4 Financial logic and bankers' institutional entrepreneurship

The politics of the "zombies" debate in bankruptcy proceedings at the Commercial Court of Paris (2000–2005)

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Businesses of all kinds usually try as much as they can to participate in the regulation of their own markets. Social control of economic exchanges and regulation of entrepreneurial activities have therefore created a political struggle between states, business, and consumers. This struggle intensifies in an organizational and market society where the state privatizes even its regalian functions. For business, one way of participating in this joint regulatory activity is to take advantage of this privatization and quietly exercise control in public institutions, for example institutions that solve conflicts among economic actors and discipline entrepreneurs. The financial industry is a powerful, but often discreet set of actors in this exercise of control. The question addressed in this chapter relates to how this notoriously "dual" (economic and political) industry, especially bankers, participates in this joint regulatory activity. This chapter argues that it does so by investing heavily in institutional entrepreneurship and looks at some of the consequences of this strategy.

This blurring of the boundaries between government and economic sectors does not mean that privatization of a state function is a form of "deinstitutionalization"; it is rather a form of imposition of private professional logics in public official decision making, combined with the accumulation of organizational clout. To show this, French "consular" institutions, in particular commercial courts, provide an interesting case in point. These institutions are a specific example of blurred boundaries between politics and finance, between public and private. In one court in particular, the Tribunal de Commerce de Paris (TCP, i.e., Commercial Court of Paris) on which this chapter focuses, the financial sector has achieved physical and epistemic domination that verges on institutional capture. Here finance is more than merely an economic sector. Banks in particular are shown to be shadow regulators and discreet policymakers. They perform these roles of discreet regulator and policy maker by importing into government and the political sphere—with the approval of the state—their own appropriateness judgments and epistemic toolkit. The latter are the core of the collective pragmatism (Lazega, 2011) of the bankers when they make judicial decisions.

In the social sciences, exogenous regulation of markets (by the state) and self-regulation (by business) are usually examined separately. This leads to strong simplifications in the comprehension of the social organization of markets, and thus of the organizational and market society. The notion of joint regulation—borrowed from Jean-Daniel Reynaud (1989) and extended to the context of the relationships between the state and business (Lazega and Mounier, 2002, 2003a, 2003b, 2003c)—and the study of its institutional forms help prevent this simplification. The consular institutions on which this chapter focuses are part of a complex system of cooperation between the French state, local meso-level institutions, and civil society individuals (Chatriot and Lemercier, 2002; Lemercier, 2003), thus precisely a system of joint regulation. They represent a specific way of sharing the costs of regulation and social control of industrial activity and markets (Falconi et al., 2005), in particular by mobilizing, on a voluntary basis, the knowledge and experience of the economy accumulated by business and labor (Lazega, 2003, 2011).

In particular, the analysis of work and professions in the financial sector has to deal, at some point, with joint regulation in the judicial work on bankruptcies as a structural dimension of the organization of business. In all countries, this area of judicial work involves the centrality of banks as the main creditors in market economies. In France, to understand the logic of the joint regulation of bankruptcies, it is necessary to understand the organization of consular commercial courts. The first sections of this chapter briefly describe this organization and the notion of collective pragmatism that characterizes joint regulation by its consular lay judges. A theoretical framework is provided, based on an approach to judicial decisions that does not separate the organization of markets from the judicial organization that makes such decisions about the financial balance of firms. The focus on bankruptcies as they are managed by the TCP shows how the financial sector, by achieving multidimensional domination of that court, participates in the above-mentioned blurring of the boundaries between politics and finance. The data used to substantiate this argument is based on a sociological study of this court (see Box 4.1).

Section I presents consular justice in France as an institution involved in the joint regulation of markets. Section II identifies a variety of pragmatic and political logics related to bankruptcy work carried out by consular judges. Section III shows how their decisions focus on eliminating "zombies," i.e., companies that should be dissolved based on the principles of market economics, but that are "artificially" kept alive by various kinds of support. In the case of the TCP, this joint regulation raises tense questions related to conflicts of interests in which bankruptcy judges are entangled, especially when they come from the financial sector. The "dirty work" of bankruptcies, as presented by various categories of consular judges at this court, is a good illustration. Section IV uses as an analyser a document, written by a former president of the TCP, jointly with a former minister of finance, that describes the discreet political strategy that they jointly designed and used during the financial crisis of 1992–1997 when the French banks themselves were the zombies. This conclusion shows that this document

provides a rare and published moment of truth that, when the bankrupt companies are the banks themselves, the articulation of the financial and political logics emerge more clearly in the analysis of consular work carried out by the professions of finance. The conclusion shows that, although fieldwork for this study dates back to 2000–2005, it is relevant to bring back its results in the context of 2016–2017.

