviation around the revolution of 1789. We present in the next section a model that tries to provide a model of legal origins consistent with French legal history.

4 Legal Centralization at the Beginning of the Revolution (1789-1791)

We propose a simple model of French legal origins, trying to undersantd the abolition of the rules of the Ancient Regime and the choice of a centralized legal system building on the arguments presented in the previous sections. The important transformation that begin with the French revolution in 1789 is the change in the nature of the regime and then the groups exercising political and judicial power. During the Ancient Regime, the reference
was the absolute monarchy. In a hierarchical society built on orders and Estates, justice was
given effect by the royal will, which was in turn preserved from arbitrariness by reason and
counsel (Baker (1989)). After the revolution, the nation had an opportunity to fully redefine
its political will. For thinkers and deciders of this evolution, the most notable being Sieys,
the will of the nation was prefectly represented by the national assembly. Sieges argued
that the people was able to talk and act only by its representatives and that each of its
representatives was representing the whole nation (Baker (1989)).

4.1 The Tocquevillian Assessment on Legal Centralization

How can we account for the shift in the preferred level of law-making before and after the
Ancient Regime? A possible answer can be found in Tocqueville’s *Democracy in America*
(see Tocqueville, 1835). For him, there is a link between aversion to inequality before
the law and the characteristics of legal systems. Indeed, one of the driving forces shaping
institutions of democratic nations is the continuous increase in equality among citizens.
For some countries, legal uniformity is seen as a necessary condition for equality of citizens.
As a consequence:

*The very next notion to that of a sole and central power, which presents itself to
the minds of men in the ages of equality, is the notion of uniformity of legislation.
As every man sees that he differs but little from those about him, he cannot
understand why a rule which is applicable to one man should not be equally
applicable to all others. Hence the slightest privileges are repugnant to his reason;
the faintest dissimilarities in the political institutions of the same people offend
him, and uniformity of legislation appears to him to be the first condition of good
government... Notwithstanding the immense variety of conditions in the Middle
Ages, a certain number of persons existed at that period in precisely similar
circumstances; but this did not prevent the laws then in force from assigning to
each of them distinct duties and different rights. On the contrary, at the present
time all the powers of government are exerted to impose the same customs and
the same laws on populations which have as yet but few points of resemblance...*

---

4 We notice that while Tocqueville’s *The Ancient Regime and the Revolution* is devoted to the analysis
of the French Revolution, it does not address the issue of legal centralization *per se.*
5 An english translation of Tocqueville’s works is available online at this link
http://faculty.law.lsu.edu/ccorcos/resume/tocqueind.htm.
6 This viewpoint is explicitly states in Chap 1, Book II, *Democracy in America* 2, fourth paragraph.
7 Chapter II, book IV, second volume of *Democracy in America.*
The trend toward more uniform rules is seen at work in America by Tocqueville.\textsuperscript{8} However, uniformity of legal rules is not achieved in the same ways across nations. Some of them favor more equality than others, and should accordingly impose more uniform rules than others. Moreover, the demand of equality can be self perpetuating and a one-time shift in favor of egalitarian institutions can have long-lasting effects.\textsuperscript{9} Tocqueville asserts that in the early 19th century, France was the leading country in the process of concentration of powers and uniformization of rules.\textsuperscript{10} During this period *Democracy in America*, laws were indeed notably more uniform in France than in England.\textsuperscript{11} For him, this is a striking fact since, elsewhere, in Tocqueville (1856), he argues that legal systems in Europe have a common origin.\textsuperscript{12}

4.2 A Simple Model of Ancient Regime Legal System

4.2.1 Elements of the model

We do not attempt to describe the whole legal system of the French Ancient Regime but rather to present a simplified version of it, mainly suited to understand the last days of its existence and the need for a change in presence of growing egalitarian aspirations. We do not take into account some elements like the existence of provincial parliaments that functioned as appeal courts but also as local law producers.

We assume that there are \( n \) local regions, \( i = 1, \ldots, n \). A local region is described by its culturally ideal law \( x_i \) (\( i.e., \) its legal preferences). We denote by \( x_i^o \) the actual law in the region. Both the actual and ideal laws are associated to points of the real line.\textsuperscript{13}

Each region \( i \) is inhabited by a representative agent whose utility function is as follows:

\[
U_i = -\frac{1}{2} (x_i^o - x_i)^2 - \frac{1}{2} \frac{1}{n} \sum_{j=1}^{n} (x_j^o - \bar{x}^o)^2
\]  

\textsuperscript{8} Chapter II, book four, second volume of *Democracy in America*, third paragraph.

\textsuperscript{9} Tocqueville indeed argues that as more equality is achieved, the remaining inequalities are considered as more unbearable. On this, see Chapter III, Book four, the second volume of *Democracy in America*, third paragraph.

\textsuperscript{10} See Chapter II, Book four, second volume of *Democracy in America*, fourth paragraph.

\textsuperscript{11} Tocqueville, quoting Blackstone, writes a long note to the chapter IV of the third Book of *Democracy in America* on the diversity of the English legal system at the end of the Ancient Regime.

\textsuperscript{12} See Chapter IV, Book 1 of *The Ancient Regime and the Revolution* (Tocqueville, 1856).

\textsuperscript{13} We may interpret a point of the real line as being the value of the aggregate index of legal rules concerning a specific issue of the legal system. The construction of aggregate indexes of legal rules is a current practice in the empirical law-and-economic literature (see, \textit{i.e}, Siems, 2011).
where $\bar{x}^o$ is the average value of the laws across regions.

