Université de Paris

LIRAES
Economie de la Santé

LIRAES WORKING PAPER n°2020-02

State Capacity, Legal Design and the Venality of Judicial Offices

Décembre 2020

Bertrand Crettez, Bruno Deffains,
Olivier Musy, Ronan Tallec

DROIT, ÉCONOMIE, GESTION
Sociétés et Humanités
Université de Paris

State Capacity, Legal Design and the Venality of Judicial Offices

Bertrand Crettez[*,†], Bruno Deffains[‡], Olivier Musy[§], Ronan Tallec[¶]

December 2020

Abstract

Judicial venality, *i.e.*, the sales of public positions in the judicial sector, was used extensively in France and in Europe from the 16th to the 18th centuries. Offices were bought because judges received trial fees from litigants. Kings sold them because they needed money, at the cost of losing control of the judiciary. We develop a model of judicial venality and we rely on this model to provide an analytic narrative of the rise and the decline of judicial venality in Old Regime France. Historically, judicial venality improved French legal capacity despite limited opportunities to raise taxes and borrow. But judicial venality also sharply increased legal diversity which, in addition to lengthy and costly trials caused its final demise.

JEL Classification Numbers : H1, K0, K40, K41, N40, N43, P48.

Key Words : Venal Justice, Legal Institutions, Legal Centralization, State Capacity, French Old Regime

[*]We thank Claudine Desrieux, Michael Faure, David Le Bris, Peter Leeson, Marie Obidzinski, Nicolas Pinsard, Gabrielle Smart, Giovanni Battista Ramello and Mehrdad Vahabi for helpful comment on previous versions of this work.

[†]Université Panthéon-Assas, Paris II, CRED, EA 7321, 21 Rue Valette - 75005 Paris, bertrand.crettez@u-paris2.fr.

[‡]Université Panthéon-Assas, Paris II, CRED, EA 7321, 21 Rue Valette - 75005 Paris, bruno.deffains@u-paris2.fr.

[§]Université de Paris, LIRAES, EA 4470, 45 Rue des Saints Pères - 75006 PARIS, olivier.musy@parisdescartes.fr.

[¶]Université Panthéon-Assas, Paris II, CRED, EA 7321, 21 Rue Valette - 75005 Paris, ronan.tallec@gmail.com.

> Fourthly, should public employments should be venal? They ought not, I think, in despotic governments, where the subjects must be instantaneously placed or displaced by the prince. But in monarchies this venality is not at all improper, by reason it is an inducement to undertake that as a family employment, which would never be undertaken through a motive of virtue; it fixes likewise every one to his duty, and renders the several orders of the kingdom more permanent. Montesquieu (1748 [1989])

> What can be more savage, than to see a nation where, by lawful custom, the office of a judge is bought and sold, where judgments are paid for with ready money, and where justice may legitimately be denied to him that has not the wherewithal to pay; a merchandise in so great repute, as in a government to create a fourth estate of wrangling lawyers, to add to the three ancient ones of the church, nobility, and people... Montaigne (1564 [2004])

1 Introduction

Raising taxes to finance public goods is not always possible or desirable for a national ruler. For instance, increasing taxes may entail granting a minimum of representation and political rights, and thus sharing power. But instead of raising taxes, a ruler can let citizens *directly* pay for public services and *indirectly* pay for public goods. To wit, what the ruler can do is sell public positions and use the proceeds of the sales to provide public goods. In turn, buyers of public positions would receive the fees paid by citizens to benefit from their services. Historically, this alternative path to financing public expenditures was followed by Old Regime France through the sale of offices. Venal offices notably included the entire judiciary and most legal professions. Venality was rife in other parts of Europe from the 16th to the 18th century. It is a striking example of public service privatization. Interestingly, while there have been mass privatization programs in many countries in the last forty years, the judicial sector remains to a large extent publicly organized everywhere (especially in Europe), even though alternative dispute resolution methods are more and more used to resolve civil and commercial disputes. Developing countries which face difficulties in providing public services often try to reproduce the current judicial systems of European countries, but not the ones that helped the latter to build their legal capacity.

This paper focuses on the advantages and defects of judicial venality. To do this we propose a new model of legal design. We consider a ruler facing a broad set of judges, each of whom being characterized by an intrinsic probability to favor a representative plaintiff. Each judge, however, is inclined to further support the plaintiff since so doing increases both the number of suits and the fees paid by litigants. But deviating from his intrinsic probability to support the plaintiff is also costly for a judge. As a result, not all judges become pro-plaintiff. The ruler is also characterized by his own probability to support the plaintiff and receives a share of the fees paid by litigants. For him, there is a tradeoff between selling offices (which, in the model is equivalent to receiving a share of the litigants' fees) and losing control of the judiciary. We study this tradeoff and how it is affected by a change in the distribution of judges' characteristics. We show that increased the diversity in the judges' propensity to support the plaintiff may weaken the appeal of venality for the ruler.

Secondly, we rely on our model to provide an analytic narrative of the rise and the decline of venality in Old Regime France.[1] Venality was a successful policy in building state capacity, as it enabled the French monarchy which initially had limited coercive power, to raise money from its subjects, and increase the size of the state at the same time. But venality, in addition to making trials both costly and lengthy, also reinforced legal diversity, which eventually caused its demise at the beginning of the French Revolution.

This paper contributes to different strands of literature. It first contributes to the literature on legal design, and more specifically addresses the issue of how to select and finance the judiciary.[2] An early paper on this issue is Allen (2005) who focuses on English legal history and analyzes how to design public employment, including the judiciary, when there are monitoring problems. He finds that resorting to office venality is useful whenever private incentives are aligned with the ruler's objectives. Where private incentives conflict with the ruler's objectives, patronage is a better choice. Here, the perspective is different since we concentrate on judicial venality *per se* and more specifically on the determination of trial fees as well as how they are shared between the ruler and the judges. We show that even when the ruler and the judges' objectives are not aligned, the former can benefit from judicial venality.

[1] Esteves (2015) also proposes a model of venality in Old Regime France. Esteves' model, however, is different from ours notably because it takes the values of the fees received by office holders as exogenous, whereas we try to endogenize them.

[2] See Gaukrodger (2017) for a recent review of the different compensation systems for adjudicators.

We also contribute to the study of the optimal degree of legal centralization (La Porta et al. (2008)). To study this degree, Glaeser and Shleifer (2002) pay attention to vertical conflicts of interests between a central ruler and local agents. They notice that decentralized justice is sensitive to local pressures, while centralized justice depends on the central ruler's preferences.[3] Comparing French and English legal systems in the Middle Ages, they argue that France chose to let royal judges make judicial decisions (leading later to a centralized legal system) because local lords feared their neighbors more than the King. By contrast, England chose a system of juries (leading later to a judge-made legal system) to counterbalance the overweening power of the King. These medieval origins of today's legal systems are criticized by Klerman and Mahoney (2007a) who show that venality made French judges more independent of the King than their English counterparts. Another criticism was made by Crettez et al. (2018) who contend that French legal centralization actually began with the French Revolution and was an institutional response to the egalitarian aspirations of citizens triggered by the Enlightenment. An alternative explanation for French legal centralization is provided by Arruñada and Andonova (2005) who center on the alleged fact that at the end of the 18th century, local judges opposed free markets and contractual equality. Granting them judicial discretion would have threatened the development of the economy which is why France chose legal centralization and enacted the Napoleonic Civil Code in 1804. Arruñada and Andonova (2005), however, do not consider judicial venality as such, nor do they highlight the tradeoff associated with this system. In addition, by focusing on the Civil Code (1804), they overlook the fact that the bulk of legal transformations occurred at the beginning of the French Revolution, from 1789 to 1791 (see Blaufarb (2016)). In a different vein, legal centralization is also analyzed in relation to horizontal conflicts of interests between private agents. The key tradeoff is that centralizing the production of law diminishes the costs of legal diversity, but does not fulfill local preferences for specific rules. In relation to this tradeoff, Loeper (2011) shows that legal uniformity can be Pareto-dominated by legal diversity. Crettez et al. (2018) reconsider the tradeoff above by arguing that legal uniformity can be desired *per se* because of aversion to inequality before the law. They show that there is a threshold such that when the intensity of aversion to inequality before the law is below this threshold legal decentralization is preferred to legal centralization (and conversely). They also show that the

[3]The subversion of legal institutions by the wealthy and the politically powerful is further addressed in Glaeser et al. (2003).

optimal way to balance the desire for local adjustments and national uniformity is to have uniform rules that can be adapted by judges. Here, we follow a far less aggregated approach and we focus on how to build state legal capacity.