Box 4.1: Sources

Compared to the majority of other commercial courts, the Commercial Court of Paris (TCP) is particular in that it is much larger: it holds a higher number of specialized chambers and hears more cases than any other. The TCP alone deals with 10–20 percent of the commercial disputes that arise in France (arbitration not included). It differs furthermore in the diversity of sectors represented by its judges as well as by having a larger customer base. The judges' level of education is often very high (X, ENA, HEC, Sciences-Po*, doctorate in law). However only half have had any judicial training. The majority of them are no longer businessmen or entrepreneurs in the traditional sense of the term, but rather executives or former senior managers of large companies.

The empirical research consisted of three waves of in-depth interviews, conducted face to face with all of the consular judges of the court. The first wave was conducted in Autumn 2000, based on the list of the 157 judges of that year, to which 10 persons were added—the "wise men" of the court (former judges who make themselves available to advise more novice judges, and knowledgeable leaders of the association of consular judges). For the second wave, carried out in 2002, a list of 197 judges was compiled. This new list combined the judges from the first wave (either still working at the court or having left it) with newcomer judges who had been elected in the interim period. The third wave of interviews took place in Autumn 2005, with a list of 234 judges including those in activity in 2005 (166 judges) and those who participated in the previous interviews and/or had been elected since 2002. The research reports on these waves of fieldwork papers and chapters are available at the Law & Justice Research Mission of the French Ministry of Justice and other scholarly publications.

Here this study ends with the presentation and analysis of a text commenting on the financial crisis of 2008. This text was co-published by a former president of the court and by the minister of finance who were in office at the same period of time. In the text they summarize the strategy, which is still in use, that they adopted in order to manage the financial crisis of 1992–1997.

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I Consular (public/private) justice in France

In France, it is in part the role of the commercial court to resolve conflicts between economic actors and to exercise discipline on the entry, activity, and exit of markets, in particular managing commercial disputes and bankruptcies. These jurisdictions, peculiar to the world of commerce, have existed for four and a half centuries and are particularly relevant for the study of this dual regulation. It was one of the only institutions that weathered the French Revolution of 1789 almost unchanged, while having been fundamentally called into question on a regular basis from its very inception. It is a shining example of an intermediary institution whose existence is difficult to justify in theory (from a classical legal and political viewpoint) and yet which has always been well established in practice, both in response to a claim from the parties concerned and from the state.

For a very long time the state has shared its judicial power in this court with the local business community, which is represented by the consular judges who work it. These judges, who willingly see themselves as representatives of "economic civil society," are voluntary, i.e., not paid for their work. The consular judges can, however, be both a court judge and get paid by the company that employs them outside of the court. Consular judges are judicial. They have the same powers and prerogatives as career judges, i.e., judges in ordinary courts, and are also subject to the same rules of abstention and recusal, as laid out in the French New Code of Civil Procedure (Articles 339 to 341). They are elected for a mandate of either 2 or 4 years (for a total maximum duration of 14 years) by an electoral body consisting of judges already in service and employers' association representatives at the chamber of commerce in their community. They can be candidates for this election after having first been sponsored by an employer's union and pre-selected by a committee from the very same chamber of commerce, as is the case in Paris. In theory, these two "sister" consular economic institutions (the chamber of commerce and the commercial court) are mutually supportive in this tight social control of markets and they maintain close ties with one another, as they have been doing for many centuries (see for example Hilaire (1999); Hirsch (1985); Lemercier (2003, 2007); Kessler (2007)). Through this institutional solution, control costs of the market economy are shared by the state, the industries or the companies, and the individual judges. In theory, however, every judge acts as an individual judge, without the specific mandate of a sector of the economy.

In the implementation of this social control, the specific value of the judges' commercial experience and their knowledge of the economic world is attached with a certain amount of pragmatism in their decision making. This pragmatism is often collective (Lazega, 2003, 2011) and reflects the fact that this institution is supported by an entire inter-institutional system. It thus represents a real consular "regime" that politicians may well have a vested interest in preserving. The Code of Commerce itself was indeed written by the president of the TCP in 1807. Another more recent example of this was the significant contribution made by the first female president of the TCP to the promotion and formulation of a new bankruptcy law in 2006.