These utility function comprises two terms. The first term $(-\frac{1}{2}(x_i^o - x_i)^2)$ represents the cost of the divergence of region $i$’s laws from region $i$’s own legal preference. The second term represents the cost of legal heterogeneity. On the one hand, legal heterogeneity creates legal barriers to interregional trade. On the other agents are assumed to have an aversion to inequality before the law. To capture the cost of inequality before the law, we assume that the utility function of each representative agent is decreasing with respect to to the variance $\frac{1}{n} \sum_{j=1}^{n} (x_j^o - \bar{x}^o)^2$ of the actual laws.

To ease the analyse, we also assume that the parameter $\alpha$ describing the intensity of the aversion to inequality before the law is the same across regions.

The differences between the ideal and the actual laws depend on the cost of inequality before the law as we explain in the next subsection.

### 4.2.2 The Ancient Regime Equilibrium

We assume that each region $i$ considers that it has no influence on the average decision ($\bar{x}^d$).

We interpret the Ancient Regime as the Nash equilibrium of the game where each region chooses its actual legal system. We call this equilibrium the *Ancient Regime equilibrium*.

In a Nash equilibrium, the following condition holds:

$$-(x_i^o - x_i) - \frac{\alpha}{n} (x_i^o - \bar{x}^o) = 0.$$  \hspace{1cm} (7)

Thus each local region chooses its law in a way such that decreasing marginally the distance between the local law and the local preferences is cancelled by the marginal increase in the distance between the local law and the average laws (to put it another way, a marginal increase in inequality before the law).

From the preceding equation we can compute the average of the local decisions and we find that:

$$\bar{x}^o = \bar{x},$$ \hspace{1cm} (8)

where $\bar{x} = (\sum_i x_i)/n$ is the average value of the $x_i$. Thus the average of value of the actual laws is equal to the average of the ideal laws. Using equation (7), we find that the actual
choice of the law in region $i$ is:

$$
\overline{x}_i^o = \frac{x_i + \frac{\alpha}{n} \overline{x}}{1 + \frac{\alpha}{n}}.
$$

(9)

This value is an average value between the ideal legal system of region $i$ and the average ideal values.

We can compute the equilibrium value of legal heterogeneity (the variance of the $x_i^d$), and we get:

$$
\sigma_{x_o}^2 = \frac{\sigma_x^2}{(1 + \frac{\alpha}{n})^2}.
$$

(10)

We see that legal heterogeneity decreases in equilibrium with respect to $\alpha$, the parameter which measures the intensity of the aversion to inequality before the law. When $\alpha$ goes to infinity, legal uniformity is achieved since all the values of the actual law converges to $\overline{x}$ (see equation (9)).

The equilibrium value of agent’s $i$ utility is as follows:

$$
U_o^i = -\frac{1}{2} \frac{(\alpha)^2}{(1 + \frac{\alpha}{n})^2} (x_i - \overline{x})^2 - \frac{\alpha}{2} \frac{\sigma_x^2}{(1 + \frac{\alpha}{n})^2}.
$$

(11)

The value of the sum of agents’utility functions in the Ancient Regime equilibrium is:

$$
\sum_{i=1}^{n} U_o^i = -\frac{n \sigma_x^2}{2} \frac{(\alpha)^2}{(1 + \frac{\alpha}{n})^2} + \frac{\alpha}{2} \frac{\sigma_x^2}{(1 + \frac{\alpha}{n})^2}.
$$

(12)

4.3 The Revolutionnary legal system

During and after the Revolution, legal centralization prevailed in France. We rely on the model introduced above to analyze legal centralization and we call the resulting equilibrium the Tocqueville equilibrium.

4.3.1 The Tocqueville Equilibrium

To analyze legal centralization, we now assume that the actual value of the law is the same across regions. Moreover, this value is supposed to be chosen by a decision maker who maximizes the sum of the agents’ utility function (this is in the spirit of Glaeser and Shleifer,
Formally, the problem of the decision maker is as follows:

$$\max_{x^c} -\frac{1}{2} \sum_{i=1}^{n} (x^c - x_i)^2,$$

(13)

where $x^c$ is the value of the actual law for all regions. We notice that since the variance of the actual laws is nil, so is the cost of legal heterogeneity.

The first order (necessary and sufficient) condition is:

$$- \sum_{j=1}^{n} (x^c - x_i) = 0.$$

(14)

We deduce from the above equation that:

$$x^c = \bar{x}.$$

(15)

The actual value of the law is equal to the average value of the ideal laws.

Agent’ $i$ utility is:

$$U^c_i = -\frac{1}{2} (x_i - \bar{x})^2,$$

(16)

and the equilibrium value of the social objective is therefore:

$$\sum_{i=1}^{n} U^c_i = -\frac{n}{2} \sigma^2_x.$$

(17)

We observe that the Tocqueville equilibrium does not depend on $\alpha$ since the variance of the actual laws is nil.

### 4.4 Comparing the Ancient Regime and the Tocqueville Equilibria

We try to account for consequences of the shift in the preferred level of law-making before and after the Ancient Regime building on the remarks made by Tocqueville (1835) presented in the preceding section. Within this view, the engine of legal centralization is the increase in the aversion to inequality before the law among citizens of the same country. We thus incorporate Tocqueville’s insight into our analysis. To do this we compare the
equilibrium value of the social objective in the Ancient Regime (legal decentralization) and
the Tocqueville equilibria (legal centralization).

