Judicial and extra-judicial conflict resolution in the Code de Procédure civile of 1806. Between Historical Heritage and Revolutionary Innovation

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From all the Napoleonic codes, the *Code de procedure civile* is the only one to suffer from a bad reputation. Even before it came into force on January 1st 1807, the new code, prepared by a governmental Commission composed exclusively of Ancien Régime practitioners, had been severely criticized. Two years earlier indeed, 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 highest Court proclaimed that "a codification of procedural rules was probably more expected and more necessary than the Code civil"[1], the judges feared that excessive formal precautions would again make civil justice slow and expensive[2]. Several generations of lawyers and historians have therefor considered that Code to be, as wrote E. Garsonnet at the end of the 19th century[3], a slavish imitation of the civil ordinance of 1667 and a restoration of the 18th century practice of the Châtelet de Paris. Nobody will deny that the new code was largely inspired by prerevolutionary procedural principles. Pigeau, the most influential member of the Commission and also the main author of the project[4], had published in 1773 a book entitled *La procedure civile*

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[1] *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)

[2] 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.

[3] E. Garsonnet, *Cours de procédure, organisation judiciaire, compétence et procédure en matière civile et commerciale*, Paris, 1883.

[4] 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 that, 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 procedure civile de 1806: un code de praticiens?", in L. Cadiet and G. Canivet (dir.), *De la commemoration d'un code à l'autre:*

du Châtelet et de toutes les juridictions ordinaires du royaume. His project openly claimed the Ancien Régime legacy and therefor choose to fit civil procedure tightly in a rigorous framework. Three reasons have been put forward by 19th century doctrine to explain not only that very formal conception of 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; second the disastrous memory of the revolutionary period, in particular the reform introduced by the decrees of Brumaire an II that called for conflict resolution without formalities or procedural obstacles and banished professional judges and even lawyers from the courts[5]; and third the knowledge that, unlike civil law, civil procedure had been codified before the Revolution and that, despite some imperfections, the ordinance of 1667 still offered the best guarantees to settle civil disputes. For this reasons, the 1806 Code of civil procedure is unanimously presented by 19th century legal literature as reactionary, to be understood as reacting against recent drifting off and therefor taking up again the pre-revolutionary heritage and legal security[6]. 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 believed, continuity and innovation, Ancien Régime and Revolution[7].

200 ans de procedure civile en France, Paris, 2006, p. 23-34 and C. Lecomte, "Le nouveau Code de procedure civile, rupture et continuité", in J. Foyer and C. Puigelier (dir.), *Le nouveau Code de procedure civile (1975-2005)*, Paris, 2006, p. 5-16.

[5] P. Boncenne, *Théorie de la procedure civile précedée 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.

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

[7] For a more general survey, see A. Wijffels, "The Code de procedure 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 appear as 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 particular procedures in the field of civil law, without any general outline nor theoretical conceptualization[8]. By refusing Pigeau's proposal to introduce the Code with a first chapter exposing "the general rules of civil procedure" and a preliminary presentation of the judicial organization and the directive principles of judicial conflict resolution — in their remarks, several courts of appeal had expressed the wish to have that general introduction —, the legislator did not clearly express 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 city imagined by the Revolutionary 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 put the judiciary in chains. For the judicial 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 as urgent. A complete and thorough overhaul of the judicial system —institutions, legal professions, modes of conflict resolution and even legal education — was to be undertaken[9]. The members of the revolutionary assembly promoted in particular extrajudicial conflict resolution[10]; "extra" to be understood as outside the public sphere. First for practical reasons: in a period where the whole society

[8] Treilhard, chairman of the governmental commission, explains that the Code should foresee everything in order to avoid any arbitrary (*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.

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

[10] 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.

should be redesigned, extrajudicial conflict resolution seemed the easiest and less expensive way to settle disputes. Secondly for philosophical and ideological reasons: the idea of the natural goodness of man, dear to Jean-Jacques Rousseau, led several members of the Assembly (an utopian and alegal trend) to proclaim the primacy of equity on law.

