



**HAL**  
open science

# Judicial and extrajudicial Conflict Resolution in the “Code de procedure civile” of 1806. Between Historical Heritage and Revolutionary Innovation

Serge Dauchy

► **To cite this version:**

Serge Dauchy. Judicial and extrajudicial Conflict Resolution in the “Code de procedure civile” of 1806. Between Historical Heritage and Revolutionary Innovation. Cordes, Albrecht. Mit Freundschaft oder mit Recht ? Inner – und außergerichtliche Alternativen zur kontroversen Streitentscheidungen im 15-19 Jahrhundert, BÖHLAU, pp.269-280, 2015, 978-3-412-21790-7. hal-02967800v2

**HAL Id: hal-02967800**

**<https://hal.univ-lille.fr/hal-02967800v2>**

Submitted on 17 Mar 2021

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

# Judicial and Extra-Judicial Conflict Resolution in the *Code de Procédure civile* of 1806. Between Historical Heritage and Revolutionary Innovation

Serge DAUCHY

Centre d'Histoire Judiciaire, CNRS – Université Lille 2

From all the Napoleonic codes, the *Code de procédure civile* is the only one to suffer from a bad reputation. Even before it came into force on January 1<sup>st</sup> 1807, the new code, prepared by a governmental commission composed exclusively of Ancien Régime practitioners, had been severely criticized. Two years earlier, the courts of appeal and the Court of Cassation, invited to submit their remarks on the project, already unanimously deplored a purely descriptive set of procedural rules without any general conceptual vision. Although the supreme court proclaimed that “a codification of procedural rules was probably more expected and more necessary than the Code civil”<sup>1</sup>, the judges feared that excessive formal precautions would again make civil justice slow and expensive<sup>2</sup>. Several generations of lawyers and historians have therefore considered that the code of civil procedure was, in the words of E. Garsonnet at the end of the 19<sup>th</sup> century<sup>3</sup>, a slavish imitation of the Civil Ordinance of 1667 and a restoration of the 18<sup>th</sup> century practice of the Châtelet court in Paris. Nobody will deny that the new code was largely inspired by pre-revolutionary procedural principles. Pigeau, the most influential member of the commission and also the main author of the project<sup>4</sup>, had published in

---

<sup>1</sup> *Observations préliminaires de la Cour de cassation sur le projet de procédure civile*, Paris, 1803-1804, ([http://polib.univ-lille3.fr/documents/B593505406\\_000000005D.43\\_IMG.pdf](http://polib.univ-lille3.fr/documents/B593505406_000000005D.43_IMG.pdf))

<sup>2</sup> S. Dauchy, “Les formes sont à la justice de la République ce que le pendule est à l’horloge. Les observations des cours d’appel sur le projet de Code de procédure civile de l’an XIII », in R. Martinage and J.-P. Royer (dir.), *Justice & République(s)*, Lille, 1993, p. 289-297.

<sup>3</sup> E. Garsonnet, *Cours de procédure, organisation judiciaire, compétence et procédure en matière civile et commerciale*, Paris, 1883.

<sup>4</sup> In March 1801, the Minister of Justice, André-Joseph Abrial, ordered a first draft. A few months later, Pigeau wrote his own project, a project which, according to S. Solimano’s investigations, seems to have been largely confirmed by the governmental commission chaired by Treilhard: cf. S. Solimano, “Alle origini del Code de procedure civile del 1806: il progetto Pigeau”, in *Studi di storia del diritto*, Milano, 1999, p. 729-772. See also J.-L. Halperin, “Le code de procédure civile de 1806: un code de praticiens?”, in L. Cadiet and G. Canivet (dir.), *De la commémoration d’un code à l’autre: 200 ans de procédure civile en France*, Paris, 2006, p. 23-34 and C. Lecomte, “Le nouveau