Using equations (12) and (17), we obtain the following Proposition after a little algebra:

**Proposition 1.** Assume that the number of local regions $n$ is higher than 2. Then, the
Tocqueville equilibrium (legal centralization) is preferred to the Tocqueville equilibrium (legal
declaration) if and only if:

$$\frac{n}{n-2} < \alpha.$$  

(18)

We rely on the previous Proposition to interpret the change in the preferred level of law-
making before and after the Ancient Regime. According to our result, a shift in the co-
efficient $\alpha$ is sufficient to make legal centralization preferred to legal decentralization. We
can consider that before the Enlightenments, and the French Revolution, we have $\alpha \leq \frac{n}{n-2}$.
Aversion to inequality before the law is low and then legal decentralization is better than
legal centralization. By contrast, during the Enlightenments and the French Revolution, 
aversion to inequality grows and so that we have actually $\frac{n}{n-2} < \alpha$. Therefore in this case
legal centralization is the best choice.

While a high value of $\alpha$ implies that legal centralization is preferred to legal decentralization,
the difference in the values on social objectives under the two regimes tend to decrease when
$\alpha$ goes to infinity. Indeed, we can check that the difference $\sum_i U^i_o - \sum_i U^i_c$ is proportional
to the function $g(\alpha)$:

$$g(\alpha) = \frac{1 - \alpha(\frac{n-2}{n})}{(1 + \frac{\alpha}{n})^2}.$$  

(19)

We see that this function is increasing whenever $\frac{n^2}{n-2} < \alpha$, and goes to 0 when $\alpha$ goes to $+\infty$.
Therefore, while when aversion to inequality before the law $\alpha$ is low legal decentralization is
better than legal centralization, and when $\frac{n}{n-1} < \alpha$, the reverse conclusion obtains, the
difference in the objective vanishes when $\alpha$ goes to $+\infty$. Intuitively, when $\alpha$ is low, it is
better to choose a law closed to the ideal one in each region. If, however, $\alpha$ increases, in
the Ancient Regime equilibrium every region tends to choose the same law $\bar{x}$. As a result,
the difference with the Tocqueville equilibrium vanishes when $\alpha$ goes to infinity.

Examining the condition stated in Proposition 1, we also see another driving fore towards
legal centralization, even if the aversion to inequality before the law is constant. Indeed, consider the threshold \( \frac{n}{(n-2)} < \alpha \) in Proposition 1, we can check that \( \frac{n}{(n-2)} \) is decreasing with respect to \( n \). Thus a reason why legal centralization could have been preferred to legal decentralization, especially at the end of the Ancient Regime, is the increase in the number of regions (assuming for instance that \( \alpha \) is no lower than 1). Actually, under the Ancient Regime, the French monarchy never ceases to make war and the number of regions naturally increased with the number of conquests.

5 Legal Centralization in the Second Period of the Revolution (1792-1793) : Was a Girondin equilibrium possible?

The first step of the French revolution occurred during the period 1789-1791, with the creation of the National Assembly, built around the Third Order (Tiers-Etat), the end of the Privileges, and the beginning of the process of legal centralization and uniformization of laws around the territory. Within this movement, Paris became the central place of political decision and the source of legal order in France. During the Ancient Regime, local identities were very strong and several provinces were seeing themselves as specific nations in the whole nation (see Ozouf (1984)). The whole reorganization of local administration was built to disrupt these local identities and specificities, inherited from history. Provinces disappeared as administrative entities and local parliaments too. The administrative system was built around three levels: department, district, municipality. The final number of department was fixed to 83, with an explicit aim in their creation to remove all historical and geographical references. The initial proposition was to build departments with a geometrical approach, each department being a square with a side of 70 km. While the final adoption was different, it shows the will to break references to past local entities and specificities ("esprit de province") and to replace them with national unity (Biard (2010)). These administrative levels were deprived from any judicial power and should only execute the decisions took by the legislative power in Paris, which became the only source of law. The previous role of Parliaments in the making of laws was fully eliminated in the new system.

France was still a monarchy until 1792. With the fall of the King during period 1791-1792, a new constitution had to be decided. The political faction in power in 1793 (the "Montagnards", coming in part from the faction of "Jacobins") was willing and able to impose a stricter control of the local application of national laws. In order to reinforce the control of this application, commissars were sent by Paris in the departments and in the
municipalities to control them. Centralization was then reinforced in this second step, both by ideology and by necessity.

The path toward full centralization of the legal and political system was not supported by the whole population and the Montagnard project was not the only one proposed by the revolutionary representatives. The main alternative during the 1792-1793 period was supported by the political faction called “Gironde”. The project proposed by the Girondins was keeping the idea of equality between men but under a more decentralized system in which the power of departments would be reinforced (Amson (2010)). Girondins were strongly opposed to the growing and now exclusive influence of Paris in the making of political and legal decisions. In 1792, the Girondin deputy Lasource argued that ”The influence of Paris should be reduced to a 1/83th, as any other department” (Biard and Dupuy (2014)).

While they were not presenting themselves explicitly as federalists14, their they were accused by the Montagnards such as Camille Desmoulins to want the fragmentation of France into a ”juxtaposition of small republics” (Chevallier (2001)). In order to prevent any federal partition of the country, the Montagnard leader Danton imposed the 25th of September, 1792 a formal declaration from the Assembly that the French republic was one and indivisible. The whole faction was eliminated during a few weeks, notably June 2, 1793, when 29 deputies from the Gironde were arrested and others on the run. This modifies the national representation and the nature of the constitution, since the Girondin’s project was abandoned. A constitution written in 7 days by the Montagnards was then voted the June 24, 1793. Any federalism or decentralized exercise of power were totally ruled out and the concentration of legal and political power in France will be more important than in any other period (Chevallier (2001)).