Venality shares many characteristics with fee-based private justice, and therefore we also contribute to the literature analyzing justice as a private good.[4] To analyze the properties of fee-based justice, we adapt the standard model of trial with optimistic litigants developed by Landes (1972), Shavell (1982) and Barg-Gill (2005), *inter alia*, to take into account the case where judges received fees from litigants. Landes and Posner (1979) argue that competition between judges should make fee-based private justice efficient, and that it is always possible to control the trial costs by fixing the fees values. We show that when competition between judges is weak, fee-based private justice has a pro-plaintiff bias because it is the plaintiff who chooses to bring the case to the court. In addition, judges can manage to extract large fees from litigants. As an example, in France Old regime venal judges received extra fees by increasing the trial length. Our results complement those obtained by Klerman (2007b) in his study of English fee-based justice before 1799. Indeed, he shows that this system was biased toward plaintiffs in order to raise fees, a fact which was vigorously denounced by Bentham. Venality, however, differs from a fee-based private justice in that the ruler sells offices and uses the proceeds of the sale to finance public expenditures. In this connection, venality can achieve a certain level of efficiency, albeit in ways that differ from those analyzed by Landes and Posner (1979).

Finally, we also contribute to the literature on *state capacity* (see, *e.g.*, Besley and Persson (2011), Dincecco (2017), Johnson and Koyama (2017)). State capacity refers to the ability of a state to provide public goods and services. It includes both fiscal and legal capacities. Fiscal capacity is the state's ability to raise the fiscal resources needed to finance the provision of public goods and services, including justice, whereas legal capacity is its ability to define and enforce the rule of law. Those capacities are intertwined. To wit, a minimal fiscal capacity is required to assure legal capacity, which in turn increases the tax base and the ability to borrow (see Johnson and Koyama (2014)). Stasavage (2003) argues that France borrowed at a higher interest rate than England during the 18th century because its power to tax was impaired by the lack of parliamentary and

[4] Landes and Posner (1979) argue that "few economists realize that the provision of judicial services precedes the formation of the state and that many formally public courts had important characteristics of private institutions."

representative institutions. Yet, early modern states like France devised ingenious ways to extract resources from society without resorting to taxation. In this regard, venality helped the monarchy to develop French legal capacity over time. In addition, the proceeds of the office sales financed other expenditues, not least wars. At this time, often called *Le Grand Siècle* (the Great Century), France was the most powerful country in Europe.

The remaining part of the paper unfolds as follows. In the next section, we present our model of litigation with judicial venality. We use this model in section 3 to study the interactions between a national ruler and a large set of venal judges. Section 4 is devoted to a brief historical presentation of judicial venality in French Old Regime. In section 5, we rely on our model to provide an analytical narrative of the evolution of venality. Some concluding remarks are offered in section 6. All the technical proofs are relegated to an appendix.

2 Judicial Venality and the Canonical Model of Litigation

Judicial venality has three distinctive features. Firstly, it is a fee-based system in which litigants directly pay the trial costs to judges. Secondly, because judges buy their offices from the ruler, they are relatively independent from him. Thirdly, when people pay trial fees they *indirectly* contribute to the financing of the ruler's expenditure. This is in contrast with the standard system where taxpayers directly finance the provision of public goods and services (including payement of civil servants).

Our model of venality aims at capturing these three features. In this section we focus on the first feature by introducing judicial venality in the canonical model of civil litigation.[5] We next briefly recall this model before adapting it to take venality into account.

2.1 The canonical model of litigation

Consider two optimistic litigants, a plaintiff and a defendant, who meet a venal judge. Let p^e be the expected probability perceived by the two litigants that the plaintiff will win his lawsuit (this probability is common knowledge and will turn out to be *judge* dependent). Let C_p denote the cost of the lawsuit for the plaintiff, and C_d the cost for the defendant.

[5]The model also applies to commercial litigation.

If the plaintiff wins the lawsuit, the defendant pays his own costs and a share γ of the trial costs borne by the plaintiff. If the plaintiff loses the lawsuit, he pays his own costs and a share α of the defendant's trial costs. The expected cost k_p of a lawsuit for the plaintiff is then

$$k_p = C_p(1-\gamma p^e) + C_d \alpha (1-p^e), \tag{1}$$

and the expected cost k_d of a lawsuit for the defendant reads

$$k_d = C_p \gamma p^e + C_d\big(1-\alpha(1-p^e)\big). \tag{2}$$

While both litigants expect the plaintiff to win his lawsuit with probability p^e, they have different estimates of the sum that the defendant is ordered to pay if the plaintiff is victorious. Let D_p and D_d be the plaintiff and the defendant's estimates, respectively, where $D_d < D_p$. This inequality reflects both the plaintiff's and the defendant's optimism. It means that the plaintiff expects to receive an amount larger than the sum that the defendant expects to give.

Under the foregoing assumptions, the expected gains of the plaintiff and the defendant are as follows

$$U_p = p^e D_p - k_p, \tag{3}$$

$$U_d = -p^e D_d - k_d. \tag{4}$$

To avoid paying litigation costs, the parties can negotiate an out-of-court settlement.[6] Pre-trial bargaining is chosen over a lawsuit whenever the expected loss of the defendant is larger than the expected gain of the plaintiff, that is

$$p^e D_p - k_p < p^e D_d + k_d. \tag{5}$$

Parties file suit whenever condition (5) does not hold. This is the case when the sum of litigation

[6] We assume that forum shopping is impossible.

costs are no greater than the expected difference in the claim values

$$C_p + C_d \leq p^e(D_p - D_d). \tag{6}$$

2.2 Litigation and venality

In contrast to the standard model of litigation, venal judges earn the trial fees paid by litigants.[7] Suppose that a judge can choose the values of C_p and C_d of the trial fees (section 5 presents evidence that Old regime judges chose the trial fees by controlling the trial length). Then the judge will extract all the surplus of the trial by choosing the value of $C_p + C_d$ that makes the litigants indifferent between going to court and negotiating an out-of-court settlement, *i.e.*,

$$C_p + C_d = p^e(D_p - D_d). \tag{7}$$

Of course, a judge should also make sure that the plaintiff is not worse off when filing a suit, *i.e.*,

$$k_p \leq p^e D_p, \tag{8}$$

and thus should check that

$$C_p(1 - \gamma p^e) + C_d \alpha(1 - p^e) \leq p^e D_p. \tag{9}$$

Notice, however, that any pair (C_p, C_d) satisfying condition (7) also satisfies condition (9).[8]

A judge would be better off by *further* favoring the plaintiff, namely, acting in such a way that $p^e = 1$. Yet, it is unlikely that all judges would give full support to the plaintiff. To see this, assume that in the absence of venality, the probability of favoring a plaintiff differs from one judge to another (this probability may depend, for example, on unclear laws, variations in courts' information, or interpretations, political views, local customs and so on). Call this probability the natural, or intrinsic probability of favoring a plaintiff. The values of this natural propensity are distributed over

[7] Not all the litigation fees are actually received by judges. For instance, litigants must also pay their lawyers and so on. For simplicity, we only consider the fees paid to judges.