1773 a book entitled *La procédure civile du Châtelet et de toutes les juridictions ordinaires du royaume*. His project openly claimed the Ancien Régime legacy and therefore opted for fitting civil procedure tightly in a stringent framework. Three reasons have been put forward by 19<sup>th</sup> century doctrine to explain not only that very formal approach to procedural codification, but also the choice of continuity with roman-canonical rules forged since the late Middle Ages by ecclesiastical courts and taken over by royal high courts. First, Napoleon's (supposed) personal disinterest for procedural matters: he attended only two sessions of the Council of State and thus gave the impression to leave discussions about the code to legal practitioners; secondly, the disastrous memory of the revolutionary period, in particular the reform introduced by the decrees of Brumaire Year II, which called for conflict resolution without formalities or procedural obstacles and banished professional judges and even lawyers from the courts<sup>5</sup>; thirdly, the knowledge that, unlike substantive civil law, civil procedure had been codified before the Revolution and that, despite some imperfections, the Ordinance of 1667 still offered the best guarantees for settling civil disputes. For those reasons, the 1806 Code of civil procedure was unanimously presented by 19<sup>th</sup> century legal literature as a reactionary legislation, to be understood as an attempt to offset at the time recent excesses and to restore the thread of the pre-revolutionary heritage and legal security<sup>6</sup>. Recent research has highlighted a more political interpretation of that code, showing an imperial will to control conflict resolution and moreover to control the actors of judicial conflict resolution, but also the commission's attempt to conciliate and even synthesize, much more than was previously acknowledged, continuity and innovation, the Ancien Régime tradition and the Revolution's achievements<sup>7</sup>.

---

Code de procédure civile, rupture et continuité", in J. Foyer and C. Puigelier (dir.), *Le nouveau Code de procédure civile (1975-2005)*, Paris, 2006, p. 5-16.

<sup>5</sup> P. Boncenne, *Théorie de la procédure civile précédée d'une introduction*, t. 1, Poitiers, 1828, p. 7 described the radical reform introduced in October 1793 as "cette expérience dont l'échec apparaissait si terrible et patent pour les contemporains que toute description en était superflue". For a more objective analysis of the revolutionary decree of Brumaire an II, see J.-L. Halpérin, "Le juge et le jugement en France à l'époque révolutionnaire", in R. Jacob (dir.), *Le juge et le jugement dans les traditions juridiques européennes*, Paris, 1996, p. 233-256. Cf. also G. Cornu and J. Foyer, *Procédure civile*, Paris, 1948, p. 22.

<sup>6</sup> P. Endres, *Die französische Prozesrechtslehre vom Code de procédure civile (1806) bis zum beginnenden 20. Jahrhundert*, Tübingen, 1985.

<sup>7</sup> For a more general survey, see A. Wijffels, "The Code de procédure civile (1806) in France, Belgium and the Netherlands", in C.H. van Rhee, D. Heirbaut and M. Storme (dir.), *The French Code of civil procedure (1806) after 200 years*, Wolters Kluwer, 2008, p. 5-73.

## I. The Code de procédure civile and the legacy of the French Revolution

The 1806 Code of civil procedure does not have the appearance of an innovative codification proposing a new approach to settle civil disputes. It rather looks as a very formal and purely descriptive achievement, a textbook explaining in 1042 articles all aspects of ordinary and special procedures in the area of civil law, without any general outline nor any theoretical conceptualization<sup>8</sup>. By refusing Pigeau's proposal to include at the beginning of the Code an introductory chapter stating "the general rules of civil procedure" and a preliminary presentation of the judicial organization and the guiding principles of judicial conflict resolution — in their remarks, several courts of appeal had expressed the wish to have such a general introduction —, the lawmaker failed to express clearly his intentions. Moreover, the new code appeared in contradiction to the revolutionary ideal (or utopia) to settle conflicts without forms or formalities and to organize justice without procedure. In the new polity imagined by the Revolution's leading figures in 1789, the implementation of a legicentric organization, the only political system able to ensure individual liberties, had absolute priority and was also considered to be the only way to keep the judiciary within strict boundaries. Since the courts' organization inherited from the absolute monarchy and all privileges, in particular judicial privileges, had been completely abolished, the Constituent Assembly did not consider a codification of civil procedure to be a matter of urgency. A full and thorough overhaul of the judicial system — institutions, legal professions, modes of conflict resolution and even legal education — was to be undertaken<sup>9</sup>. The members of the revolutionary assembly promoted in particular extrajudicial conflict resolution<sup>10</sup>; "extra" to be understood as outside the public sphere. That policy was in the first place based on practical considerations: in a period during which the whole society would have to be reshaped, extrajudicial conflict resolution seemed the easiest and a less