14 The degree of federalism of the Girondins is subject to some controversies and the idea that Montagnards were in favor of centralization while Girondins were favorable to decentralization is disputed by some historians (see Biard (2010) or Ozouf (1984) for example). Girondins were indeed not requiring a federalist organization and the term ”federalists” was more used by their political adversaries in order to discredit them. An explicit position toward federalism was however impossible and Gironde’s leaders were obligated to be very careful in their public positions since, as stated by Ozouf (1984), in France, the epithet ”federalist” sent men to the guillotine. Indeed, by the end of 1793, many of the Gironde’s leaders were on the run, arrested or executed in consequence of their political positions and opposition to the Montagne faction. In protest to the arrest of deputies from the Gironde, a ”federalist insurrection” began in 60 departments. We do not enter into the details of this historical debate and we only try to analyze under which conditions a more decentralized judicial system was possible.
5.1 The Girondin model

In this section, we extend the possible choices of the best level for law-making considered in the previous subsection. Instead of deciding the law at the region level, or the nation level, law-making can be made at the departmental level. The program proposed by the Girondins was closed in spirit to this idea. Was this third alternative better than either (maximum) legal decentralization and legal centralization? To address this issue, we now study what we call a Girondin equilibrium and we compare this equilibrium to the Ancient Regime and the Tocqueville equilibria.

Let us assume that France is divided into \( P \) different provinces. The set of provinces is denoted \( \mathcal{P} \). A province \( P \) is comprised of \( n_P \) regions. Each province \( P \) chooses its law \( x^c_P \) (that is, the law \( x^c_P \) will prevail in all the regions \( i \) contained in \( P \)).

Given these assumptions, the preferences of agent \( i \) given in (6) can be written as follows:

\[
U_i = -\frac{1}{2}(x^c_P - x_i)^2 - \frac{\alpha}{2n} \sum_{P \in \mathcal{P}} n_P (x^c_P - \bar{x}^c)^2,
\]  

where \( \bar{x}^c \) is the average value of the law accross the different provinces. That is:

\[
\bar{x}^c = \frac{1}{n} \sum_{i=1}^{n} x^d_i = \sum_{P \in \mathcal{P}} \sum_{i \in P} \frac{x^c_P}{n} = \sum_{P \in \mathcal{P}} \frac{n_P}{n} x^c_P.
\]  

5.2 The Girondin Equilibrium

We assume that the law-makers of Province \( P \) maximize the sum of representative agents objective (21) of the regions which belong to it, but considering as given the decisions in the other provinces. This is contrast with the Tocqueville equilibrium where the objective is the sum of all the regions objectives. A Girondin equilibrium is a Nash equilibrium for this game. To study this equilibrium we first study the province decision.

Taking the other provinces \( P' \) decisions \( x^c_{P'} \) and the average decision \( \bar{x}^c \) as given, Province \( P \) solves the following problem:

\[
\max_{x^c_P} \sum_{i \in P} U_i = \max_{x^c_P} \sum_{i \in P} \left\{ -\frac{1}{2}(x^c_P - x_i)^2 - \frac{\alpha}{2n} \sum_{P' \in \mathcal{P}} n_{P'} (x^c_{P'} - \bar{x}^c)^2 \right\}. 
\]  

24
The optimal decision of province $P$ satisfies the following necessary condition:

$$
\sum_{i \in P} (x^c_{P} - x_i) + \frac{\alpha}{n} n^2_P (x^c_{P} - \overline{x}) = 0.
$$

(23)

Solving for $x^c_{P}$ we get:

$$
x^c_{P} = \frac{\overline{x}_P + \alpha \frac{n_P}{n} \overline{x}^c}{1 + \alpha \frac{n_P}{n}},
$$

(24)

where $\overline{x}_P$ is the average value of the regions ideal legal laws:

$$
\overline{x}_P = \sum_{i \in P} \frac{x_i}{n_P}.
$$

(25)

Equation (24) gives the optimal law of each province given the average value of these decisions. In equilibrium, this given average value must be equal to the actual average value. We now determine the equilibrium.

Summing equations (24) across provinces and solving for $\overline{x}^c$, we find that:

$$
\overline{x}^c = \frac{\sum_{P \in P} \frac{n_P}{n} \overline{x}_P}{1 - \alpha \sum_{P \in P} \left( \frac{n_P}{n} \right)^2}.
$$

(26)

Substituting (26) into (24), we get the equilibrium values of the different provinces’ decisions:

$$
x^c_{P} = \frac{\overline{x}_P + \alpha \left\{ \frac{\sum_{P \in P} \frac{n_P}{n} \overline{x}_P}{1 + \alpha \frac{n_P}{n}} \right\} \left( \frac{\sum_{P \in P} \left( \frac{n_P}{n} \right)^2}{1 - \alpha \sum_{P \in P} \left( \frac{n_P}{n} \right)^2} \right)}{1 + \alpha \frac{n_P}{n}}.
$$

(27)

5.3 **Comparison of the Girondin and the Tocqueville equilibria**

We now compare the Girondin and the Tocqueville equilibria. This comparison does not yield clear cut results in general. We do have, however, a result when the aversion to inequality before the law $\alpha$ goes to $+\infty$. This result, which is proven in an appendix, is given by the following Proposition:
Proposition 2. When aversion to inequality before the law is high (i.e., when $\alpha \to +\infty$), the Tocqueville equilibrium (legal centralization) is always preferred to the Girondin equilibrium.

