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978-1-107-00386-6 - Rules of Exchange: French Capitalism in Comparative Perspective,  
Eighteenth to Early Twentieth Centuries

Alessandro Stanziani

Excerpt

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## INTRODUCTION

The ideal of competition, as it has been proposed, imposed or rejected, debated and analysed, at least since the end of the eighteenth century in France, Great Britain, Italy, Germany, Japan, China and elsewhere, is an intellectual invention that bears little resemblance to the way economic systems actually work. In the course of the last three centuries, this ideal has engendered the main oppositions in economic policies: the opposition between liberalism and interventionism in the eighteenth century and a good part of the nineteenth century; between liberalism and Marxism, planned versus market economies, Keynesianism versus monetarism in the twentieth century; and today, between free competition and the welfare state. At present, the debate over competition is affecting the construction of Europe, development policies, “North–South” relations and tensions between growth and inequalities.

Our aim is twofold: firstly, we want to go back and identify the sources and explain the success of this intellectual construct, that is, the principle of competition; secondly, we would like to demonstrate how capitalism really works. This will involve writing a history that is both intellectual and factual; we will show that, in the name of competition, markets actually express an ideal of non-competition. In reality, the control of competition and the attempt to invent a competitive market are designed, at best, to reconcile socioeconomic stability with innovation, and at worst, to keep some of the competitors out of the market. From there, we will go on to emphasise that the impulse to regulate the market was not only characteristic of the guild-controlled eighteenth century or the regulatory, state-controlled twentieth

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century, but also expressed itself forcefully in the nineteenth century, during the so-called liberal period and in the “neo-liberal” twenty-first century. If these periods are usually in opposition, it is because intervention and regulation have been reduced to macroeconomic and administrative policies (taxation, interest rates). On the contrary, the greatest amount of economic regulation and its most ongoing form did not originate in the market itself or in public administrative action, but rather in contract law and regulation of micro-economic relationships. This book argues that microlegal regulation ensured the main part of market operations and thereby influenced social hierarchies. In other words, the nineteenth century was not more “liberal” than the eighteenth or twentieth century; the entire period should be studied as a whole from a single perspective that transcends the traditional cleavages of historiography and of political and economic thought. In this regard, no real break occurred with the industrial revolution which was based on market institutions and organisations formed between the second half of the seventeenth century and the eighteenth century. Contrary to widely accepted arguments, if indeed there was a break in the history of capitalism, it should be situated at the turn of the nineteenth and twentieth centuries, with the radical transformation of the economy and its institutions (mass production and consumption, the welfare state, collective bargaining).

We intend to call the accepted history of capitalism into question not only from the standpoint of chronology but also in terms of its geographical scope; we will show that, as regards market regulation, there is little reason to juxtapose so-called civil law countries (France in particular) to Anglo-Saxon common law countries, distinguishing the former by significant state intervention in the economy from the latter’s self-regulating market. On the contrary, case law has played a decisive role in the development of legal rules and economic behaviour in France, whereas in Anglo-Saxon countries, legislation, positive law and the State intervened quite systematically in regulating the economy.

Markets have thus been regulated and institutionally situated everywhere; there are no free markets to compare to regulated markets, but merely forms of regulation that are sometimes similar and sometimes different. The history of markets is a global history in the sense that analogous changes have taken place in the various countries more or

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less at the same time. On the other hand, the solutions adopted have always been local. This is why we speak of global history at local time.

### THE AIM: CAPITALIST ECONOMY AND LAW FROM A HISTORICAL PERSPECTIVE

Market dynamics and the industrial revolution relied on rules, markets and social actors essentially rooted in the late seventeenth and eighteenth centuries. This is why, unlike Polanyi, we will not speak of a “great transformation” to show a break in the eighteenth and early nineteenth centuries that swept away the old pre-capitalist world through enclosures and the poor law and replaced it with a self-regulating economy which, in turn, is said to have been replaced by a new form of interventionism in the twentieth century. This chronology is false not only because new economic and legal rules were introduced over the long term, but also because the nineteenth-century market was anything but self-regulated.