Therefore, from the point of view of some sectors of the economy, consular judges are regarded as more than mere judges. In effect, they can be regarded as

"institutional entrepreneurs" (DiMaggio, 1988). This term is here understood in the sense of actors who, in order to defend their regulatory interests, act–and have sufficient resources—to maintain, modify or create institutional solutions and structures, whether by instrumental and strategic calculation or by ideological or moral convictions, which are themselves more or less institutionalized (Lawrence, 1999; Lawrence and Phillips, 2004). Consular judges uphold militant beliefs regarding the functioning of the economy and act both in their own name and on behalf of companies and the employers' organizations who sponsored them at the time of their election. They promote "sensitivities" and specific functional rules in the business world. These are also "judicial entrepreneurs" in the sense of McIntosh and Cates (1997)—in particular those who come from over-represented sectors (notably banks and the construction industry). This observation invites political sociology to rethink public policy based upon a review of this consular, hybrid, and joint regulation regime.

A pragmatic institution of joint regulation of markets

In France these private disputes are dealt with by a variety of different commercial courts, which are located in different cities, each with a defined geographical remit. Article L.411-1 of the French Code of Judicial Organization defines commercial courts as specialized first instance jurisdictions whose specific competence is to settle commercial disputes between natural and corporate trading "persons," i.e., between companies but also, for example, between a company and an individual consumer who is engaged in a commercial act. Furthermore, the Commercial Courts are now competent in insolvency matters (judicial recovery or liquidation) and, more recently, in the prevention of bankruptcy.

Such a joint regulatory system is justified by the actors in several ways: as a less costly and speedier form of justice than a system that calls upon career judges; as having experienced judges who are trained to understand the problems faced by companies and the behavior of company executives, particularly in matters of insolvency and bankruptcy; as having an understanding of the idiosyncrasies of the different sectors of the economy, designated as "customs"; as having the ability to rapidly unlock the systems and adapt laws and regulations in the ever-changing world of business : customs are sources of law (*Les usages sont sources de droit*, an expression often used by consular judges). It is upon these justifications, among others, that the claims to joint regulation are based.

In fact, elected consular judges perform what is usually considered to be a regalian function of the state. This somewhat anomalous case of joint regulation is an extreme form of "co-regulation" (Grabowsky and Braithwaite, 1986: 83), which is understood to be a form of self-regulation by the industrial organizations that the state has approved and to which it lends a part of its sanctioning powers. This institution, however, suffers nevertheless from a certain lack of legitimacy. The parties involved have only a limited amount of confidence in the impartiality of a court's decisions, especially in the commercial courts in smaller towns. They fear that the judges of these smaller courts have the ability to exercise judicial control over their own competitors and this lack of legitimacy repeatedly comes to light as an issue in recurrent attempts to reform these commercial jurisdictions.

Collective pragmatism, customs, and judgments

From the perspective of the notions of dispute, sides, respect of the adversarial principle, and the obligation to judge in law, consular justice does not theoretically diverge from the law. Nevertheless, some elements of "practical" commercial procedure observed ethnographically, and that experienced business lawyers teach at the Ecole de Formation du Barreau de Paris (i.e., Paris Bar Association School), make it possible to determine the context in which pragmatic reasoning begins to take on its meaning. Much of the reasoning of consular judges is based on precedents; however, the jurisprudence remains opaque (as in all first instance jurisdictions in France). Very often, commercial disputes are not foremost a question of justice, but rather a question of renegotiation of contracts based on the decision of the court. It is often frowned upon by consular judges if lawyers are summoned without prior attempts at finding an amicable solution. They feel a sense of closeness to the litigants: they value that the parties appear in person (especially for the pleadings); they like to ask them questions using non-legal language. Hence, the lawyers fear any uncontrolled reactions from their clients during these interactions. The judges also seek alternatives: subsidiary demands that help the parties to reach a compromise, stressing where both parties are in the right, explaining to the unsuccessful party why they lost.

In this context, pragmatism is, in practice, affirmed by the judge as the evaluation of the consequences of their decisions on the functioning of the economy: prime importance is attached to the consequences of the rule of law, precedents, decisions, and institutions on the realm of facts. A decision is considered pragmatic in that it combines the judge's knowledge of the economy and of management with his or her knowledge of law and jurisprudence. In practice, this produces judgments that are based on a synthesis of law, management, and economics, but that also calls upon the customs of the business world, common sense, and the judges' sense of "fairness."