[8] That is because both $1 - \gamma p^e$ and $\alpha(1 - p^e)$ are lower than one.

the set $[0, \overline{p}]$ according to a probability distribution function F which has a density f.

Furthermore, suppose that the cost for judge i of deviating from his natural probability of favoring a plaintiff p_i is equal to

$$\frac{\rho}{2}(p^e - p_i)^2, \tag{10}$$

where ρ is a positive parameter.[9] This overall cost includes the cost of deviating from one personal opinion, the cost of deviating from the law as it is commonly perceived, the cost of being overturned by an appeal court and so on. Using the above assumptions, the net payoff of judge i is given by

$$p^e(D_p - D_d) - \frac{\rho}{2}(p^e - p_i)^2. \tag{11}$$

It turns out that no judge would give full support to the plaintiff wherever ρ is large enough.

2.3 Venal judges and the ruler

Venal judges bought their offices at a price $\mathscr{P}_o$. Owning a judicial office enabled judges to obtain fees from litigants, as well as continuing payment from the ruler. Let f_t and g_t be the trial fees and the payment received by a judge at each date t, respectively. Also assume that these terms remain constant over time. Then one can show that choosing the values $\mathscr{P}_o$ and g_t boils down to choosing the share ϕ of the trial fees accruing to the ruler (the judges receiving a share $1-\phi$ of the fees).[10] Therefore, there is no loss of generality in focusing on this share and ignoring the determination of $\mathscr{P}_o$ and g_t.

In relation to the trial studied in the foregoing subsection, the judge's net gain is given by $(1-\phi)p^e(D_p - D_d)$. Hence, judge i's behavior is given by the solution to the following problem

$$\max_{0 \leq p^e \leq 1} \left\{ (1-\phi)p^e(D_p - D_d) - \frac{\rho}{2}(p^e - p_i)^2 \right\}. \tag{12}$$

This solution depends on p_i, the judge's propensity to favor the plaintiff absent venality, and is given

[9] For simplicity, we suppose that this parameter does not depend on judges' types.

[10] See appendix A.

as follows

Proposition 1. *A venal judge whose natural propensity to favor the plaintiff is p_i actually favors him with probability $p^e(p_i)$, where*

$$p^e(p_i) = \begin{cases} p_i + \frac{(1-\phi)}{\rho}(D_p - D_d) & \text{if } p_i \leq 1 - \frac{(1-\phi)}{\rho}(D_p - D_d), \\ 1, & \text{otherwise.} \end{cases} \tag{13}$$

Clearly, the probability $p^e(p_i)$ increases with p_i and $D_p - D_d$ (the difference in the assessment of damages by the litigants), and decreases with ϕ (the share of the trial fees accruing to the ruler) as well as ρ (the cost of deviating from one's natural propensity to favor the plaintiff). Thus, the fee-based feature of venality creates a *pro-plaintiff bias*, that the ruler can reduce by increasing his share ϕ of the trial fees.

We shall hereafter assume that

$$\overline{p} + \frac{D_p - D_d}{\rho} < 1. \tag{14}$$

This assumption ensures that judge $\overline{p}$, who is the most inclined to favor the plaintiff, will not always decide the case in his favor, even if he can keep all the fees paid by the litigants. To put it another way, $p^e(p_i)$ will always be strictly lower than one. Such a property will considerably simplify the foregoing analysis of the interactions between the ruler and the judges, without affecting our results qualitatively.

3 Legal Design and the Venality of Judicial Offices

This section addresses the optimal design of judicial venality from the ruler's viewpoint. We first consider the ruler's payoff. Then, we study the choice between venality of judicial offices and a legal system where the ruler directly controls judges' decisions.

3.1 The ruler's payoff

Assume that all trials can be described by the model of the preceding section. Recall that there is a representative plaintiff who estimates that the representative defendant owes him D_p, whereas the defendant estimates his liability to be D_d. Also recall that there is a continuum of judges whose natural propensities p_i to favor the plaintiff belong to $[0,1]$. Now assume that the ruler has his own opinion about the right probability to favor the plaintiff, which we denote by p_R, and that the cost for him of having a judge's propensity $p^e(p_i)$ different from p_R is $\frac{\psi}{2}(p^e(i)-p_R)^2$, with $\psi > 0$.

Furthermore, suppose that the ruler's payoff W_R is given by

$$W_R = \int_0^{\overline{p}} \phi\, p^e(p_i)\,(D_p - D_d)\, f(p_i) dp_i - \frac{\psi}{2}\int_0^{\overline{p}} (p^e(p_i)-p_R)^2 f(p_i) dp_i. \tag{15}$$

In the expression above the first term represents the trial fees received by the judges that are paid back to the ruler. The greater these fees, the higher the ruler's payoff. The value of these fees notably depends on the distribution of the judges' natural propensities p_i to favor the plaintiff. The more the distribution is concentrated on higher values of p_i, the greater the fees and the income received by the ruler.

The second part of the ruler's payoff represents the cost of having independent judges deciding cases on the basis of their own preferences and not on the ruler's. The parameter ψ is the relative cost of deviation from p_R in terms of the ruler's income.

3.2 The case for the venality of judicial offices

Let us assume that where there is no venality of judicial offices, the ruler receives no fees but can control the judiciary and force judges to favor the plaintiff with a probability equal to p_R. Thus, $p^e(p_i) = p_R$ for all p and it holds that $W_R = 0$.[11]

Venality of judicial offices is therefore the best decision whenever

$$W_R = \int_0^{\overline{p}} \phi\, p^e(p_i)\,(D_p - D_d)\, f(p_i) dp_i - \frac{\psi}{2}\int_0^{\overline{p}} (p^e(p_i)-p_R)^2 f(p_i) dp_i \geq 0. \tag{16}$$

[11] Actually, W_R is likely to be negative since the ruler is unlikely to control all the judges' decisions. Besides, judges must be paid, and the ruler, who is reluctant to raise taxes, will have to rely on his own resources.

This condition can be rewritten as

$$W_R = \phi \mathbb{E}[p^e(p)]\,(D_p - D_d) - \frac{\psi}{2}\left[\mathbb{V}[p^e(p)] + \left(\mathbb{E}[p^e(p)] - p_R\right)^2\right] \geq 0. \tag{17}$$

where $\mathbb{E}[p^e(p)]$ is the expected value of the $p^e(p_i)$ and $\mathbb{V}[p^e(p)]$ is their variance.

Inspecting the value of W_R in (17) we see that the venality of judicial offices is more likely to be chosen

- where the variance of the actual propensities to favor the plaintiff $\mathbb{V}[p^e(p)]$ is low (holding $\mathbb{E}[p^e(p)]$ constant);
- where the ruler's preferred propensity p_R nears the expected propensities of judges to favor the plaintiff $\mathbb{E}[p^e(p)]$;
- where the relative cost of the deviation ψ is small.

3.3 Optimal levy on trial fees

Assume that condition (16) is fulfilled and that the ruler chooses ϕ to maximize his payoff $W_R(\phi)$, where $W_R(\phi)$ is obtained from equation (15). The next Proposition gives the optimal value of the levy ϕ on trial fees.