When the aversion to inequality before the law $\alpha$ goes to $\infty$, the provinces tend to choose the same law, so that $\lim_{\alpha \to \infty} x^c_P = \lim_{\alpha \to \infty} x^c$. This last limit is written as follows:

$$\lim_{\alpha \to +\infty} x^c = \sum_{P \in P} \frac{x^c_P}{P}.$$  \hfill (28)

In the limit, legal uniformity is then achieved in any Girondin equilibrium, but this equilibrium is different from the Tocqueville equilibrium. The Ancient Regime equilibrium is a degenerate equilibrium in which each province coincide with one and only one region. In this case, we have $\lim_{\alpha \to +\infty} x^c = 0$, and the limit equilibrium is the same as the Tocqueville equilibrium.

The intuition on the above result is as follows. When a province comprises several regions it pays less attention to the difference with the average laws than when the province coincide with a region.

The conclusion of the above analysis is that when the aversion to inequality before the law is high, it is better to centralize the law. A Girondin equilibrium can not be a better choice (nor is the choice of the status quo, that is, sticking to the Ancient Regime equilibrium).

6 Legal Centralization and Judges’ discretion

6.1 Centralization and the Control of Judges: Understanding the Napoleonic Ending of the Legal Transformations

An important thesis in legal studies is the complementarity between a civil law system and codification of the law: “In the civil law, large areas of private law are codified. Codification is not typical of the common law” (Von Mehren, 1957). For Glaeser and Shleifer (2002), the aim of codification is not to make adjudication more transparent but to control judges, transforming them in automata enforcing the will of the central authority. The higher the desire of the central authority to impose its will, the more precise has to be the code. While the Civil code appeared in France in 1804, the will to control the judge was present from the beginning of the Revolution. Judges decisions were tightly controlled and adjudication was
almost forbidden. Whenever an interpretation of a law or a new law were needed, judges had to consult the National Assembly, which had the monopoly of law interpretation. As was soon realized, however, the dream of a judge always adhering to the statutes could not be achieved (Carbasse, 2014, page 243). As a result, at the end of the Revolution and under the napoleonic empire, the intensity of the judges’ control decreased. Adjudication and interpretation were tolerated again. To account for these patterns we now enrich the model used in the previous section by introducing the possibility of legal deviations to central rules offered to judges.

6.2 Equilibrium of the model with judges

Specifically, we assume that in each region $i$, there is a judge who maximizes the following objective:

$$\mathcal{U}_i^j = -\frac{1}{2}(x^c + z_i - x_i)^2 - \frac{\theta}{2}z_i^2 - \frac{\alpha}{2n} \sum_{j=1}^{n} (z_j - \bar{z})^2.$$  \hspace{1cm} (29)

In this objective, the actual value of the law in region $i$ is supposed to be $x^c + z_i$. The first term $x^c$ of this sum is the law decided in a centralized way (i.e., the statutes). The second term $z_i$ represents the change in $x^c$ that is made by the judge to make the law better suited to the region’s needs.

Given the assumption that the actual law in region $i$ is $x^c + z_i$, the variance of the law is equal to the variance of the judges’ decisions:

$$\frac{1}{n} \sum_{j=1}^{n} (x^c + z_i - (x^c + \bar{z}))^2 = \frac{1}{n} \sum_{j=1}^{n} (z_j - \bar{z})^2,$$  \hspace{1cm} (30)

where $\bar{z}$ is the average of the judges’ decisions.

We observe that the judges’ objectives are equal to that of the representative agent in their region, up to the term $(\theta/2)(z^i)^2$. This terms captures the cost borne by the judges to adapt the law to local conditions. On the one hand, judges are benevolent. But departing from the law $x^c$ is also costly (e.g., because their decisions can be cancelled by an appeal court).\(^{15}\)

\(^{15}\) See, e.g., Harnay and Marciano (2003).
6.3 An equilibrium with legal centralization and judges’ discretion

We will now determine an equilibrium in which: a) the law \( x^c \) is first chosen; and then b) the judges adapt it to local conditions. In this second second step, the judges do not cooperate: given \( x^c \), their decisions constitute a Nash equilibrium. In the second step, the law-maker acts as a Stackelberg leader: it takes into account the fact that the decisions made by the judges in a Nash equilibrium depends on \( x^c \). Thus, by assumption, the lawmaker in the National Assembly is aware that its decisions will be adapted by the judges to fit the local conditions, and exploits their best responses.

To determine the equilibrium we will first study the Nash equilibrium when judges take the value of the law \( x^c \) as given.

6.3.1 The Nash equilibrium

In any Nash equilibrium the judge decisions \( z_i \) in region \( i \) must satisfy the following first-order condition:

\[
-(x^c + z_i - x_i) - \theta z_i - \frac{\alpha}{n} (z_i - \bar{z}) = 0, \tag{31}
\]

from which we find that:

\[
z_i = \frac{(x_i - x^c) + \frac{\alpha \bar{x}}{n}}{1 + \theta + \frac{\alpha}{n}}. \tag{32}
\]

To compute the equilibrium value of the mean, we sum the above equations across regions and we find that:

\[
\bar{z} = \frac{\bar{x} - x^c}{1 + \theta}. \tag{33}
\]

After a little algebra, we find that the utility of agent’s \( i \) is:

\[
U_i = -\frac{1}{2} \frac{1}{(1 + \theta + \frac{\alpha}{n})^2} \left( \left( \theta + \frac{\alpha}{n} \right) (x^c - x_i) - \frac{\alpha x^c - \bar{x}}{1 + \theta} \right)^2 + \alpha \sigma_x^2, \tag{34}
\]

and the variance of the judges’s decisions is:

\[
\sigma_z^2 = \frac{1}{(1 + \theta + \frac{\alpha}{n})^2} \sigma_x^2. \tag{35}
\]
6.3.2 The equilibrium value of the law \( x^c \)