In the judges' minds, these pragmatic judgments are often based on "sensitivities" (*sensibilités*) and individual experiences. However, this pragmatism is not just an individual characteristic as it is also associated with more collective norms of the business world. There are many non-legal conventions and criteria that consular judges resort to in order to make their judgements, notably when these judges have strong discretionary powers. In the area of bankruptcy, strong political positions are used to make decisions in matters of liquidation and/or judicial recovery and, for the latter, whether it be a case of cession or continuation. This issue is as topical as ever due, for example, to ongoing restructurations in the banking sector in the western world.

II Politicizing the judiciary by promoting financial collective pragmatism

The financial sector is clearly overrepresented at the Commercial Court of Paris, in both absolute and relative terms. Between 2000 and 2005, 29 percent of the consular judges came from the financial sector (38 percent if insurance

companies are included in the financial sector), whereas these sectors represented 5.1 percent of the workforce in the Paris area (Ile-de-France). Each year this sector—which has at least one person paid full time to watch what goes on at these consular institutions and seek potential recruits—puts up dozens of candidates for the positions of consular judge in the commercial courts. Finance expends great quantities of resources in commercial litigation and bankruptcies. Consequently, it is willing to invest in the political and regulatory process and it is in its interest to try to structure the court in a way that will increase the influence of its own norms and practices rather than those of other sectors. Its priorities (e.g., upholding the value of assets, eschewing both excessive financial support or sudden cut-offs in lines of credit, high sensitivity to the repercussions of business failures on the economy at large) are thus likely to be promoted with insistence as ready-made solutions in this kind of commercial court, to be permanently taken into consideration there in connection with all kinds of legal disputes and bankruptcy cases. Promoting a financial logic in this institution takes organizational clout (Lazega, Mounier and Brandes, 2011; Lazega and Mounier, 2012). For example, there is a concentration of bankers in specialized (and closed to the public) bankruptcy chambers. With these strategies finance shows how it has been able to "capture" a pragmatic judicial institution, a target for bankers as judicial entrepreneurs. This pragmatism, individual and collective, characterizes joint regulation in general and shows the necessity to look at the financial logic, in particular that of bankers, in their bankruptcy decisions without dissociating the organization of markets from how the judicial organization operates with respect to the financial balance of companies.

Institutions of joint regulation thus appear to be the locus of a struggle to exert influence upon the construction of the shared frame of reference, which is required if their members are to be able to describe and interpret facts in a consistent way. In this "epistemic" and normative competition between sectors, banking and finance (often, but not always formally organized to do so) are in a position to promote their own readily identifiable occupational sensitivities and pragmatism, their 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 making decisions in which they have a great amount of discretion (Lazega and Mounier, 2009).[1]

For example, judges with a law degree 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. In such disputes they are more inclined than other judges to decide in favor 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 contractual disputes. 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 mechanisms.

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 stockholders. They are much more interventionist than the other judges in inter-organizational litigation between parties to a contract on a given market. Judges representing the building sector are also more punitive in awarding damages.

By systematically sending senior managers with legal education to the Commercial Court of Paris, the financial sectors have achieved physical and epistemic domination of that court: bankers with a law degree are consistently the most central, if not super-central players in the advice network in this court (Lazega et al., 2009). This domination is not necessarily well tolerated by non-bankers. Bankers' social integration into the court is weaker than that of judges coming from other sectors, precisely because the banking sector's strong presence or "position" (in Flemming's [1998] sense) is resented by others, and even sometimes proves 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 economy. As a response to this very critical reaction, one president of the court, himself a former banker, dismissively declared: "Shopkeepers hate bankers."

III Bankruptcy work as politically dirty work: the "don't feed the zombies" controversy

More generally, this resentment is related, in part, to the fact that when a company faces bankruptcy judges, it is usually the case that its bank has decided not to support it any longer. Banks evaluate business creditworthiness based on several factors, including legal structure, business age, business credit ratings, company revenues, personal credit scores of the entrepreneurs, and finally the social network of the entrepreneur; even the social relationship of the entrepreneur and the bank manager can be a decisive factor when seeking credit (Uzzi, 1999). In France, a cat and mouse game between the entrepreneur and the bank manager revolves around the fact that jurisprudence of the Cour de Cassation (the highest French court) allows entrepreneurs to sue their own banks either for "abusive support" ("*soutien abusif*") or for "abusive termination of credit" ("*rupture abusive de crédit*"), or both. Knowing that, entrepreneurs try to get banks heavily involved, to strongly implicate them in their business so as to be able to sue them and their deep pockets in case the business goes bankrupt. Bank managers walk a fine line between both demands. This creates a strong micro-economic incentive for banks to be present at the court and to send in representatives of their industry who will side with creditors when dealing in bankruptcy proceedings.