Proposition 2. *The optimal levy on trial fees ϕ^* is*

$$\phi^* = \max\left\{0, \min\left\{1, \frac{\left(1+\frac{\psi}{\rho}\right)\left(\mathbb{E}[p_i\,] + \frac{D_p - D_d}{\rho}\right) - \frac{\psi}{\rho}p_R}{\frac{D_p - D_d}{\rho}\left(2+\frac{\psi}{\rho}\right)}\right\}\right\}. \tag{18}$$

The optimal value of ϕ is no lower than zero, because $W_R(0) < 0$. More precisely, choosing a levy equal to zero obviously yields no income, and nor does it ensure that judges' propensities to favor the plaintiff are equal to p_R: in that case, not choosing venality of judicial offices is the best solution. The optimal value of ϕ can also be lower than one. To understand why, consider the case where the ruler sets ϕ equal to 1 and suppose that he contemplates the effect of a marginal decrease in ϕ by an amount ε. Notice that when $\phi = 1$, judges no longer specially favor the plaintiffs (that is, beyond their natural propensity to do so) and the ruler receives the total value of the trial fees. When the

levy on trial fees decreases by a small amount, the ruler receives a marginally lower share of the total value of the trial fees. But a marginal decrease in ϕ also leads judges to favor the plaintiffs slightly more. When the judges' expected natural propensities to favor the plaintiff are lower than the preferred value of the ruler, a marginal decrease in ϕ makes every judge's propensities $p^e(p_i)$ closer to p_R. That shift *decreases* the ruler's cost for the deviation of judges' decisions from p_R. When the second effect dominates the former, the ruler is better off reducing the levy on trial fees. Finally, observe that ϕ^* increases with the expected value of the judges' propensity to favor the plaintiff $\mathbb{E}[p_i]$ and decreases with the ruler's propensity p_R.

3.4 Country size and venality

How does the ruler's payoff relate to the size of his country? A larger country a priori needs more judges than a smaller one. Therefore, the ruler of a large country can sell more offices and receive more trial fees compared to what he would get were the country smaller. But judges' characteristics can also be more diverse in larger countries and the cost for the ruler of the decisions made by independent venal judges may increase according to the size of his country. As a result, it is possible that the larger the country, the smaller the ruler's payoff.

More formally assume that the size of the country is initially normalized to one and increases to $L > 1$. Assume also that the *proportion* of judges of types i in $[p_i, p_i + dp_i]$ is given by $g(p_i)dp_iL$ (instead of $f(p_i)dp_i$ before the expansion of the country). For simplicity, suppose that the distributions F and G have the same means.[12] We then obtain the next result

Proposition 3. *Assume that distributions F and G of judges' natural propensities to favor the plaintiff have the same means. Then the effect of an increase in the country size on the ruler's payoff is given by*

$$W_S^L - W_S^1 = \phi(L-1)\left[\mathbb{E}[p_i] + (1-\phi)\frac{D_p - D_d}{\rho}\right] - \psi(L-1)\left[\mathbb{E}[p_i] - p_R(1-\phi)\frac{D_p - D_d}{\rho}\right]^2 - \psi\left(L\mathbb{V}_G(p_i) - \mathbb{V}_F(p_i)\right). \quad (19)$$

[12] Notice that whenever the distributions of judges' characteristics F and G have the same mean, Proposition 2 ensures that the optimal value of ϕ is independent of the country size.

Thus a sharp rise in the cost associated with an increase in judges' heterogeneity (the last term in the above expression) may outweigh the increase in the value of the trial fees received by the ruler.[13]

We shall use Proposition 3 to propose an analytical narrative of the evolution of the French Old Regime practice of venality. We summarize the main features of this practice beforehand.

4 French Old Regime and the Venality of Judicial Offices

Financing public expenditure through the sale of offices was by no means a French exception. That was current practice in Germany, England, Spain, Venice, the Papal states and so on. In France, however, the sale of offices appears to have been the most considerable and to have lasted the longest. Office venality was instrumental in the building of state capacity (and notably legal capacity) and remained in use until the very last days of the monarchy. This section briefly presents the origins of venality, then focuses on judicial offices before briefly studying the costs of venality and the attempts at reforming it.

4.1 Adoption and development of office venality in France

Saint-Bonnet and Sassier (2011) (p. 233) assert that at least since the end of the 13th century, a new royal tax was considered legitimate insofar it had been formally accepted by the common people. In the 14th and 15th centuries, acceptance was given by the General Estates, a general assembly representing the French estates of the realm.[14] Yet, during the rise of the absolute monarchy (from 1614 to 1789), French kings avoided summoning the General Estates. Therefore, it was difficult to raise taxes, and since the French monarchy was considered a bad debtor, issuing public debt was no easier. Despite increased fiscal capacity over time (see Johnson and Koyama (2014)), the French monarchy actually faced a persistent default risk until its demise (see Velde and Weir (1992) for the period from 1746 to 1793). Venality was hence a means used by the monarchy to develop

[13] Notice that the assumptions made in the Proposition are satisfied when the distribution function F is second-order stochastically dominant over the distribution function G. That is $\int_0^{p'} F(p)dp < \int_0^{p'} G(p)dp$, $\forall p' \in]0, \overline{p}[$. This implies that the variance $\mathbb{V}_G(p_i)$ of the natural propensities p_i with G is higher than $\mathbb{V}_F(p_i)$ and that the means of the two distributions are equal.

[14] Those estates included the clergy (the First Estate), the nobility (the Second Estate), and the commoners (the Third Estate). The commoners, however, were not democratically elected. They were mainly guild members, bourgeois, and officers who stood out from the people by their wealth, influence or status.

administrative institutions under constantly tight budget constraints (Reinhard (1998), Descimon (2006)). Office venality was not only an expeditious way to develop state capacity. According to Montesquieu, venality was also an effective means to allocate public offices under a monarchy because it prevented clientelism, favoritism and nepotism.[15]

Beginning in the absence of any clear legal framework under the reigns of Francis I and Henry IV during the 16th century, office venality was progressively given sound legal foundations. [16] What was only a financial expedient in years deeply affected by the wars in Italy and the civil war became a central institution of the monarchy and remained until its fall in 1789, when venality was completely abolished (Bien (1987)).

According to Mousnier (1970) (p. 2) and Nagle (2008), French administration was much more developed during the Old Regime than it was during the medieval period. While the number of stable positions in the royal administration was around 300 at the end of the Middle Ages (and included only a few dozen for the King's Council, the main organ of power, Harsgor (1980)), there were at least 4000 officers (of whom 1500 judges) in 1515, and 46 000 in 1665 (among whom 9000 judges).[17] With the progressive centralization of power, delivering justice gradually evolved from a duty of local lords to one of the main missions of the King (Olivier-Martin (2005), p. 518). After giving an official framework to venality in 1523, Francis I laid the foundations of the new public service of justice. The very nature of the judiciary was modified. While in England lay judges survived in many courts, in France "through the last three centuries of the Old Regime, the displacement of lay by professional judges was almost everywhere complete" (Dawson (1960), p. 69). Officers were independent from the King but they remained public servants in the sense that the monarch could withdraw the title to the office from his holder (albeit with financial compensation) in the event of abuse of authority, prevarication or death.

With venality, the number of judges increased, which made it possible to provide justice on a larger scale. The country was increasingly covered by new courts. In 1552, Henri II created 60

[15] Richelieu, quoted by Doyle (1992) also argued that "The system of offices destroyed the power of aristocratic clientage, eliminated corruption by introducing publicity, and gave to the rich a vested interest in supporting the government."

[16] Pinsard (2018) and Pinsard and Tadjeddine (2019) analyze how the market for offices was progressively implemented in France during the 16th century.

[17] By contrast, Royer et al. (2016), (p. 113) estimates the number of judges in modern France to be 8500 for a population which is more than three times that of the Old Regime.

new *présidiaux* (local courts), see Figure 1. Some provincial Parliaments were also created later, reaching 14 at the end of the Old Regime. Inside any given court, activity was on the rise. As an example, Figure 2 gives the number of appeal trials for criminal justice over a century in the area of the Parliament of Paris.