By the decrees of August 1790 the Assembly encourages the use of arbitration and conciliation as "most reasonable ways to end disputes between citizens"[11]. Arbitration is allowed in all matters, without any exception, and appeal is only possible when expressly provided by the litigants in the arbitration clause. Nothing very new in reality[12] since arbitration had been frequently used by litigants since the late Middle Ages, in particular in commercial law but also when several courts claimed competence, and organized in Modern Times by successive ordinances that shaped its formal rules by taking over the dispositions found in the Digest. The history of arbitration, in particular the questions related to the possibility of an appeal before a royal jurisdiction[13], is in that sense a good way to weight up the control of extra or infra-judicial conflict resolution by central authorities. In Modern Times indeed, that control became gradually but steadily more restrictive and statutory formalities imposed to arbitration — as those required by the royal edicts of 1560 and 1561— seek assimilation with judicial conflict resolution. The French Revolution, on the contrary, relaxed its grip on non-judicial forms of dispute settlement and rid them of any constraint other than those freely accepted by the litigants themselves[14].

Nevertheless, arbitration bore much resemblance with judicial resolution of conflicts. Arbitral proceedings remained subject to formal rules and arbitration awards often had to be enforced by court judgments. The revolutionary ideology aimed in fact more prejudicial than extra or infra-judicial conflict resolution. Prevent and/or avoid disputes rather than settle them. Conflict mediation and in particular "conciliation" therefor should

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[11] 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 present, un avenir*, Paris, 2004, p. 693-713.

[12] 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 Revolution française*, 2007, n° 4, p. 69-85.

[13] 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.

[14] See C. Jallamion, *L'arbitrage en matière civile du XVII^e^ au XIX^e^ siècle. L'exemple de Montpellier*, unpublished PhD dissertation, Montpellier, 2004.

become the cornerstone of the new judicial structure[15]. When discussion started about the new judicial organization before the Constituent Assembly on March 24th 1790, deputy Thouret proposed the creation of justices of the peace as basement of the new judicial building[16]. According to Thouret's own phrase, judges of peace should be "man of good" (without any legal training or special qualification), elected by the community to prevent and, if necessary, settle disputes. Not a judge, but a comprehensive *pater familias*. He was expected to hinder all procedural miasmas, to pay attention to the facts and not to law, reason why lawyers had to be excluded from any attempt to reach conciliation. In the famous decrees of 16-24 August 1790, conciliation becomes compulsory: judicial proceedings before the district courts are subject to the presentation of a certificate issued by a "peace office" (bureau de paix) proving that all attempts to conciliate the parties did not succeed or that one of the parties had refused to appear.

The official and compulsory character of preliminary conciliation (*préalable de conciliation*) is without any doubt the most emblematic turnover in civil conflict resolution and the one that had the most repercussions 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. Many municipal courts proposed ever since the Middle Ages so-called "gracious justice" to its inhabitants and the royal edict of Fontainebleau issued in 1560 already forced arbitration by family or friends in matters concerning successions, guardianship or dowry[17]. Nevertheless mediation in all its forms had never been imposed as preliminary condition to bring 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 and preliminary to any legal action, if necessary with the help of a good father or an *amicabilis compositor* called (and that name appears as contradictory to its mission) a "juge" de paix. The Constitution of the year VIII (1799) in its article 60 even ranked preliminary conciliation among the constitutional principles.

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[15] S. Dauchy, "La mediation: bref survol historique", in C.H. van Rhee, D. Heirbaut and M. Storme (dir.), *op. cit.*, p. 77-88.

[16] See, among many other works dedicated to 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.

[17] J.-F. Traer, "The French family court", in *The journal of the Historical Association*, vol. 59 (1974), p. 211-228.