By eliciting the discourse of consular judges about bankruptcy, it is possible to flesh out a central controversy within and outside the courthouse, a controversy coined the "don't feed the zombies" debate. The zombie is a metaphor used by bankers and economists for a company that is a "living dead", i.e.,

neither alive nor dead, no longer making profits but not willing to give up and declare bankruptcy. It threatens both banks and the market economy by "distorting the competitive arena." To do this, a module in the interviews with the judges asked them about their personal opinion and criteria for how best to manage insolvency proceedings using liquidation vs. a recovery/administration plan, and when using the latter, selecting between selling the company ("cession") or continuing with the same owners and managers ("continuation"). Discourse analysis did not need much subtlety to tease out, beyond the technical dimensions of these decisions, their political—if not militant—dimension. In spite of the lack of room in this text, it is worth showing the color of this discourse with short quotations when summarizing its content and variations among the consular judges of the TCP.

When analyzing the arguments developed about recovery plans, the court can be considered to be divided into three categories: two opposing minority groups and one majority that "pragmatically" mixes the views of the minority groups. The views of the two "extreme" minority groups were for the most part divergent on the issues related to bankruptcy proceedings: preference for either a cession (takeover, for example) or a continuation, importance of purely legal criteria, cost of cession, safeguarding employees, reimbursement of liabilities, etc. These opposing views are founded on very different visions of the role of consular justice with respect to recovery plans and representations of the functioning of the business world, i.e., what they consider to be appropriate or not in general commercial practices. In the middle, the largest of the three groups is pulled between these two opposing orientations, adopting an apparently more neutral position, while here and there borrowing aspects that they agree with.

The first group of judges is thus characterized by their propensity to take into account the social impact of their decisions both at the level of the employees about to be fired and at the level of the directors of the companies in difficulty. They favor continuation plans on the grounds that they would provide more guarantees to save employment, which they consider to be the main objective of any recovery plan, including the continued employment of the same management. Throughout the discourse, the entrepreneur who runs his/her company is viewed as a highly-valued figure, a genuine source of wealth creation, the lifeblood of innovation, and the foundation of an economy centered on industrial creation. As such, he/she must be protected against attacks from financiers, whose aim is only to increase their profits regardless of the company's added value. In this conception, the task of consular justice is to preserve the company, notably by favoring continuations, which are perceived as a source of economic life. Here the judges strongly condemn those amongst their colleagues who place too much emphasis on a company's accounts—this must be linked to the fact that the members of this group are mainly themselves former company managers, notably coming from the construction, services, and industrial sectors.

The following are some typical examples of the discourse from this category of judges:

Judge A: A part of the court is in fact very considerate: it truly does try to save the company. That is abundantly clear. I've known this ever since I was in bankruptcy chambers, it truly is their goal. The priority is to save the company, along with the former manager.

Judge B: I personally favor continuations if they safeguard jobs; and cessions if the new buyer keeps the staff on; but that is just my political stance.

Judge C: The idea is that keeping a company alive is preferable to letting it die. Therefore, if in any doubt, recovery plans are always preferred, especially continuation plans.

Judge D: In cases of cessions, beware of sharks and vultures amongst the buyers. There are plenty of them around.

Given their opposing views, members of the second group maintain a clear preference for systematic liquidation and, in some cases, for cession plans on the grounds that they are economically more viable than continuation plans: they can generate cash that the company needs. Furthermore, they constitute a sort of "electric shock" for the company, as they are more conducive to radical reorganizing of the business. Moreover, in contrast to the first group, the judges in this group are not preoccupied with the preservation of the social dimension of the company. They hold that employees cannot be a fundamental aspect of the consular judgment, since it represents only a secondary aspect of the company—giving it more importance would only lead, irremediably, to the failure of the recovery plan, which will rapidly result in liquidation. Therefore preference must be in favor of a company's creditors, for two reasons: first, creditors are considered to be the source of a company's economic dynamism. Second, they are also companies in their own right and can be affected by their clients' difficulties—in the worst situations creditors themselves can go bankrupt if their clients do not pay them back what they are owed, which in turn also leads to redundancies. The role of the judge must be restricted to the preservation of the interests of creditors as their investments play a key role within the global economy (capital is reinjected into other companies), promoting a dynamic movement of financial flows. This viewpoint tends to characterize judges with a background in the banking and industrial sectors, who dominate this group both in terms of numbers and influence.