Figure 1: Local courts created in 1552 (from Claerr (2008))

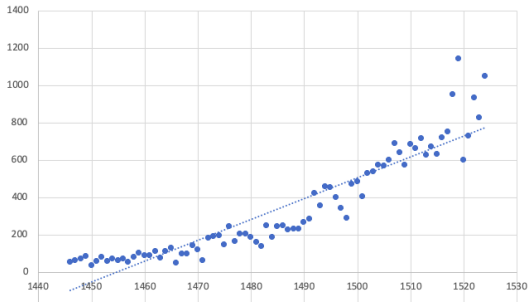

Figure 2: Criminal trials by the Parliament of Toulouse (from Viala (1953), p. 213)

.

4.2 Office acquisition

Acquisition of offices followed a standard pattern. New or vacant offices were sold by public auction. A buyer would pay the price (the "*finance*") to a special Treasury department. He could later sell his title or pass it on to his heir: offices were considered as private property. They were bought for two reasons. Firstly, buying an office was a way to obtain a more honorable social position[18] and even in some cases to obtain a title of nobility.[19] This explains why the demand for offices was continuously high. As commented by Pontchartrain, a minister of Louis XIV: "Each time the King of France creates an office, God immediately creates an idiot to buy it." (Royer et al. (2016)). Secondly, officers received two types of income. The first one, called "gages", was paid by the King, albeit intermittently. Gages were totally independent from the officers' level of activity. The second one, called "epices" for officers of justice, depended on the officers' activity. Epices consisted of

[18] See Deffains et al. (2020) for a presentation and an estimate of the price of social status in the French Old Regime.
[19] As a result, office venality came to be known as the "polishing brush for commoners" (Royer et al. (2016), p. 123).

trial fees paid to judges for performing tasks like cases studies, enquiries, information gathering and so on.

4.3 Legal procedures

During the Old Regime, legal procedures differed from one local court to another (they were referred to as "the style of the court"), although they had much in common. The Code of civil procedure introduced in 1667 standardized procedures over the kingdom, but did not achieve legal unification. We next rely on this code to give a brief account of a civil trial.[20]

A plaintiff would bring a lawsuit against a defendant by resorting to a bailiff. The latter would then transmit the lawsuit to the president of the court. If the president deemed the lawsuit acceptable, it was registered in the list of coming trials (the *role*). Each rank in the list corresponded to a specific judge. Then each party would hire a prosecutor (in addition to lawyers), whose task was to make sure that procedural formalities were complied with. Prosecutors could always try to negotiate a pre-trial settlement agreement. Short of this agreement, a first hearing would take place.[21] During the first hearing, the judge in charge of the trial would decide whether the case was a simple or a complex one. When the case was considered simple, the judge could make a decision (and accordingly, earn a limited value of the trial fees). When the case was considered complex, the judge could ask the litigants to supply additional trial materials. Each additional item had to be paid for by the parties to the judiciary. Once the trial materials had been collected and processed, the judge could finally hand down a decision. However, to obtain a written trace of the judgment, the parties had yet to pay a supplementary fee. The trial procedure corresponded roughly to the modern one, except that the parties had to remunerate the court and its staff directly. Figure 3 summarizes the conduct of a trial.

[20] For a more thorough presentation, see Fréger (2006) and Feutry (2013).

[21] The defendant had the right not to come to the hearing. But in that case, the judge adjudicated in favor of the plaintiff.

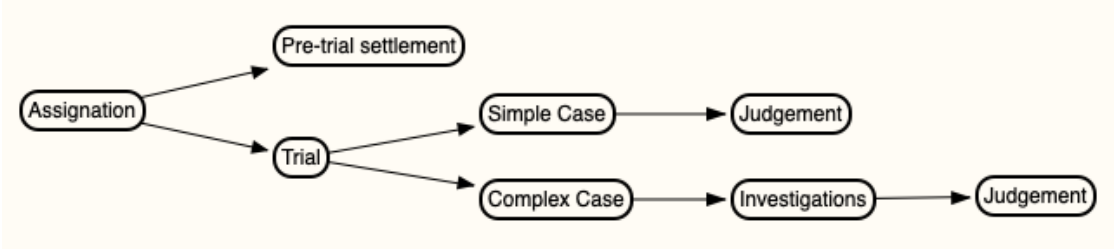

Figure 3: French Standard Civil Procedure in 1667

4.4 The costs of venality

Old Regime civil justice was frequently deemed both costly and lengthy.[22] Judges exploited the specificities of local customs and legal procedures to request many documents from litigants and thereby increased the trial fees. Further, as stated by Hamscher (1976) (quoted by Johnson and Koyama (2014), p. 80), venality and the growing number of offices resulted in "perennial jurisdictional conflicts among the courts and in a great expense to litigants who faced a vast judicial hierarchy if they were entitled to appeal a decision from a lower court." In a different vein Carbasse (2014) (p. 206) considers that France was also characterized by "an excessive diversity of judgments - with an excessive diversity of jurisprudence from one place to another." Venality of offices was a key factor in this diversity, because venal judges could freely interpret laws which were often obscure and contradictory.

The demand for simplified and standardized legal procedures to render trials cheaper and shorter was expressed from the beginnings of venality until its end. Judges' greed was deeply ingrained in the collective imagination, as can be seen in the famous writings of Rabelais (2004) or Racine (1668). It was less and less tolerated during the 18th century, in an era marked by the Enlightenment (Crettez et al. (2018)). As a consequence, there was a constant demand for the standardization of French legal procedures (Halperin (1992), p. 47). This standardization was notably considered as much more important than the unification of civil laws (Dauchy (2006)).

[22] Criminal justice was plagued by the same defects.

4.5 Attempts at reforming the judicial venality

Most of the reforms attempted to limit the negative effects of venality without completely removing it, because that was politically too costly. The first major reform of venality was undertaken by Louis XIV, who gave his minister Colbert the task of reducing legal uncertainty and the costs borne by litigants.[23] As a result of Colbert's efforts, Louis XIV enacted in 1667 the *Ordonnance Civile*, a comprehensive code regulating civil procedure, also known as the *Code Louis*.[24] The preamble of the code explicitly stated that the arbitrariness of courts resulted in lengthy and costly trials leading in turn to the ruin of families. Legal diversity was seen as a source of disorder and it was the monarch's duty to limit it (Saint-Bonnet and Sassier (2011), p. 386). To reduce legal diversity, the *Code Louis* restricted judges' freedom to determine the value of trial fees and procedural length. Moreover, it was no longer possible to interpret royal laws.

Despite its ambition, Colbert's reform had limited effects due to venality judges remained independent from the King.[25] In particular, they continued to rely on local customs to justify their decisions.[26] Moreover, in local superior courts, local customs continued to take precedence over royal ordinances until the end of the Old Regime (Wijffels (2014), p. 142). Consequently, there were also some attempts at unifying customs into a sort of "common law", but to no avail. As summarized by Carey (1981), those reforms did not penetrate to the roots of the problem, namely mingling finance and justice (p. 50).

Later on, d'Aguessau, *Chancelier* of King Louis XV, furthered the harmonization of legal decisions made by local courts, the number of which he also wanted to halve (Carey (1981), p. 54). But only a small number were abolished, because of the successful opposition of venal, and thus independent, judges (Carey (1981), p. 60). The subsequent major reform directly attempted to abolish venality and ensure free access to justice (Doyle (1997), p. 258). In April 1771, Maupeou, a minister of Louis XV, bought back many offices and introduced a new system where judges were nominated

[23] In 1665 Colbert identified more than 30 000 judicial offices and estimated that at most 8000 judges were actually needed (Doyle (2000)).