---

<sup>8</sup> Treilhard, chairman of the government's commission, explains that the code should foresee everything in order to avoid any arbitrary decision (« *Le code doit tout prévoir afin que rien ne se fasse qui n'ait été ordonné et imposer une marche fixe qui ne permette pas l'arbitraire dans l'instruction parce qu'il serait bientôt suivi de l'arbitraire dans le jugement* »): P. Lepage, *Nouveau style de la procédure dans les cours d'appel, les tribunaux de première instance, de commerce et dans les justices de paix ou le Code judiciaire mis en pratique par des formules ; suivi de l'exposé des motifs présentés au Corps législatif par les orateurs du Gouvernement, et du texte de la loi d'après l'édition originale et officielle*, Paris, 1806.

<sup>9</sup> J.-P. Royer e.a., *Histoire de la justice en France*, 4th ed., Paris, 2010, p. 251 sq.

<sup>10</sup> Cl. Bloch and J. Hilaire, "Nouveauté et modernité du droit révolutionnaire : la procédure civile?", in *La Révolution et l'ordre juridique privé. Rationalité ou scandale ?*, Paris, 1988, t. 2, p. 469-482.

expensive way to settle disputes. Secondly, the policy was founded on philosophical and ideological reasons: the idea of man's natural goodness, cherished by Jean-Jacques Rousseau, led several members of the Assembly (following a both utopian and legal trend) to proclaim the primacy of equity over law.

By the decrees of August 1790 the Assembly encouraged the use of arbitration and conciliation as the “most reasonable ways to end disputes between citizens”<sup>11</sup>. Arbitration was allowed in all matters, without any exception, and appeal was only allowed if it had been expressly provided by the litigants in the arbitration clause. None of that was really very new<sup>12</sup>, as arbitration had been frequently used by litigants since the late Middle Ages, in particular in commercial cases, but also when several courts claimed competence, and during the early-modern centuries, it had been organized by successive ordinances which shaped its formal rules, taking over various provisions from the Digest. The history of arbitration, in particular the questions related to the possibility of an appeal before a royal jurisdiction<sup>13</sup>, is in that sense a good way to assess the control of extra- or infra-judicial conflict resolution by central authorities. In early-modern times, that control became gradually but steadily more restrictive; in addition, statutory formalities imposed to arbitration — as, for example, those required by the royal edicts of 1560 and 1561— tried to assimilate arbitration proceedings with judicial conflict resolution. The French Revolution, on the contrary, relaxed the courts' grip on non-judicial forms of dispute settlement and free them from any constraints other than those freely accepted by the litigants themselves<sup>14</sup>. Nevertheless, arbitration still bore much resemblance with judicial resolution of conflicts. Arbitral proceedings remained subject to formal rules and arbitration awards often had to be enforced through court judgments.

The revolutionary ideology aimed in fact to achieve prejudicial rather than extra- or infra-judicial conflict resolution. The purpose was to prevent and/or avoid disputes

---

<sup>11</sup> Cf. Th. Clay, “Une erreur de codification dans le Code civil: les dispositions sur l'arbitrage”, in *1804-2004, le Code civil: un passé, un présent, un avenir*, Paris, 2004, p. 693-713.

<sup>12</sup> Except in family disputes where “forced” arbitration became compulsory. See C. Jallamion, “Arbitrage forcé et justice d'Etat pendant la Révolution française d'après l'exemple de Montpellier”, in *Annales historiques de la Révolution française*, 2007, n° 4, p. 69-85.

<sup>13</sup> S. Dauchy, “Le recours contre les décisions arbitrales en perspective historique. Aux origines des articles 1481-1491 NCPC”, in *Revue de l'arbitrage*, n° 4 (1999), p. 763-783.