Amongst the typical remarks from this category of judges:

Judge G: It is utterly essential to avoid intensive care.

Judge H: The question "Is this not going to upset the social order?" is something that I really feel strongly about. For me, social order is competition. If I put this in extreme terms, a company that is no longer performing has to be liquidated. If companies in difficulty are killed off, there'll be no more companies in difficulty! I'm almost not joking here: in the jungle or in the savannah there are no sick animals because all sick animals die off. The problem of sick animals has therefore been eliminated, as they have all died!

Judge I: As a banker I can tell you that bankruptcy is just a phase in the life of a company. Companies are formed, they live and they die, just like humans. So therefore if you apply this to financial analysis, you are going to have a certain amount of companies that die out, it's the functioning of the economy. The point is that it doesn't get out of hand. You then of course have the problem of staff which is now a significant issue but it must be treated separately, in particular through career switches.

The third group comprises the majority of judges and is split between the divergent orientations of the two smaller groups. Its position is based upon a thorough examination of the particularities of each individual recovery plan. It advocates a solution that is meant to combine the interests of all of the parties involved (managers, workers, creditors)—a solution believed to be possible. From this point of view, the judge can theoretically favor neither continuation nor takeover—in the same way that he/she cannot take the side of either the employees or the creditors. Indeed, both the prospect of staff redundancies and the writing off of debt obligations are measures that must be considered as possibilities: they are a legitimate part of the (difficult) reality of the market economy and they can therefore not be exempt from consular intervention. Accordingly, allowing takeovers often constitutes a difficult consular decision, insofar as they bring about layoffs and exclusion of the entrepreneur/company creator, whom many judges are nevertheless willing to support. Coming from the business world, many of the judges in this group empathize with the managers in difficulty and have a tendency to favor them.

The following are examples of typical discourse from this category of judges:

Judge J: What really matters is the future of the company and the benefits to society. But in truth there are no key factors, it's on a case by case basis. So should the situation occur where safeguarding the staff is paramount or the *stability* of the provisional recovery plan, the only certainty is that whatever the prevailing element ends up being, it must guarantee the durability of the business.

Judge K: It's common sense, in order for a takeover plan to work out, two things are required: firstly, the company has to be truly viable and secondly, it cannot be done by recklessly damaging the interests of the creditors or the employees. There has to be something in it for everyone. A continuation plan, during the judicial process, allows the manager to have a bit of a "spring clean" within the business, if he needs to lay off some staff or if he needs to renegotiate his contracts with his suppliers etc.

Within this third group, a sub-group of judges nevertheless stresses the need to develop decision strategies to combat a broader economic trend, i.e., the increasing concentration of wealth and power of decision in the hands of large financial groups. A strong criticism of financiers' logic emerged from their discourse,

which was observed in conjunction with some benevolence towards the entrepreneur, whom they consider to be the true creator of wealth. These judges are particularly attuned to the personality of the company boss or the potential buyer. As a result the will, business experience, and know-how of the entrepreneur play an important role in the formation of their judgements.

IV Saving the financial zombie

Thus, the "zombie" debate brings out deep ideological beliefs, conventions, professional disputes, and political rhetorics of the judges with respect to the life and death of companies, as articulated with their own careers. This case also shows how the work of financiers extends financial logics and pragmatism beyond the boundaries of the financial sector. The political dimension of these choices permeates the discourse and practices of all consular judges dealing with bankruptcy proceedings. This level of politicization, however, is intrinsic to the politically "dirty job" itself. The next section looks at how the TCP and consular judges reach a much higher level of politicization in their discourse and practice of bankruptcy. It is based on a narrative by a former president of the TCP, a narrative that reflects a "moment of truth" in the discourse of consular judges, and that was published a year after the 2008 financial crisis. This shows that when banks themselves are caught in insolvency proceedings, politicization reaches its highest levels and the zombies debate takes a different dimension. After citing at length a section that shows how this president of the TCP coordinated with the minister of economics and finance to both slow down bankruptcy proceedings in exchange for specific investments reflecting government industrial policy, this section looks at the institutional context that supports this institution precisely because it is capable of such discreet political activity (Box 4.2).