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 "inferior courts" concerns "conciliation". Article 48 even repeats the revolutionary principles: "parties are not allowed to introduce a demand 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"[18]. At first sight, preliminary conciliation seems anyway required before a judicial settlement, except for disputes related to public interest, municipalities, governmental institutions, minors, vacant successions, trusteeship and different other matters listed in article 49 and also when a lawsuit needs to be settle promptly. However, what remained of the revolutionary ideas and the Constituents' hope to settle most disputes by mediation but even so of the litigants' enthusiasm for the utopian believe in the "innate goodness of man"[19]? 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 ten years (two candidates were presented by the cantonal assembly) and progressively most of them became trained professionals[20].

[18] 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 recue 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 compare". 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).

[19] 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".

[20] J. Krynen, *L'Etat de justice. France, XIII^e^-XX^e^ 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 function judiciaire*, Brussels, 1998.

In that way, the new rules of civil procedure first served the government's judicial polity, halfway 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 and the Revolution therefor also created special family tribunals [21]), or they decide upon arbitration because they need an appropriate degree of expertise to bring highly technical subject matter to a conclusion. However, the scope of extra or infrajudicial conflict resolution and the relationship with judicial conflict resolution — in particular the possibility left to litigants to settle freely whatever matter out of court, the limited or enlarged avenues for appeal of non-judicial settlements and even so 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 writes that the former ignored central legislation and left to the judiciary the competence to decide on a discretionary way in individual cases where in the latter the legislator limits the power of the courts to a strict application of general norms[22]. Thus he opposes the well-known dialectic distinction between judicial norms enforceable towards the parties only and statute law expected to be general and abstract. 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, as concerns the prerevolutionary period, private settlements by notaries, corporations, guilds, town or by ecclesiastics…) depends on the degree of state building and even more on the relations between the central political authorities and their judges[23]. From the late Middle Ages on and in 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

[21] J.-L. Halpérin, "La composition des tribunaux de famille sous la Révolution ou les jurists, comment s'en débarrasser?", in *La famille, la loi, l'Etat: de la Révolution au Code civil*, Paris, 1989, p. 292-304.
[22] H. Kelsen, *Pure Theory of Law*, transl. By M. Knight, Clark, New Jersey, 2008, p. 286.
[23] J. Hilaire, *La construction de l'Etat de droit dans les archives judiciaires de la cour de France au XIII^e siècle*, Paris (Dalloz, L'esprit du droit), 2011.

litigants to appeal from these private settlements. In a period where it was often difficult to enforce decisions of the court, even from the highest court of the realm, judges encouraged that kind of settlements as is proven by the so-called *concordia* of the Paris' Parlement. 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* considered to have the same force as a final judgment. Progressively, arbitration was also integrated in the legal order by royal edicts that made it possible to appeal before the royal courts against whatever arbitral decision (whether issued by *arbitri, arbitrators* or *amicabiles compositores*) and, according to jurisprudence, even when the parties had decided in the arbitral clause that the decision was not open to appeal[24]. Integration of extra-judicial means of conflict resolution appeared indeed the easiest way to control them and, even more important, to impose the authority of the king's justice, particularly in new conquered territories. When, in the 17th and 18th centuries, the judiciary became more and more independent (in particular due to heredity and venality of their charges) and when parlements began to consider themselves as a senate empowered 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 1669 and 1670, called ordinances for the reformation of justice, first codified civil and criminal procedure (and that civil law, on the contrary, has only been very partially codified before the French Revolution) is one argument among others to think that Louis XIVth main purpose was to break the judiciary's opposition[25]. It also explains why France has always chosen (Louis XIVth as well as 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 one hand the state's monopoly of conflict resolution and on the other hand a royal distrust against the judges, in

[24] S. Dauchy, "Les recours contre les sentences arbitrales au Parlement de Paris (XIIIe-XIVe siècles). La doctrine et la legislation à l'épreuve de la pratique judiciaire", in *Tijdschrift voor Rechtsgeschiedenis/The Legal History Review*, t. LXVII (1999), p. 255-31.
[25] 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.