<sup>14</sup> See C. Jallamion, *L'arbitrage en matière civile du XVII<sup>e</sup> au XIX<sup>e</sup> siècle. L'exemple de Montpellier*, unpublished PhD dissertation, Montpellier, 2004.

rather than to settle them. Conflict mediation, and in particular “conciliation”, was therefore to become the cornerstone of the new judicial structure<sup>15</sup>. When discussions about the new judicial organization started in the Constituent Assembly on March 24<sup>th</sup> 1790, deputy Thouret proposed the creation of justices of the peace as the foundation of the new judicial edifice<sup>16</sup>. According to Thouret’s own phrase, a judge of the peace had to be “*un homme de bien*” (i.e. without any legal training or special qualification), elected by the community to prevent and, if necessary, to settle disputes. Not a judge, but an all-round *pater familias*. He was expected to preclude all procedural chicanery, to pay attention to the facts and not to legal issues, which was why professional lawyers had to be excluded from any attempt to reach conciliation. In the famous decrees of 16-24 August 1790, conciliation became compulsory: judicial proceedings before the district courts were subject to the presentation of a certificate issued by a “peace office” (*bureau de paix*) proving that all attempts to bring peace between the parties had failed or that one of the parties had refused to appear.

The official and compulsory character of preliminary conciliation (*préalable de conciliation*) was without any doubt the most emblematic shift in civil conflict resolution and the one that had the greatest impact on civil procedure. Ancien Régime justice did not ignore the possibility to settle a dispute out of court, even when the case had been brought before the judge. Ever since the Middle Ages, many municipal courts had proposed so-called “gracious justice” to its inhabitants and the royal edict of Fontainebleau issued in 1560 had imposed arbitration by family or friends in matters concerning successions, guardianship or a dowry<sup>17</sup>. Nevertheless, mediation in all its forms had never been imposed as a preliminary condition for bringing a case before the judge. For the revolutionary Assembly, on the contrary, judicial conflict resolution had to become the exception and extrajudicial conflict resolution the rule. Citizens should reach dispute settlement outside the court, prior to any legal action, if necessary with the help of a good father or an *amicabilis compositor* called (although that name may appear to be

---

<sup>15</sup> S. Dauchy, “La médiation: bref survol historique”, in C.H. van Rhee, D. Heirbaut and M. Storme (dir.), *op. cit.*, p. 77-88.

<sup>16</sup> See, among many other works on the history of the “justice de paix”, the contributions in J.-G. Petit (dir.), *Une justice de proximité: la justice de paix (1790-1958)*, Paris, Collection “Droit et justice”, 2004.

<sup>17</sup> J.-F. Traer, “The French family court”, in *The Journal of the Historical Association*, vol. 59 (1974), p. 211-228.

contradictory to its mission) a “*juge*” de paix. The Constitution of the Year VIII (1799), article 60, even ranked preliminary conciliation among the constitutional principles.

For Treilhard and the other members of the commission appointed by the First Consul, the main difficulty was without any doubt the integration of the revolutionary legacy, but also of the new imperial regime’s view on the judiciary, in a code of formal rules forged by Ancien Régime practice. Although the general structure of the Code draws its inspiration from the Ordinance of 1667, the first book (or chapter) is entitled “De la justice de paix” and the first title of the second book dedicated to the “lower courts” deals with “conciliation”. Article 48 even repeats the revolutionary principles: “parties are not allowed to introduce a claim before a court without having first been summoned or having appeared of their own free will before a justice of the peace in order to settle their dispute by conciliation”<sup>18</sup>. At first sight, preliminary conciliation seems always required before a judicial settlement, except for disputes related to public interest, municipalities, governmental institutions, minors, vacant successions, trusteeship and various other matters listed in article 49, or also when a lawsuit required to be settled promptly. However, what remained of the revolutionary ideas and the Constituents’ hope to settle most disputes by mediation, or even of the litigants’ enthusiasm for the utopian belief in the “innate goodness of man”<sup>19</sup>? Justices of the peace had become part of the judicial organization, the lowest level of a state-controlled establishment. They were not longer elected but appointed by the Emperor for a term of ten years (two candidates were presented by the cantonal assembly) and gradually most of them

---

<sup>18</sup> Code de procédure civile de 1806, liv. 1, tit. 1, art. 48: “Aucune demande principale introductive d’instance entre parties capables de transiger, et sur des objets qui peuvent être la matière d’une transaction, ne sera reçue dans les tribunaux de première instance, que le défendeur n’ait été préalablement appelé en conciliation devant le juge de paix, ou que les parties n’y aient volontairement comparé”. See, about the “*Préliminaire de conciliation*”, Th. Clay, “Le modèle pour éviter le procès”, in Th. Revet (dir.), *Code civil et modèles. Des modèles du Code au Code comme modèle*, Paris, 2005, p. 51-73 (p. 57-59).