This former President of the TCP, Michel Rougier, recounts in an article on the financial crisis of 2008 how he had gone about saving the French banks during a previous crisis between 1992 and 1997 (which had also been triggered by the bursting of a real estate bubble). This earlier crisis, although less spectacular than in 2008, nevertheless posed the threat of collapse for the large French banks. The former President of the TCP, along with the Minister of Finance and the Economy in office at the time, partook in a debate about the role of the banks during the crisis. His account is based on his experiences as president at the time of this crisis.

Box 4.2: Excerpt from the article by Edmond Alphandéry, Michel Rougier, and Patrick Pélata (2009), Qu'attendres des banques? Le Journal de l'Ecole de Paris, vol. 78, pages 8–16.

Michel Rougier

Between the summers of 1992 and 1997, I asked myself daily, and occasionally at night, the question that brings us here tonight: What is to be

expected from banks? To answer this, we need to establish the two given meanings of the verb 'to expect': "What do we expect?" expresses a requirement, whereas "What can we expect?" expresses patience. It is somewhere between these two that my speech will meander.

The crisis of 1992–1997

What we experienced between 1992 and 1997 was a crisis of "promised revenues," much like today. This crisis had begun at the end of the 1980s in the commercial and real estate markets in the United States and London. In France, it took the form of a crisis of promised revenues linked to the exchanges of realestate transaction promises that had begun circulating in very high quantities. Upon his appointment as Minister of Finance, Edmond Alphandéry blocked the free circulation of these sales agreements, which had become a form of hidden securitization of epidemic proportions. Given the significant valuation slump that is observed when property markets turn, the banking system proved to be totally incapable of bearing the corresponding cost.

The prospect of planned legislative elections in March 1993 and the impending political changeover did little to ease the management of the crisis. From September 1992, the commercial court found itself on the front line as there was no longer anyone in the political class who was able to make the necessary decisions. And yet the situation was serious: not only were the banks affected, but also the three main insurance companies (Union des Assurances de Paris - UAP, Groupe des Assurances Nationales - GAN and Assurances Générales de France - AGF).

Patience

Faced with this economic and political collapse, we quickly realized that it would be impossible to expect everything from the banks and that rather, we would have to learn to wait for them, whatever pressure from public opinion we faced. This pressure was, however, very strong: the main criticisms were targeted at the Crédit Lyonnais, but we also helped to settle ideological scores between the supporters and adversaries of the central bank

We were confident that if we could leave the enormous property assets acquired by the banks, for which they had not yet found any buyers, for just a few years in these banks' hands, we would be able to resolve the crisis as the privatization of insurance companies would result in the emergence of a new property market. We did indeed succeed in postponing the first liquidation of a significant bank, the Pallas Stern, until 30th June 1995. If this collapse had happened two years earlier, it would have undoubtedly caused a real systemic crisis similar to the collapse of the Lehman Brothers in 2008. However, in 1995, the warning beacons were well placed and the collapse did not bring about any serious consequences. The property market was already starting to re-emerge from the ashes. American companies rushed to France to buy in earnest, often without seeming too concerned about

what they were buying, i.e., properties or debt. Sang-froid and the ability to remain patient paid off in the end.

Demand

At the same time we put the second strand of our plan into action, which, conversely, consisted in setting for the bank very strong expectations within a very specific area—the preservation of two industrial sectors which seemed to us essential to protect. The first being the transportation sector and the second being the press, upon which depended the advertising, printing, and pulp and paper industries. We did not compromise on this point and imposed on the banks to extend all the necessary credit to these sectors. This was not a simple task and in some cases we needed to resort to coercion. We noted that under these circumstances politicians by and large left us on our own: they obviously thought that the judge's imperium would be more effective when dealing with banks than any pressure that they would exert.

The current situation

In order to get us out of the current crisis, we are again going to need to know how to apply the two meanings of the verb to expect ....

As far as the consular judges within the commercial court are concerned, President Rougier is the president "who saved the French banks." His account brings to light another political dimension of the work of the commercial judge in France. It is here particularly interesting as it illustrates the institutional ecology and supports from which the commercial court benefits, the continued existence of which depends on an entire institutional system.