We now determine the value of the law \( x^c \) by maximizing the sum of the \( U_i \) with respect to \( x^c \):

\[
\max_{x^c} \sum_{i=1}^{n} U_i = \max_{x^c} \sum_{i=1}^{n} -\frac{1}{2} \left( \frac{\alpha}{n} \right)^2 \left( \frac{x^c - x_i}{1 + \theta} \right)^2 - \frac{n\alpha}{2} \frac{1}{\left( 1 + \theta + \frac{\alpha}{n} \right)^2} \sigma_x^2.
\]

(36)

The first-order condition is:

\[
- \sum_{i=1}^{n} \left( (\theta + \frac{\alpha}{n})(x^c - x_i) - \frac{\alpha x^c - \bar{x}}{n(1 + \theta)} \right) (\theta + \frac{\alpha}{n} - \frac{\alpha}{n(1 + \theta)}) = 0,
\]

(37)

\[
\iff (\theta + \frac{\alpha}{n})(x^c - \bar{x}) - \frac{\alpha(x^c - \bar{x})}{n(1 + \theta)} = 0.
\]

(38)

We deduce from the last equation that:

\[
x^c = \bar{x}.
\]

(39)

and the equilibrium value of the judges’ decisions are given by the following equations:

\[
 z_i = \frac{x_i - \bar{x}}{1 + \theta + \frac{\alpha}{n}}.
\]

(40)

The equilibrium value of an agent’s \( i \) objective is:

\[
 U_i = -\frac{1}{2} \frac{(\theta + \frac{\alpha}{n})^2}{\left( 1 + \theta + \frac{\alpha}{n} \right)^2} (\bar{x} - x_i)^2 - \frac{n\alpha}{2} \frac{1}{\left( 1 + \theta + \frac{\alpha}{n} \right)^2} \sigma_x^2.
\]

(41)

If we sum the equations (41) across regions, we find that the value of the social objective is:

\[
\sum_{i=1}^{n} U^c_i = -\frac{1}{2} \sigma_x^2 \left( \theta + \frac{\alpha}{n} \right)^2 + \alpha.
\]

(42)

6.4 The optimal value of judges’ discretion

We now want to study the optimal value of judges’ discretion. In the Ancient Regime version of our model, judge’s discretion is maximal. This corresponds to the case where
$\theta = 0$. On the other hand, in the version of Tocqueville model, judge’s discretion is nil (we are in the case where $\theta = +\infty$). Therefore, the higher $\theta$, the lower the value of judges’ discretion.

How to best control judges’ decision can be studied in our model by studying the values of $\theta$ which maximize the social objective (42). These values minimize the following function of $\theta$:

$$\Gamma(\theta) = \frac{(\theta + \frac{\alpha}{n})^2 + \alpha}{(1 + \theta + \frac{\alpha}{n})^2}. \quad (43)$$

We can check that:

$$\Gamma'(\theta) = \frac{2(\theta - \alpha(1 - \frac{1}{n}))}{(1 + \theta + \frac{\alpha}{n})^3}. \quad (44)$$

Inspecting the above equation, we obtain the next Proposition:

**Proposition 3.** There exists a unique optimal value of the judges’ discretion. This level is given by:

$$\theta = \alpha(1 - \frac{1}{n}). \quad (45)$$

Moreover, the higher the degree of inequality aversion $\alpha$, the lower the optimal value of judges’ discretion (i.e., the higher $\theta$).

The optimal value of judges’ discretion results from a trade-off. To understand this trade-off, let us consider the equilibrium value of region’s $i$ representative agent:

$$U_i = -\frac{1}{2} \frac{(\theta + \frac{\alpha}{n})^2}{(1 + \theta + \frac{\alpha}{n})^2}((x - x_i)^2 - \frac{\alpha}{2} \frac{1}{(1 + \theta + \frac{\alpha}{n})^2} \sigma_x^2$$

The first term of the above expression corresponds to the loss incurred by agent’s $i$ due to the divergence of the equilibrium value of the local law from his legal preferences. As we have seen, when $\theta = 0$, judges’ discretion is maximal and the local judge can satisfy the local legal preferences by choosing $x^c + x_i = x_i$. On the other hand, when $\theta$ goes to infinity, the actual equilibrium value of the law goes to $\pi$ and corresponds with the value of the law $x^c$ chosen by the National Assembly. We see that the first part of agent’s $i$ loss increases with $\theta$. The lower the judges’ discretion, the higher the region’s loss.
The second part of the above expression correspond to the loss due to legal heterogeneity. This part is always decreasing with $\theta$. Indeed, the higher $\theta$, the lower the judges' discretion, and the lower legal heterogeneity.

Therefore, when $\theta$ increases from 0, the gain resulting from the decrease in legal heterogeneity more than compensate the increase in the divergence of the law from legal preferences. This happens until $\theta$ reaches its optimal level $\alpha(1 - \frac{1}{n})$. When $\theta$ increases from this level, the gain from the decrease in legal heterogeneity is lower than the increase in the additional loss resulting from the increase in the divergence of the actual law from legal preferences.

Proposition 3 shows that it is never optimal to eliminate judges' discretion ($\theta = \infty$), nor is it optimal to allow for complete legal discretion ($\theta = 0$). A legal system with some degree of judges' discretion is better than a system with complete centralization.

It remains to analyse how the optimal degree of discretion changes with the aversion to inequality before the law ($\alpha$). This is because the higher $\alpha$ the higher the weight given to the loss due to legal heterogeneity the higher the control on judges. The Code becomes more precise with inequality aversion.