<sup>19</sup> Several courts of appeal expressed their doubts about preliminary conciliation. They considered it was a useless formality, mainly because of a lack of means given to the peace offices but also because the litigants’ unwillingness. *Observations des cours d’appel sur le projet de procédure civile*, Paris, 1803-1804, Cour d’appel de Dijon (Titre III, section I): “L’institution des bureaux de paix est une belle conception dans la théorie; mais dans la pratique, elle n’est qu’une formalité illusoire qui embarrasse l’action de la justice et multiplie les procédures. Deux choses ont surtout contribué à tromper Presque entièrement les vues du législateur; la mauvaise volonté des plaideurs et l’insuffisance des moyens de la plupart de ceux à qui la conciliation était confiée”.

became trained professionals<sup>20</sup>. In that way, the new rules of civil procedure first served the government's judicial policy, half-way between Ancien Régime hierarchy and revolutionary rationalism.

## II. Civil procedure, conflict resolution and the control of the judges

Parties often seek to resolve their disputes outside the institutional courts for pragmatic reasons. Litigants choose alternative forms of dispute resolution because they are faster, less expensive, less formal, more confidential (especially in family disputes; the Revolution therefore also created special family tribunals<sup>21</sup>), or they opt for arbitration because they need an appropriate degree of expertise to bring highly technical issues to a conclusion. However, the scope of extra- or infra-judicial conflict resolution and the relationship with judicial conflict resolution — in particular the possibility left to litigants to settle freely whatever issue out of court, the limited or enlarged avenues for appeal of non-judicial settlements and even the enforceability recognized to those settlements by judges — depends upon the degree of state-building, on political choices and ideological commitments. When distinguishing decentralized and centralized legal orders, Kelsen wrote that the former ignored central legislation and left to the judiciary the discretionary powers to decide in individual cases, whereas in the latter the lawmaker limits the powers of the courts to a strict application of general norms<sup>22</sup>. Thus he opposes the well-known dialectic distinction between judicial norms enforceable towards the parties only, on the one hand, and statute-law, which is expected to be general and abstract, on the other. In the same way the latitude left to extra-judicial conflict resolution and the control of those means of conflict resolution (arbitration, conciliation, mediation, but also, during the pre-revolutionary period, private settlements by notaries, corporations, guilds, towns or clerical office-holders...) depends on the degree of state-building and even more on the relationship between the central

---

<sup>20</sup> J. Krynen, *L'Etat de justice. France, XIII<sup>e</sup>-XX<sup>e</sup> siècle*, t. II: *L'emprise contemporaine des juges*, Paris, 2012, and for the evolution of the justices of the peace in Belgium towards professionalism, J.-P. Nandrin, *La justice de paix à l'aube de l'indépendance de la Belgique (1832-1848). La professionnalisation d'une fonction judiciaire*, Brussels, 1998.

<sup>21</sup> J.-L. Halpérin, "La composition des tribunaux de famille sous la Révolution ou les juristes, comment s'en débarrasser?", in *La famille, la loi, l'Etat: de la Révolution au Code civil*, Paris, 1989, p. 292-304.