V The consular court, an institution at the crossroads of multiple political interests

Indeed, provided that the state is not considered to be a monolithic organization (Laumann and Knoke, 1987), this institution represents a vested interest for a number of actors. For politicians in general, management of bankruptcies is delegated to the "independent" judges whose "imperium would be more effective when dealing with banks." For the minister of economy and finance, the consular court represents, beyond just a simple instrument for awarding moratoria, a discrete industrial policy tool, i.e., "the preservation of two industrial sectors." Based on the delegation of the "dirty work" (in the sociological sense of Everett Hughes) of managing crises and bankruptcies by means of restructurations, it makes it easier for them to play for time and prolong any procedures until the effects of the crisis have been sufficiently mitigated. For the minister of justice (still on a very low budget compared with many other ministries), it delivers considerable savings in terms of the salaries that would have to be paid to career judges if

another institutional solution were put in place. Companies are able to rely on this institution that offers a self-contained normative space, a form of justice taking pragmatically into account the constraints of the business world: speed, awareness of market customs, easy instrumentalization compared with the generalist justice of the Tribunal d'Instance (Court of First Instance), and encouragement of contractual renegotiations between the parties rather than dogmatic implementation of the law. It is also used as an institutional tool to convey new ideas of business self-regulation to the legislative powers in the early stages of lobbying campaigns. From this perspective, based on the idea that "customs are a source of law" (*les usages sont sources de droit*), the consular commercial court proves to be a source of legislative innovations and legitimacy in the promotion of these innovations within the political system. It is a place for the formulation, testing "prototype norms," and maturation of new rules for an economy in constant evolution. Lastly, further to the ministries, trade associations, and companies, it is worth mentioning the consular judge associations. These help the consular judges who operate this institution on a daily basis keep their convictions and personal commitment (see above for examples of quotes concerning bankruptcies).

Unlock and capture: banks as shadow regulators and discreet policymakers

Although our research dates back to 2000–2005, it is relevant to bring it into the context of 2016–2017. In France and in other Western nations, this context is characterized by a proliferation in the number of bankrupt businesses and banking restructurations, whereas the system itself has changed little since 2000. The continued relevance of the handling of large banking collapses, as managed during the 1990s, is that they are still today administered in three ways: in courts, politically (organization of "consolidation" by the ministry of finance), and financially (recovery of collateral by central banks)—although the latter has seen much change since the 1990s. The restructuring of the French banking sector however is ongoing and the question of conflicts of interest remains as relevant as ever.

More generally, our theoretical framework and definition of joint regulation insists on the necessity to examine bankruptcy work without dissociating the organization of markets from the judicial organization making decisions about the financial balance of companies. Thus, by looking into the discourse of consular judges at the TCP, the dual dimension of the zombies debate emerges, stressing one or the otherside depending on whether the zombies are industrial or financial companies. The blurring of the boundary between politics and finance appears to be an outcome of the blurring of underlying boundaries between executive, legislative, and judiciary powers altogether. The story of how the zombie banks themselves were saved shows that this blurring of the boundaries by institutionalized brokers such as consular judges is often convenient for both politicians and the financial industry. 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. Moreover, the specialized institution can only be captured by a shadow regulator (Huault et al., 2012) because it has been sustained for centuries by the social milieu that has been constructed around it: commercial court judges, with all their heterogeneity, are the primary recruiters of new judges and they are also often likely to be relatives or friends of new judges (Falconi et al., 2005).

Lastly, the fact that privatization of state functions is not "de-institutionalization," but rather a gradual replacement of statutory institutions with institutions that operate on the hybrid, consular model and redefine the boundaries between public and private, points to the wide overlap between politics and economic sectors and to the importance of rethinking public action on the basis of a neo-structural critique of such consular regimes, as much as on the basis of a conventionalist and regulationist economic sociology (Lazega, 2003). Based on this analysis of the work and professions of finance in the bankruptcy minefields, 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 (Ayres and Braithwaite, 1992; Swedberg, 2003). With the zombies debate, research on notions such as self-regulation, co-regulation, and joint regulation goes far beyond the usual divide between hard law and soft law. It brings in neo-structural analyses that show how financial sectors have achieved epistemic domination of such institutions of joint regulation. The debate is inextricably ideologically and institutionally political because banks are shadow regulators and discreet policymakers importing into public institutions—often with help from the state itself—appropriateness judgments and logics that were designed for their private practice. Theories and methodologies that can be promoted by such an economic sociology of law and joint regulation have yet to be further developed (Lazega and Favereau, 2002). In this area much remains to be done.

Note

1 These results are based on in-depth interviews and jurisprudential exercises on real life cases, as correlated with biographical and career data for these judges (Lazega and Mounier, 2009).

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