We rely on Proposition 3 to interpret choices made at the beginning and the end of the French Revolution. At the beginning of the Revolution, the National Assembly seeks to control judges’ decision. As we have mentioned, this went so far as forbid adjudication. But this proves unworkable. To put it another way, $\theta = +\infty$ was not the best decision. After the Revolution, and with the different Codes (the Code civil and the Code Pnal), judges discretion was tolerated, which corresponds to the choice of a finite $\theta$.

### 7 Conclusion

We have proposed a model of the historical process of legal centralization, locating the date of change at the beginning of the French revolution. This precise date is important because in our view, motivations for this change were clearly built on egalitarian principles. This contrasts with the view that assumes that the revolution and the empire were just the continuation of an older process, considering that even in the Ancient Regime days, centralization was present, the feudal order being diminished and the nobility deprived from political and judicial power. In this view, absolutist desires are motivating the process of unification and centralization. The aim is not to have citizens equal before the law but rather to impose the will of the king over the entire kingdom.
Along with the conclusions of Glaeser and Shleifer (2002), we find that a centralized legal system is accompanied by some control of the judges ($\theta = 0$ is not optimal), but not a complete one. Judges should not behave as automata ($\theta = \infty$ is not optimal). The Code has to be intentionally not too precise, giving some freedom of interpretation and the possibility of local adjustment by judges. The wish to control judges was lesser under the Napoleonic era than under the revolutionary one (Carbasse, 2014). Again, at the difference of Glaeser and Shleifer (2002), the motivation to control the judges in our model is not to guided by the wish to impose the will of the sovereign, but rather to limit the legal inequalities that would be the result of decentralized judicial decisions and discretionary power granted to judges. When citizens value legal equality, centralization and codification can be optimal for the society as a whole, and not only for the political power in place.

An important implication of our analysis is that wealth measures such as GDP per capita are not the only argument of the welfare function of countries when one analyses the compared virtues of alternative legal organizations at a national level. Legal deciders could want to reach other objectives, maybe at the expenses of the former if they lack judicial instruments. In countries favoring legal uniformity, centralized civil law systems could be preferred. Empirical measures focusing only on specific economic outcomes can lead to misleading conclusions about the costs and benefits of each system and could prescript make erroneous policy recommendations. Within the recent literature, there would be a bias toward common law, which could not be the optimal legal system, especially for countries highly valuing legal uniformity within their territory.

While such effects are not present in our model, it should be noted that the relationship between uniformity of practices and legal centralization is not always positive. Johnson and Koyama (2013) show for example that legal centralization can also lead to the acceptation of more diversity, taking the example of increased religious toleration which have followed centralization in France. A too narrow definition of the rule can indeed be too costly when religious practices are sufficiently heterogeneous.

References


Montaigne, Michel de (1595 (2009)). Essais. Pocket.


A Proof of Proposition 2

Proof of Proposition 2.

• Step 1

We first prove the following Lemma:

**Lemma 1.** We have: \( \lim_{\alpha \to +\infty} x^c = \sum_{P \in \mathcal{P}} \frac{n_P x_P^c}{\bar{x}}. \)

**Proof.** Let us defined \( u = 1/\alpha. \) We can then rewrite equation (26) as follows:

\[
x^c = \frac{u \left( \sum_{P \in \mathcal{P}} \frac{n_P x_P^c}{u + \frac{x}{n}} \right)}{1 - \sum_{P \in \mathcal{P}} \left( \frac{n_P}{u + \frac{n_P}{n}} \right)^2}.
\]

Using L’Hospital’s rule, we have:

\[
\lim_{u \to 0} x^c = \lim_{u \to 0} \frac{\sum_{P \in \mathcal{P}} \frac{n_P x_P^c}{u + \frac{x}{n}} - u \left( \sum_{P \in \mathcal{P}} \frac{n_P x_P^c}{u + \frac{n_P}{n}} \right)^2}{\sum_{P \in \mathcal{P}} \left( \frac{n_P}{u + \frac{n_P}{n}} \right)^2} = \sum_{P \in \mathcal{P}} \frac{x_P^c}{\bar{x}}
\]

\[\square\]

• Step 2

Recall that the equilibrium value of the social objective in the Tocqueville equilibrium given in equation (17) is:

\[
\sum_{i=1}^{n} \mathcal{U}_i = -\frac{1}{2} \sum_{i=1}^{n} (x_i - \bar{x})^2
\]

The value of the social objective associated to a girondin equilibrium (associated to a set of \( \mathcal{P} \) provinces) is:

\[
\sum_{i=1}^{n} \mathcal{U}_i = -\frac{1}{2} \sum_{P \in \mathcal{P}} \sum_{i \in P} (x_i - x_P^c)^2 - \frac{\alpha}{2} \sum_{P \in \mathcal{P}} n_P (x_P^c - \bar{x})^2
\]
where \( x^c_p \) and \( \bar{x}^c \) are given respectively by equations (24) and (26).