<sup>22</sup> H. Kelsen, *Pure Theory of Law*, transl. By M. Knight, Clark, New Jersey, 2008, p. 286.

political authorities and their judges<sup>23</sup>. From the late Middle Ages onwards and during Early-Modern Times, we can observe a tendency to integrate extra- and infra-judicial means to settle disputes in the legal order, in particular by allowing litigants to appeal against decisions reached through such private settlements. At a time when it was often difficult to enforce decisions of a court, even judgments given by the highest court of the realm, judges encouraged this kind of settlements, as one can make out from the so-called *concordia* of the Parlement of Paris. At any moment of the procedure, even after the *litiscontestatio*, litigants could end a case brought before the sovereign court by a settlement, and judges not only offered their mediation to the parties, they also conferred enforceability to these *concordia*, which were considered to have the same force as a final judgment. Progressively, arbitration was also integrated in the legal system through royal statutes that made it possible to appeal before the royal courts against any arbitral decision (whether issued by *arbitri*, *arbitrators* or *amicabiles compositores*) and, according to the case law, even when the parties had decided in the arbitral clause that the decision was not open to appeal<sup>24</sup>. Extra-judicial means of conflict resolution could much more easily be controlled through their incorporation into the legal and judicial process. Even more importantly, it also proved the best way to impose the authority of the king's justice, particularly in newly conquered territories. During the 17<sup>th</sup> and 18<sup>th</sup> centuries, when the judiciary became more and more independent (in particular due to the heredity and venality of the judicial offices) and when the *Parlements* began to consider themselves as a "senate" whose task was to counter-balance the monarch's raising absolutist authority (through the so-called right of *remonstrance* against royal ordinances and decrees), codification appeared to be the best and most efficient way to neutralize the arbitrary power of the judges, in particular by codifying civil and criminal procedure. The fact that the great ordinances of 1667 and 1670, called ordinances for the reformation of justice, started with codifying civil and criminal procedure (whereas civil law, was only been very partially codified before the French Revolution) is one argument among others which may indicate that Louis XIV's

---

<sup>23</sup> J. Hilaire, *La construction de l'Etat de droit dans les archives judiciaires de la cour de France au XIII<sup>e</sup> siècle*, Paris (Daloz, L'esprit du droit), 2011.

<sup>24</sup> S. Dauchy, "Les recours contre les sentences arbitrales au Parlement de Paris (XIII<sup>e</sup>-XIV<sup>e</sup> siècles). La doctrine et la législation à l'épreuve de la pratique judiciaire", in *Tijdschrift voor Rechtsgeschiedenis/The Legal History Review*, t. LXVII (1999), p. 255-31.

main purpose was to quash the judiciary's opposition<sup>25</sup>. It also explains why France has always chosen (whether under Louis XIV or under Napoleon) the technique of separate special codes or *Einzelkodifikation*. Indeed, beyond the political will to rationalize and unify civil procedure in the courts of the realm and to clarify the relationship between statute law and case law, the ordinance of 1667 expressed seemingly contradictory principles: on the one hand the state's monopoly of conflict resolution, and on the other hand a distrust on the monarchs' side against the judges, in particular against the *Parlements*. Pussort, the main architect of the royal decree for the reformation of justice (and also Colbert's nephew) was commissioned to impose control on extra-judicial conflict resolution through institutional justice, but at the same time, he worked out a formal procedure considered to be the most efficient bulwark against the judges' arbitrary powers. Napoleon also distrusted professional judges and therefore introduced a code of civil procedure which was expected to anticipate everything in detail in order to reduce the role of the judge to a mechanical application of the law<sup>26</sup>, something which had been impossible to achieve in Ancien Régime France, not only because of (a non-codified) plurality of sources of law (royal decrees, customary law, Roman law), but even more so because judges did not have to give the reasons of their decisions, the *ratio decidendi*.

In that sense the Napoleonic Code of civil procedure appears to be some kind of historical reiteration. Inevitably, the 1806 code was primarily a reaction against some of the bold reforms or projects from the revolutionary period and it contributed to stabilize the "bourgeois society". However, is it still possible to argue (as one may still often read) that procedural rules were only envisaged as adjective rules, less important than the substantial rules of the civil and penal codes which guaranteed the bourgeois order based on family and ownership<sup>27</sup>? Codification of civil procedure appears to have been a cornerstone of Napoleon's deliberate and ambitious policy to reshape the legal system in France (and later in Europe) and to reform the courts' organization. From 1800 onwards, courts of appeal were re-introduced and professional lawyers were re-

---

<sup>25</sup> J. Krynen, "*La haute magistrature contre la codification. Autour de l'Ordonnance civile (1667)*", in A. Iglesia Ferreiros (dir.), *El dret comú i Catalunya*, Barcelona, 2005, Barcelona, pp. 175-196.