On the contrary, according to our approach, there is no reason to contrast the liberal nineteenth century to the eighteenth and twentieth centuries described as interventionist, each in its own way. What differentiated these periods was not liberalism versus regulation, but different forms of regulation. For example, in the nineteenth century, the consumer did not exist from a legal standpoint; the law referred only to the purchaser, in keeping with the idea that the final consumer, like any professional buying a product, should be protected only by ordinary contractual rules. Thus, it was not until the very end of the nineteenth century that case law decisions began talking about the consumer rather than the purchaser; these decisions usually pointed to the unequal positions of the parties when they entered into the contract, particularly regarding their knowledge of product characteristics, to explain the deception to which the end consumer claimed to have been subject. Hence, special protection was seen to be necessary and it took the form of regulating food-related fraud and falsification. This legal innovation would have a major impact on political and economic hierarchies during the twentieth century and up to today.

Similarly, nineteenth-century firms had little in common with the way the era is portrayed by historians and economists. The relationship

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between firm, company and family remained at the heart of capitalist organisation not only in France, but also in Great Britain and even in Germany; companies in the strict sense grew out of this tradition rather than out of anonymous capital markets. Family law, credit law and the rules governing the land market remained closely intertwined and were not separated until after the First World War. Again, this major change belongs to the turn of the nineteenth–twentieth centuries not to the first industrial revolution; we need to escape backward historical interpretations.

Of course, trade institutions, market control and the rules of competition came into being before the nineteenth century. Yet doing history involves more than simply asserting “everything was already there”; a chronological division is justified by the question raised and the theories formulated. In the present case, we do not intend to call into question the long development of capitalism so dear to Braudel; on the contrary, by situating the “break” well downstream in time (late nineteenth–early twentieth century), I intend to argue that the script was not entirely written in the eighteenth century and, although the first industrial revolution owed a great deal to the slow development of capitalism and its institutions, beginning at least in the twelfth century, at the same time that world was radically transformed only in the twentieth century. In short, we agree that the industrial revolution should be included in the long-term development of capitalism, provided the break is situated not in the eighteenth century, but much later, at the beginning of the twentieth century. This issue finds its justification in the fact that we integrate Braudel’s approach (long-term evolution) with institutionalist history.

This chronology is therefore much closer to that advanced by Douglass North, Alfred Chandler and Arno Meyer.<sup>1</sup> However, we provide different content for this breakthrough and its main features and origins. Not only Chandler’s (and Williamson’s) business organisation, but above all the rules of the game and the law matter in our scheme. But, unlike North, we maintain that legal rules cannot be reduced to

<sup>1</sup> Douglass North, *Structure and Change in Economic History*. New York and London, Norton, 1981; Alfred Chandler, *The Visible Hand*. Cambridge, Mass., Harvard University Press, 1977; Arno Meyer, *The Persistence of the Old Regime: Europe to the Great War*. New York, Pantheon, 1981.

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property rules and, above all, the introduction, affirmation and decline of legal institutions and institutions in general do not necessarily respond to efficiency. The economic rationale seeking efficiency's optimisation was far from being the prime or unique mover in the history of markets.

To confirm these statements, the chronology we are proposing for France will be shown to be a widespread phenomenon; in Great Britain, Italy, Germany and the United States, the industrial revolution and growth in the eighteenth and nineteenth centuries took place through markets and institutions rooted in family-type economies, hostile to limited liability companies, speculation and sudden innovation, in which the consumer was barely taken into account by the law.

Together with trade and consumption, the control of capital constituted one of the pillars of the organisation of competition. There were significant continuities in this area in France (between the eighteenth and early twentieth centuries) and between France and the other countries. Everywhere, capital markets were highly controlled until around the last quarter of the nineteenth century, and even then it would be more accurate to speak of new forms of regulation than of liberalisation. Forward transactions, which had long been prohibited, were now accepted and with them, the produce exchanges. However, new rules intervened (anti-trust and anti-speculation norms). In this context, immaterial capital (shares, future products) or intangible capital (reputation–goodwill) emerged alongside more traditional forms of material capital (land) as an object of economic investment and source of social legitimacy and was recognised in France as well as the United States, Great Britain and Germany. A common wave lifted up the entire capitalist world. In the eighteenth and nineteenth centuries it brought about growth through small firms and innovations that ultimately required little capital. Purchasers (not consumers), servants and apprentices (rather than “salariés”) held centre stage. The second industrial revolution shattered this world, leading to new participants in the economy: wage earners, consumers, limited liability companies and competition law. The rise of the welfare state and the stock exchange, large firms and standardised products took hold in every country undergoing industrialisation. Everywhere, contract law ran up against wide-ranging restrictions in the name of social balance.