We now compare the values of the social objectives given in equations (49) and (50). To do this, we first study the difference:

\[
\Delta = \sum_{i=1}^{n} (x_i - \bar{x})^2 - \sum_{p \in P} \sum_{i \in P} (x_i - x^c_p)^2
\]

(51)

We have:

\[
\Delta = \sum_{p \in P} \sum_{i \in P} \left\{ (x_i - \bar{x})^2 - \left( x_i - \frac{\bar{x}P + \alpha \frac{n_P}{n} \bar{x}^c}{1 + \alpha \frac{n_P}{n}} \right)^2 \right\}
\]

(52)

\[
= \sum_{p \in P} \sum_{i \in P} \left\{ x_i^2 - 2x_i \bar{x} + \bar{x}^2 - \left[ x_i^2 - 2x_i \left( \frac{\bar{x}P + \alpha \frac{n_P}{n} \bar{x}^c}{1 + \alpha \frac{n_P}{n}} \right) + \frac{\bar{x}^2P + 2\alpha \bar{x}P \bar{x}^c \frac{n_P}{n} + \alpha^2 \frac{(n_P)^2}{n^2} (\bar{x}^c)^2}{(1 + \alpha \frac{n_P}{n})^2} \right] \right\}
\]

(53)

\[
= \sum_{p \in P} \left\{ -2n_P \bar{x}P + n_P \bar{x}^2 + 2n_P \bar{x}P \left( \frac{\bar{x}P + \alpha \frac{n_P}{n} \bar{x}^c}{1 + \alpha \frac{n_P}{n}} \right) - n_P \left( \frac{\bar{x}^2P + 2n_P \bar{x}P \bar{x}^c \frac{n_P}{n} + \alpha^2 \frac{(n_P)^2}{n^2} (\bar{x}^c)^2}{(1 + \alpha \frac{n_P}{n})^2} \right) \right\}
\]

(54)

\[
= -2n \bar{x}^2 + n \bar{x}^2 + 2 \left( \sum_{p \in P} \frac{n_P \bar{x}^2_p}{n + \alpha \frac{n_P}{n}} + \bar{x}^c \sum_{p \in P} n_P \bar{x}P \alpha \frac{n_P}{n} \right) \]

(55)

\[
- \sum_{p \in P} \frac{n_P \bar{x}^2_p}{(1 + \alpha \frac{n_P}{n})^2} - 2\bar{x}^c \sum_{p \in P} \frac{n_P \bar{x}P \alpha \frac{n_P}{n}}{(1 + \alpha \frac{n_P}{n})^2} - (\bar{x}^c)^2 \sum_{p \in P} \frac{n_P \alpha \frac{n_P}{n} \bar{x}^c}{(1 + \alpha \frac{n_P}{n})} \}
\]

(56)

\[
= -n \bar{x}^2 + \sum_{p \in P} \frac{n_P \bar{x}^2_p}{1 + \alpha \frac{n_P}{n}} (2 - \frac{1}{1 + \alpha \frac{n_P}{n}}) + 2\bar{x}^c \sum_{p \in P} \frac{\alpha \frac{n_P}{n} n_P \bar{x}P}{n} \left( \frac{1}{1 + \alpha \frac{n_P}{n}} - \frac{1}{(1 + \alpha \frac{n_P}{n})^2} \right)
\]

(57)

\[
- (\bar{x}^c)^2 \sum_{p \in P} \frac{n_P \alpha \frac{n_P}{n} \bar{x}^c}{(1 + \alpha \frac{n_P}{n})^2}
\]

(58)

\[
= -n \bar{x}^2 + \sum_{p \in P} \frac{n_P \bar{x}^2_p}{(1 + \alpha \frac{n_P}{n})^2} (1 + 2\alpha \frac{n_P}{n}) + 2\bar{x}^c \sum_{p \in P} \frac{\alpha \frac{n_P}{n} n_P \bar{x}P}{n} \left( \frac{1}{1 + \alpha \frac{n_P}{n}} - \frac{1}{(1 + \alpha \frac{n_P}{n})^2} \right)
\]

(59)

\[
- (\bar{x}^c)^2 \sum_{p \in P} \frac{n_P \alpha \frac{n_P}{n} \bar{x}^c}{(1 + \alpha \frac{n_P}{n})^2}
\]

(60)

\[
= -n \bar{x}^2 + \sum_{p \in P} \frac{n_P \bar{x}^2_p}{(1 + \alpha \frac{n_P}{n})^2} (1 + 2\alpha \frac{n_P}{n}) + 2\bar{x}^c \sum_{p \in P} \frac{n_P \bar{x}P}{n \alpha \frac{n_P}{n} \frac{n_P}{n}} \left( \frac{1}{1 + \alpha \frac{n_P}{n}} - \frac{1}{(1 + \alpha \frac{n_P}{n})^2} \right)
\]

(61)

\[
= (\bar{x}^c)^2 \sum_{p \in P} \frac{n_P \alpha \frac{n_P}{n} \bar{x}^c}{(1 + \alpha \frac{n_P}{n})^2}
\]

(62)
Moreover, we have:

\[
\alpha \sum_{P \in P} n_P (\bar{x}_P - \bar{x}_c)^2 = \alpha \sum_{P \in P} n_P \left( \frac{\bar{x}_P - \bar{x}_c}{1 + \alpha \frac{n_P}{n}} \right)^2 \\
= \alpha \sum_{P \in P} n_P \frac{\bar{x}_P^2 - 2 \bar{x}_P \bar{x}_c + (\bar{x}_c)^2}{(1 + \alpha \frac{n_P}{n})^2}
\]  

(63)

(64)

Using (62) and (64) we find that the differences of the objective values (up to a scalar 1/2) is as follows:

\[
\lim_{\alpha \to +\infty} \left\{ \Delta(\alpha) - \alpha \sum_{P \in P} n_P (\bar{x}_P - \bar{x}_c)^2 \right\} = -n \bar{x}^2 + 2n \bar{x} \sum_{P \in P} \frac{\bar{x}_P}{\bar{P}} - n \left( \sum_{P \in P} \frac{\bar{x}_P}{\bar{P}} \right)^2 \\
= -n (\bar{x} - \sum_{P \in P} \frac{\bar{x}_P}{\bar{P}})^2
\]

(65)

(66)

\[
< 0.
\]

(67)