[24] While Colbert had wished to unify larger parts of the law, Louis XIV only wanted to reform legal procedures. In addition to the *Code Louis*, a code of criminal procedures was introduced in 1670.

[25] However, Colbert bought back 20,000 offices at fixed reimbursement prices that were below their market values (Doyle (2000)).

[26] The use of local customs to limit the application of central legislation was well understood by the revolutionary decision-makers, who completely eliminated venality as well as customs as a source of the law (Crettez et al. (2018)).

and paid by the King (Villers (1937)). This reform met strong local political opposition and was actually canceled when the King died in 1774, despite improvements in judicial efficiency (Villers (1937)). Yet public support for venality continuously decreased over time and only a few people actually supported it by the end of the 18th century (Doyle (1997)).

Office venality was fully removed at the beginning of the French Revolution (Lafon (2001)). The reform of the judiciary was among the first tasks undertaken by the newly created National Assembly. Judges became ordinary civil servants, paid by the State, and had to strictly apply the legislation made by a central parliament. They were not allowed to interpret the law or rely on local customs. This, however, proved impractical. A more flexible legislation was introduced by Napoléon later on, including the *Code civil* (1804) and the *Code de procédure civile* (1806). In this regard, it is worthy of note that the codification of civil procedures promoted by the Emperor was inspired by the codification of civil procedures achieved in 1667.[27]

5 An analytical narrative of judicial venality in the Old Regime

We now rely on the model studied in sections 2 and 3 to provide an analytical narrative of the evolution of judicial venality in Old Regime France. We first discuss the historical relevance of key assumptions used in the model.

Judges' independence

We have assumed that venal judges are independent of the ruler and can make decisions that differ from what he wishes. That assumption is supported by historical evidence. For instance, Klerman and Mahoney (2007a) state that "venality made French judges more independent than their English counterparts."[28] They even argue that "judicial insulation from political oversight reached an excessive level." With regard to the French Revolution, they contend that "an important goal of revolutionary reforms was to reduce the judges' power and independence."

Absence of forum shopping

[27] Treilhard, one of the four fathers of the Civil code, stated that a code of civil procedures was necessary to prevent judges from slowing trials or making arbitrary decisions.

[28] This is in contrast with Glaeser and Shleifer (2002) who underline the King's control over French justice.

Forum shopping is impossible in our model. To put it another way, judges do not compete with each other and the absence of competition enables them to set large trial fees. What limits these fees is the possibility that litigants might negotiate an out-of-court settlement. During the Old Regime, competition between judges was limited. That was because, as was already mentioned, lawsuits were registered in the list of coming trials, and each rank in the list corresponded to a specific judge. Choosing a particular judge was therefore difficult. Yet, to bring a lawsuit, it was sometimes possible to substitute an ecclesiastical court (or a seigniorial court) for a royal one. This alternative, however, had the same deterrent effect as an out-of-court settlement. It limited, but did not cancel, judges' power to set large trial fees.

Trial fee sharing

In our model, the ruler determines ϕ, *i.e.* the share of trial fees that accrue to him. There are no office sales *per se*. During the Old Regime, however, offices were sold on a primary market and were characterized by their prices and the level of *gages* that came with them. Yet, the King had the discretionary power to modify the value of these *gages* and he actually not always paid them. Moreover, officers were sometimes forced to pay extra fees in order to keep their offices. Therefore, our assumption that the ruler can choose the value of ϕ by determining a combination of the office sale price, the values of *gages* and mandatory payments, echoes with what French Kings did.

We now discuss some implications of the model regarding Old Regime venality.

Pro-plaintiff bias

Proposition 1 states that venal judges have a pro-plaintiff bias. It is difficult, however, to measure this bias directly and thus ascertain whether French judges were pro-plaintiff biased. Yet, where judges tend to favor the plaintiffs there should be a large number of trials. That was precisely the case in the last centuries of the Ancien Regime. Going to court was a "French passion": there were as many trials in France as in other European countries (Nagle (2008)). A somewhat indirect empirical evidence of the pro-plaintiff bias is provided by Klerman (2007b) for England, which had fee-based justice until 1799. By comparing judicial decision-making before and after the statutory reform that took fees away from the judges, he finds that on average judges ruled more for the plaintiff before the reform.

Costly trials

The study of our model has shown that where competition between judges is weak, each of them is able to receive significant fees from litigants. As far as the Old Regime is concerned, it is difficult to give an estimate of the trial costs (see Fréger (2006)). But there is a broad consensus as to the idea that trials were expensive. For instance, Marion (1969), p. 212, considers that "without any doubt, justice fees were considerable." Croix (1930) presents the details of the expenses incurred by a clothier who went to court to defend the rights of his corporation at the Parliament of Dijon and shows that he made numerous payments to the different members of the judiciary. More precisely, according to Guenee (1963), the costs of a trial without an appeal ranged from 3 to 50 *livres tournoi*.[29] A trial with an appeal to the Parliament of Paris could cost up to 500 *livres tournoi*. These figures are not consistent with Landes and Posner (1979)'s claim that it is always possible to limit trial costs by fixing the rates of judicial acts. While in the Old Regime *epices* did have a fixed value (Fréger (2006)), the degree of complexity of a trial was at the judges' discretion and it was fairly easy for them to increase it in order to make trials costlier.

Lenghty trials

Because trials were often complex, they could also be lengthy. Trials with an oral decision were short, but those with a written decision were longer, many of them lasting several years. Even a simple trial with a written decision never lasted less than two years and a half (Guenee (1963), p. 244). Some evidence is also provided by the pre-revolutionary *cahiers de doléances* (books of grievance) which on many occasions deplored the costs and the length of justice.[30] Ever since the beginning of venality, there were many attempts to reduce trial lengths (see, *e.g.*, Jeanclos (1977) on the projects of judicial reform of Raoul Spifame under the reign of Henri II).

The demise of venality

Venality was removed at the beginning of the Revolution, but we have seen that some kings had already tried to get rid of it because trials were too long and expensive. This policy shift was also

[29] According to Fourastié (1950), the maximum annual income of a 18th century laborer was around 150 *livres tournoi*.

[30] Civil trials were comparatively more expensive and lengthier than penal ones (see Bouloiseau and Cheronnet (1971), p. 139).

the unintended consequence of the sale of thousands of judicial offices over the years as well as of the rise in the size of the kingdom, in particular after Louis XIV'conquests. As offices were sold to people with more and more disparate backgrounds (in terms of values, skills, geographical origins, and so on) new officers tended to hold different views on justice than the King's. Moreover, the new components of the kingdom were allowed to keep many parts of their legal systems. Legal diversity was continually on the rise, resulting in what Carbasse (2014) calls a "normative abundance" (p. 219). Therefore, the judges of the new territories also tended to hold different views on justice to the King's. This evolution can be interpreted in the model as a change both in the size of the country and in the distribution of judges' natural inclinations to favor the plaintiff. Proposition 3 shows that when the country grows bigger and jugdes' characteristics vary more, the cost of venality rises for the ruler.

But this cost further increased because legal diversity came to be thought of as abnormal, especially during the 18th century (Crettez et al. (2018)). Indeed, law was no longer seen as a natural social fact, but as an institution that needed to be designed rationally and in this respect legal diversity was perceived as arbitrary. We can interpret this new view as an increase in ψ, which directly makes venality less appealing.

For these reasons, it was relatively easy to change the legal regime when the Revolution began. The country was ready to adopt a judicial system in which judges were public servants paid by the state, and where legal rules were made uniformed, the better control adjudication.