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The regulation of consumption, work, companies and stock market transactions fulfilled these same requirements. Henceforth, the law intervened not to confirm but rather to correct social inequalities.

Yet, within these common occurrences, differences appeared among countries. In particular, the legal status of the actors remained far more important in continental Europe than in common law countries, as the legal definitions of the tradesman and the consumer demonstrate. Current differences between business law and consumer law in European countries and at the international level testify to the tenacity of these diverging orientations. Thus, in France, the control of forward transactions was situated at the intersection of the old norms regarding monopoly and the new concerns of wage earners and farmers faced with “globalisation”. In the United States and Germany, on the contrary, new controls on forward transactions were defined in relation to farmers on the one hand and industry concentration on the other. These differences had equally far-reaching consequences. In France, the recognition of know-how and reputation as forms of capital helped small shops, whereas elsewhere, these items were immediately included in the valuation of all forms of enterprise. In common law countries, the reputation of the actor and of the products and services he offered came together in the trademark, the trade name and goodwill. In France, on the contrary, this convergence proved to be more problematic, and the solution was found in rooting reputation more strongly in a territory (*Appellation d’Origine Contrôlée*).

Finally, these differences also reflected those between fair competition, free trade and the overall control of competition. In France, the notion of fair competition gradually emerged in case law during the second half of the nineteenth century, whereas no antitrust laws had been adopted, and industry concentration was regulated by long-standing norms pertaining to goodwill.

In the United States, while antitrust norms developed rather early on, the notion of unfair competition was less common than in Germany or France, because it tended to be reduced (by the judges as well as by the economic actors) to patent law. In the United States, these features in turn supported the development and strength of major family-based company capitalism, just as the secondary place assigned to fair competition was to enable the rise of advertising (including comparative

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advertising). In other words, if the United States enjoyed a successful second industrial revolution, it was because forward transactions were quickly regulated, fairness was identified with patent ownership, and advertising and alliances between groups were allowed, whereas sector control (monopoly) was prohibited.

Conversely, if France's performance over the very long term (from the eighteenth century to today) ultimately proved to be more stable than that of its Anglo-Saxon rivals, it is because it afforded no protection to the consumer during the nineteenth century, fairness prevailed over vertical integration as the ideal for competition, and finally, the private order of the market was never altogether disconnected from the public order.

## SCALES OF COMPETITION

Is it relevant to compare forms of capitalism on a national basis? Naturally, approaching this topic through law gives decisive weight to national factors, as one can speak of English law, French commercial law, and so on. Legal institutions are also defined on a national scale. The rules of law as asserted beginning in the eighteenth century were given national legitimacy, if not necessarily content, which is indispensable to understanding capitalist industrialisation. Legal nationalism often went together with economic nationalism in the nineteenth century.<sup>2</sup> At the same time, this national dimension had to cope with fragmented legal decisions and trade customs on the one hand and capitalist dynamics on the other, which in the end were more regional and international than national.<sup>3</sup> Outside state policy, the nation is not a unit that travels very well.<sup>4</sup>

<sup>2</sup> Willibald Steinmetz, *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany and the United States*. Oxford, Oxford University Press, 2000; Michael John, *Politics and the Law in Late Nineteenth Century Germany: The Origin of the Civil Code*. Oxford, Oxford University Press, 1989; Jean Carbonnier, "Le code civil." In Pierre Nora, *Les lieux de mémoire*, II, *La nation*. Paris, Gallimard (1986): 293–315.

<sup>3</sup> Sidney Pollard, *Peaceful Conquest: The Industrialization of Europe, 1760–1970*. Oxford, Oxford University Press, 1981; Jeffrey Williamson, "Globalization, Convergence and History." *Journal of Economic History*, 80 (1990): 651–68; Kenneth Pomeranz, *The Great Divergence*. Princeton, NJ, Princeton University Press, 2000.

<sup>4</sup> Pomeranz, *The Great Divergence*, 7.

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The scale of analysis does not privilege the (external) observer; involved actors and institutions also think and act according to their historical perceptions of local, international, global and regional markets. Spatial variables are operational tools, not merely conceptual categories. Territorial roots, the relationships between actors and companies, trust and local customs, and “specific regional features” in general, do not exist outside institutional control; these elements are subject to tensions and agreements that are in no way spontaneous. The possibility of gaining recognition for local trade customs or product value through regional appellations is an example of this process. One of the mainsprings of capitalist economies lay in these tensions between national institutions, global dynamics and local recognition of products, services and actors.