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 extrajudicial conflict resolution by institutional justice but at the same time conceived a formal procedure considered to be the most efficient rampart against the judge's arbitrary. Napoleon also distrusted professional judges and therefor ordered a code of civil procedure that was expected to foresee everything in detail in order to reduce the role of the judge to a mechanical application of the law[26], something that 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 because judges did not have to give the reasons of their decisions, the *ratio decidendi*.

In that way the Napoleonic Code of civil procedure appears as a kind of historical reiteration. The 1806 Code of course first reacted against some bold reforms or projects of the French Revolution and contributed to stabilize the "bourgeois society". However, is it not wrong to continue to pretend (as is still often written) that procedural rules were only considered as adjective rules, less important than the substantial rules of the Civil and penal Codes that guaranteed the bourgeois order based on family and ownership[27]? Codification of civil procedure appears to be a corner-stone of Napolean's conscious and ambitious policy to reshape the legal order in France (and later in Europe) and reform the judicial organization. From the year 1800 on, courts of appeal reappeared and professional lawyers were re-established; first the avoués or solicitors who were appointed by the Minister of Justice and considered, as well as notaries, to be "auxiliaries of justice" and later (1810) advocates with their corporate organization. Legal education was also re-instituted with a State monopoly and state control[28] and, last but not least, judges were no more elected, but appointed by the head of the executive power and in principle irremovable except the judges of the peace (appointed for 10 years) and the public prosecutors. Generally speaking, the government controlled all legal professions (from their education and appointment to their discipline), he also controlled the career of the judges from the lowest courts to the Court of Cassation. Last but not least, Napoleon

[26] Cl. Bloch and J. Hilaire, "Interpréter la loi, les limites d'un grand débat révolutionnaire", in Miscellanea foriense historica, Amsterdam, 1988, p. 29-48.
[27] 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 proprietaries" (p. 118-167).
[28] F. Audren and J.-L. Halpérin, *La culture juridique française. Entre mythes et réalités, XIX^e^-XX^e^ siècles*, Paris, 2013, p. 15-29.

introduced a strict separation between ordinary and administrative courts with the creation in 1799 (art. 52 of the Constitution of the Year VIII) of he Council of State and thus prevented judges to challenge the constitutionality of statutory laws and limited structurally the influence of ordinary courts[29]. Reducing the judiciary's influence (or, in the continuity of Ancien Régime, the judge's arbitrary) was also a major objective of the new Code of civil procedure (which imposed oral debates as general rule and made the legal grounding of each decision compulsory). Did Jeremy Bentham not also recommend in his *Scotch Reform*, written in the very same years 1806-1807 and maybe influenced by French codification, a complete set of procedural formalities imposed by the legislator as most efficient guarantee against judges and lawyers[30]? 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 balance between tradition and Revolution or as a compromise between legal equality and individual liberty, on one hand, political authority and social stability, on the other hand, appears in fact more as integration of extra-judicial conflict resolution in a State controlled legal order and an institutional legalization of non-judicial means of dispute settlement between citizens. The judge himself should try to reach conciliation before settling conflicts by a judicial decision.

Nevertheless, was he really considered by the parties as mediator trying to reach conciliation or did he behave as judge? And did these judges act '*mit Freundschaft*' or did they (for whatever reason) settle conflicts '*mit Recht*'. Today we do not speak of extra- or infrajudicial conflict resolution (a terminology that stresses on the relation with institutional justice); we rather use "alternative" modes of conflict resolution, probably because the relation to state building and to the control of judges is less important and disappears progressively behind a new apprehension of the question and new challenges about conflict resolution.

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[29] Jean-Guillaume Locré, first secretary-general of the Council of State (1799), and author of *L'esprit du Code de procedure civile* published in 1815, considered the Napoleonic Council of State, reshaped by the decrees of 11 June and 22 July 1806, to be the continuity 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.

[30] 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.