6 Conclusion

While office venality may seem a strange institution (or even a "weird" institution, in the sense of Leeson (2017)), this paper contributes to the understanding of its rationality in terms of legal design and creation of state capacity. Venality can be a useful institution for a state lacking fiscal resources, or/and without opportunity to borrow, and it was instrumental in the development of several European states.

We have proposed a model of venal judicial offices which builds on a version of the canonical model of litigation with optimistic litigants. We have analyzed how the ruler and the judges share

the trial fees. We have specifically studied the optimal value of the share accruing to the ruler. We have argued that the final demise of the venality system can be accounted for by increased diversity in judges' preferences (reflected in the model by their natural propensity to favor the plaintiff). Venality was no longer an efficient way of extracting resources from the common people. It was, however, politically costly to remove it, which is why it took no less than a Revolution to achieve.

Our analysis provides new insights into modern legal design. That is because, many countries still find it extremely difficult to tax and to borrow, and hence cannot develop state capacity. Venality can be thought of as an *intermediate institution* that can overcome initial funding constraints. Whether some modern forms of venality can, at least in part, alleviate the financial difficulties faced by some countries is a natural topic for further research.

References

ALLEN, DOUGLAS W. (2005), Purchase, Patronage, and Profession: Incentives and the Evolution of Public Office in Pre-Modern Britain, Journal of Institutional and Theoretical Economic, 161,57–79.

ARRUÑADA, BENITO AND ANDONOVA, VENETA (2005), Market Institutions and Judicial Rule-making, in Handbook of New Institutional Economics, Menard, Claude and Shirley, Mary M. eds., 229-250, Springer.

BAR-GILL, OREN (2005), The Evolution and Persistence of Optimism in Litigation, Journal of Law, Economics & Organization, 22, 2, 490–507.

BESLEY, TIMOTHY, AND PERSSON, TORSTEN (2011), Pillars of Prosperity: The Political Economics of Development Clusters, Princeton University Press.

BIEN, DAVID D. (1987), Offices, Corps, and a System of State Credit: The Uses of Privilege under the Ancien Régime, in The Political Culture of the Old Regime, Baker, Keith Michael ed., 93–97, Pergamon Press.

BLAUFARB, RAFE (2016), The Great Demarcation: The French Revolution and the Invention of Modern Property, Oxford University Press, Oxford.

BOULOISEAU, MARC AND CHERONNET, BERNARD (1971) Cahiers de doléances du Tiers-Etat du baillage de Gisors, Bibliothèque Nationale.

CARBASSE, JEAN-MARIE (2014), Manuel d'Introduction Historique au Droit, 5th Edition, Presses Universitaires de France.

CAREY, JOHN A. (1981), Judicial Reforme in France before the Revolution of 1789, Harvard University Press.

CLAERR, ROSELINE (2008), L'histoire d'une prise de décision : les édits des présidiaux (janvier et mars 1552), in La prise de décision en France (1525-1559), Publications de l'Ecole nationale des chartes.

CRETTEZ, BERTRAND, AND DEFFAINS, BRUNO, AND MUSY, OLIVIER (2018), Legal Centralization: A Tocquevillian View, Journal of Legal Studies, 46, 2, 295-323.

CROIX, CH. (1930), Ce que coutait un procès au XVIè siècle (1597), Annales de Bourgogne, 2, 185-187.

DAUCHY, SERGE (2006), La conception du procès civil dans le Code de procédure de 1806 in De la commémoration d'un code à l'autre: 200 ans de procédure civile en France, Cadiet, Loïc, and Canivet, Guy eds., Litec.

DAWSON, JOHN P. (1960), A History of Lay Judges, Harvard University Press.

DEFFAINS, BRUNO, KOREVAAR, MATTHIJS, MUSY, OLIVIER, AND TALLEC, RONAN (2020), The Price of Status: Venality in Pre-Revolutionary France, Working paper.

DESCIMON, ROBERT (2006), La vénalité des offices comme dette publique sous l'ancien régime français. Le bien commun au pays des intérêts privés, in La dette publique dans l'histoire, colloque organisé par le Centre de recherches historiques en novembre 2001, Andreau, Jean and Béaur, Gérard and Grenier, Jean-Yves eds, 175-240, Comité pour l'histoire économique et financière de la France.

DINCECCO, MARK (2017), State Capacity and Economic Development, Cambridge University Press.

DOYLE, WILLIAM (1997), Venality: The Sale of Offices in Eighteenth-Century France, Clarendon Press.

DOYLE, WILLIAM (2000), Colbert et les offices, Histoire, économie et société, 19, 4, 469–480.

DOYLE, WILLIAM (1992), 4 August 1789: The Intellectual Background to the Abolition of Venality of Offices, Australian Journal of French Studies, 29, 2-3, 230–240.

ESTEVES, RUIU (2015), Archomania: Venality and private finances on the eve of the french revolution. Working paper.

FEUTRY, DAVID (2013), Plumes de fer et robes de papier. Logiques institutionnelles et pratiques politiques du parlement de Paris au XVIIIe siècle, 1715-1790, Institut Universitaire Varenne.

FOURASTIÉ, JEAN (1950), Quelques réflexions sur l'évolution du niveau de vie des classes ouvrières, Revue Economique, vol. 1-4, 467–479.

FRÉGER, LAURIE (2006), Le légitime salaire du magistrat ? - Le régime des épices des magistrats aux XVIe-XVIIe siècles, Phd Thesis, Université de Rennes-I.

GAUKRODGER, DAVID (2017), Adjudicator Compensation Systems and Investor-State Dispute Settlement, OECD Working Papers on International Investment, 2017/05.

GUENÉE, BERNARD (1963), Tribunaux et gens de justices dans le bailliage de Senlis à la fin du Moyen âge, Les Belles Lettres.

GLAESER, EDWARD AND JOHNSON, SIMON AND ANDREI SHLEIFER (2001), Coase Versus the Coasians, The Quarterly Journal of Economics, 116, 3, 853-899.

GLAESER, EDWARD AND SHLEIFER, ANDREI (2002), Legal origins, Quarterly Journal of Economics, 117, 4, 1193-1229.

GLAESER, EDWARD, AND SCHEINKMAN, JOSÉ, AND SHLEIFER, ANDREI (2003), Inequality, Growth, Subversion of institutions, Journal of Monetary Economics, 50, 1, 199-222.

HALPERIN, JEAN-LOUIS (1992), L'impossible Code civil, Presses Universitaires de France.

HAMSCHER, ALBERT N. (1976), The Parlement of Paris after the Fronde, 1653–1673, University of Pittsburgh Press.

HARSGOR, MIKHAEL (1980), Recherches sur le personnel du Conseil du roi sous Charles VIII et Louis XII, Honoré Champion.

JAAIDANE, TOURIA, MUSY, OLIVIER AND TALLEC, RONAN (2020), Rent-seeking, reform and conflict: Louis XV and the French Parliaments, Working paper.

JEANCLOS, YVES (1977), Les projets de réforme judiciaire de Raoul Spifame au XVIe siècle, Droz.

JOHNSON, NOEL AND KOYAMA, MARK (2014), Taxes, lawyers, and the decline of witch trials in France, Journal of Law and Economics, 57, 1, 77–112.

JOHNSON, NOEL AND KOYAMA, MARK (2017), States and economic growth: Capacity and constraints, Explorations in Economic History, 64, 1-20.

KLERMAN, DANIEL AND MAHONEY, PAUL (2007), Legal Origin?, Journal of Comparative Economics, vol. 35, 278–293.

KLERMAN, DANIEL (2007), Jurisdictional Competition and the Evolution of the Common Law, University of Chicago Law Review, vol. 74-4, 1179–1226.

LAFON, JACQUELINE LUCIENNE (2001), La Révolution française face au système judiciaire d'Ancien Régime, Droz.