<sup>26</sup> Cl. Bloch and J. Hilaire, "Interpréter la loi, les limites d'un grand débat révolutionnaire", in *Miscellanea forensia historica*, Amsterdam, 1988, p. 29-48.

<sup>27</sup> J.-L. Halpérin, *Histoire du droit privé français depuis 1804*, Paris, Collection droit fondamentale, 1996, chapters "L'ordre des familles" (p. 82-117) and "Le règne des propriétaires" (p. 118-167).

established. The first to be re-instated were the *avoués* or solicitors, who were appointed by the Minister of Justice and regarded (as were also the notaries) as “auxiliaries of justice”. Later (in 1810), the advocates with their corporate organization were also re-admitted into the legal system. Legal education was also restored as a state monopoly and under the state’s control<sup>28</sup>. Last but not least, judges were no longer elected, but appointed by the head of the Executive and could as a rule not be removed from office, except the justices of the peace (who were appointed for 10 years) and the magistrates who were appointed as public prosecutors. Generally speaking, the government controlled all the branches of the legal profession, with regard to their education and training, their appointments and their professional discipline), including the careers of the judges, from the lowest courts to the Court of Cassation. Napoleon also introduced a strict separation between ordinary courts and administrative tribunals by establishing in 1799 (art. 52 of the Constitution of the Year VIII) the Council of State, a move which prevented judges to challenge the constitutionality of statutes and enactments, and at the same time limited structurally the influence of ordinary courts<sup>29</sup>. Reducing the judiciary’s influence (or, in the line of the Ancien Régime, the judges’ arbitrary powers) was also a major objective of the new Code of civil procedure, which imposed public oral debates as a general rule and made the explicit legal justification of all judicial decisions compulsory). In Britain, Jeremy Bentham also recommend in his *Scotch Reform*, written during the very same years 1806-1807 and perhaps influenced by the French codification, a complete set of procedural formalities imposed by the legislator as the most efficient guarantee against judges and lawyers<sup>30</sup>. But apart from controlling the judiciary, the code also pursued a state monopoly on conflict resolution. What is often considered to be an attempt to strike a balance between tradition and Revolution, or as a compromise between, on the one hand, legal equality and individual liberty, and, on the other, political authority and social stability, appears in fact to have been the integration of extra-judicial conflict resolution in a state-controlled legal

---

<sup>28</sup> F. Audren and J.-L. Halpérin, *La culture juridique française. Entre mythes et réalités, XIX<sup>e</sup>-XX<sup>e</sup> siècles*, Paris, 2013, p. 15-29.

<sup>29</sup> Jean-Guillaume Locré, first secretary-general of the Council of State (1799), and author of *L’esprit du Code de procédure civile* published in 1815, considered the Napoleonic Council of State, reshaped by the decrees of 11 June and 22 July 1806, to be a continuation of the former King’s Council. Cf. C. Durand, *Etudes sur le Conseil d’Etat napoléonien*, Paris, 1949 and *Le fonctionnement du Conseil d’Etat napoléonien*, Gap, 1953.

<sup>30</sup> See A. J. Draper, “Corruptions in the administration of Justice: Bentham’s critique of civil Procedure, 1806-1811”, in *Journal of Bentham Studies*, London, vol. 7 (2004), p. 1-21.

system and the institutional legalization of non-judicial forms of dispute settlement between citizens. The judge himself had to attempt to bring about conciliation before settling conflicts through a formal judicial decision.

Even so, one may wonder whether the judge was really perceived by the parties as a mediator trying to reach conciliation or as an official authority acting as a judge. Did these judges act '*mit Freundschaft*' or did they (for whatever reason) settle conflicts '*mit Recht*'? Today we tend to avoid the phrases of extra- or infra-judicial conflict resolution (a terminology which puts too great an emphasis on the relationship with institutional justice). We rather refer to "alternative" modes of conflict resolution, probably because the association with state-building and the state control over judges seems less important and gradually fades away in favour of a new understanding of the question and new challenges around conflict resolution.