At the same time, the tensions between the local dimension and national stakes fit into a resolutely international framework. The history of trade customs and *lex mercatoria* shows that over the very long term, trade customs were not opposed to state rules, but instead were perfectly in keeping with them, and in fact complementary.

This is all the more true in that, since the twelfth century, but particularly beginning at the end of the eighteenth century, trade involved not only objects and human beings but also knowledge, techniques, theories and norms. For example, France exported the civil code as well as silk; similarly, towards the end of the nineteenth century, American antitrust law was debated in France where different solutions were adopted, which in turn influenced the dynamics of the American economy and law.

Circulation of models and ideas cannot be excluded from the analysis, but it is not everything. Historical paths and bifurcations in markets and societies are the ultimate goal of our study.

## THE SCOPE OF THE BOOK

This book is mostly about market in its triple meaning: as a physical place, as transaction and as regulatory principle. Braudel has already mentioned these levels; I wish to add an institutional dimension. Of course, we are not going to study all the rules and all the markets. We



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will confine ourselves to studying product markets discussing certain aspects of credit, but we will leave aside labour and the land market. These aspects are no doubt related (the exchange of goods is linked to the sale of labour) and, even from the standpoint of the history of regulations, for a long time the control of competition came under the control of labour and was not separated from it until the end of the nineteenth century (coalition offences were long reserved for the labour market before becoming a core item in anti-trust legislation). At the same time, labour competition would require a book of its own.

Similarly, it would seem necessary from the start to include the land market in any study of competition. Indeed, this market has been perhaps one of the most regulated over the long term (we need only to think of the control of land and real estate transactions). It is precisely the strong, ongoing regulation of the land market that has prompted us to put it aside; if we succeed in establishing that other markets were regulated everywhere by showing the control of commercial transactions in movable property, products and goods, the argument will hold all the more for the real estate market.

We will not study the financial market itself. We will rather examine its historical and economic emergence as a market distinct from labour and produce markets. This separation was far from spontaneous and requires an explanation. To this end, we will focus on certain types of credit, particularly commercial credit, shop financing, forward transactions and the commodity exchange. These will help us understand how the borderline between products and goods on the one hand and credit and money on the other was historically defined, negotiated and shifted. Commercial credit, commodities markets and shops have played an important role not only in commercial and industrial capitalism, but also in advanced, post-industrial and financial capitalism. This is in no way to deny the importance of finance and the stock exchange in themselves; on the contrary, we are eager to show that the ways in which the various forms of capitalism have historically regulated stock exchange and financial dealings are indebted to commodities markets, produce exchanges and speculation, the intangible capital of companies and their forms of financing.

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Finally, a remark concerning the geographical area we will be covering. We will emphasise the case of France and then compare it with certain Western countries. The case of France is not of interest because it was the country of “Colbertism” as opposed to liberal England; on the contrary, France is a perfect example of the ability to adapt pre-industrial rules to a dynamic context through legal codes, the adoption of trade customs and all the rules in support of family firms, intangible capital, and the reputations of actors and products. The comparison with other European countries and the Anglo-Saxon countries is justified by the question we are studying, namely the “specificities” of civil law countries in relation to common law countries in the construction of capitalism.

No doubt, these reflections could be enlarged to a much wider context including Russia, the Asian countries and Latin America. However, a real global analysis of trade and capitalism and a departure from Eurocentric approaches require a previous analysis of what the West and its economies really were. This book aims to answer this question.

The first two chapters will study representations and perceptions of market in a broad sense. After a look at the main economic history approaches to the topic of competition from the eighteenth century to today, we will study general legal-economic institutions. I will discuss the relationship between civil law and commercial law, law and customs, norms and case law. In particular, we will see how customs were incorporated into so-called formal law and the crucial role played by interpretation and jurisprudence in French law.

We will then go on to study the market and competition by differentiating three main levels: the market as a place of exchange (covered markets, shops, produce exchanges); the market as transactions and contracts; and finally, the market as a regulatory mechanism (control of competition). Although covered markets, shops and produce exchanges have often been seen as the expression of the competitive market, they were in fact regulated by a range of rules concerning access to places and the classification of the actors and traded goods.

I will then analyse the market as synonymous with exchange; within this scope, I will examine the rules for accepting products in the