LANDES, WILLIAM (1972), An Economic Analysis of the Courts, Journal of Law and Economics, 61–107.

LANDES, WILLIAM AND POSNER, RICHARD (1979), Adjudication as a Private Good, The Journal of Legal Studies, vol. 8-2, 235–284.

LA PORTA, RAFAEL, LOPEZ-DE-SILANES, FLORENCIO AND SHLEIFER, ANDREI (2008), The Economic Consequences of Legal Origins, Journal of Economic Literature, vol. 46-2, 285–332.

LEESON, PETER T. (2017), WTF?!: An Economic Tour of the Weird, Stanford Economics and Finance.

LOEPER, ANTOINE (2011), Coordination in Heterogeneous Federal Systems, Journal of Public Economics, 95, 7, 200-2012.

MARION, MARCEL (1969), Dictionnaire des institutions de la France aux XVIIe et XVIIIe siècles.

MONTAIGNE, MICHEL DE (1564 [2004]), The complete essays, Penguin UK.

MONTESQUIEU, CHARLES DE (1748 [1989]), Montesquieu: The spirit of the laws, Cambridge University Press.

MOUSNIER, ROLANND (1970), Le conseil du roi: de Louis XII à la Révolution, Presses universitaires de France.

MOUSNIER, ROLAND (1971), La vénalité des offices sous Henri IV et Louis XIII, Presses universitaires de France.

NAGLE, JEAN (2008), Un orgueil français. La vénalité des offices sous l'Ancien Régime, Odile Jacob.

OLIVIER-MARTIN, FRANCOIS (2005) Histoire du droit français des origines à la Révolution, new edition of the 1948 version.

PINSARD, NICOLAS (2018), La marchandisation des offices comme appareils d'Etat au XVIIe siecle, Terrains & Travaux, vol. 33-2, pp. 25–45.

PINSARD, NICOLAS AND TADJEDDINE, YAMINA (2019), The Paulette edict of 1604: the marketization of the royal finances, Revue d'économie financière, vol. 135-3, pp. 273–280.

RABELAIS, FRANÇOIS (2004), Le cinquième livre.

RACINE, JEAN (1668), Les plaideurs.

REINHARD, WOLFGANG (1998), Papauté, confessions, modernité, Editions de l'EHESS.

ROYER, JEAN-PIERRE AND DERASSE, NICOLAS AND ALLINNE, JEAN-PIERRE AND DURAND, BERNARD AND JEAN, JEAN-PAUL (2016), Histoire de la justice en France, Presses Universitaires de France.

SAINT-BONNET, FRANÇOIS, AND SASSIER, YVES (2011), Histoire des institutions avant 1789, Montchrestien.

SHAVELL, STEVEN (1982), Suit, settlement, and trial: A theoretical analysis under alternative methods for the allocation of legal costs, The Journal of Legal Studies, 11 , 1, 55–81.

SOMAN, ALFRED (1995), La justice criminelle, vitrine de la monarchie française, Bibliothèque de l'École des chartes.

STASAVAGE, DAVID (2003), Public Debt and the Birth of the Democratic State: France and Great Britain, 1688-1789, Cambridge University Press.

VELDE, FRANÇOIS R., AND WEIR, DAVID R. (1992), The financial market and government debt policy in France, 1746–1793, Journal of Economic History, 52, 1, 1–39.

VIALA, ANDRÉ, Le parlement de Toulouse et l'administration royale laïque , 1420-1555 environ, Toulouse.

VILLERS, ROBERT (1937), L'organisation du parlement de Paris et des conseils supérieurs d'après la réforme de Maupeou (1771-1774), Sirey.

VOLTAIRE (1819), Œuvres complètes de Voltaire: Dialogues et entretiens philosophiques.

WIJFFELS, ALAIN (2014), Introduction historique au droit : France, Allemagne, Angleterre, Presses Universitaires de France.

A On the price of a judicial office and the tax levy ϕ on trial fees

Let $\mathscr{P}_o$ be the price of a judicial office, $(f_t)_t$ the stream of fees associated with this office and $(g_t)_t$ the stream of payments received from the ruler. Assume for simplicity that the time horizon decision of a would-be judge is infinite and that the interest rate is constant across time.[31] Under these assumptions, buying an office is profitable whenever

$$\mathscr{P}_0 \leq \sum_{t=1}^{\infty} \frac{f_t + g_t}{(1+r)^t}. \tag{20}$$

For simplicity, let us assume that f_t and g_t are also constant across time. Then the above inequality reads

$$r\mathscr{P}_o \leq f + g. \tag{21}$$

The time period net gain of an office buyer can be written: $f + g - r\mathscr{P}_o$. Denoting by $\phi = \frac{r\mathscr{P}_o - g}{f}$ the net share of fees accruing to the ruler, we have

$$f + g - r\mathscr{P}_o = f(1-\phi). \tag{22}$$

The office price is then equal to

$$\mathscr{P}_o = \frac{g}{r} + \frac{\phi f}{r} \tag{23}$$

This price is equal to the discounted sum of the gages value and the share ϕ of the trial costs. Therefore, one can analyse judicial venality by focusing only on the determination of the value of ϕ.

[31] An infinite decision-horizon is relevant particularly when judicial offices can be bequeathed.

B Proofs

Proposition 2 The optimal value of the levy on trial fees is given by

$$\rho^* = \max\left\{0, \min\left\{1, \frac{\left(1+\frac{\psi}{\rho}\right)\left(\mathbb{E}[p_i\,] + \frac{D_p - D_d}{\rho}\right) - \frac{\psi}{\rho}p_R}{\frac{D_p - D_d}{\rho}\left(2+\frac{\psi}{\rho}\right)}\right\}\right\}. \tag{24}$$

Proof. First of all, the objective function is continuous with respect to ϕ, therefore by the Weierstrass Theorem, there exists an optimal solution to the rulers' problem. Now recall that

$$W_S(\phi) = \int_0^{\overline{p}} \phi\, p^e(p_i)\,(D_p - D_d)\, f(p_i)dp_i - \frac{\psi}{2}\int_0^{\overline{p}} (p^e(p_i) - p_R)^2 f(p_i)dp_i \tag{25}$$

From Proposition 1 we have $p^e(p_i) = p_i + \frac{(1-\phi)}{\rho}(D_p - D_d)$. Then we get

$$\frac{\partial W_S}{\partial \phi} = \int_0^{\overline{p}} p^e(p_i)\,(D_p - D_d)\, f(p_i)dp_i - \phi\frac{(D_p - D_d)^2}{\rho} + \frac{\psi\,(D_p - D_d)}{\rho}\int_0^{\overline{p}} (p^e(p_i) - p_R)\, f(p_i)dp_i. \tag{26}$$

Again using Proposition 1, we obtain the Proposition after a little algebra. □

Proposition 3 *Assume that F and G have the same means. Therefore the effect of an enlarged kingdom on the King's payoff is equal to*:

$$W_S^L - W_S^1 = \phi(L-1)\left[\mathbb{E}[p_i] + (1-\phi)\frac{D_p - D_d}{\rho}\right] - \psi(L-1)\left[\mathbb{E}[p_i] - p_R(1-\phi)\frac{D_p - D_d}{\rho}\right]^2 - \psi\left(L\mathbb{V}_G(p_i) - \mathbb{V}_F(p_i)\right). \tag{27}$$

Proof. First of all, since the means of the distribution functions F and G are equal, from Proposition 2 we deduce that an increase in kingdom size from 1 to L leaves the optimal value of ϕ unchanged. Given our assumptions, when the kingdom's size is L the King's payoff is given by:

$$W_S(\phi) = L\left(\int_0^{\overline{p}} \phi\, p^e(p_i)\,(D_p - D_d)\, g(p_i)dp_i - \frac{\psi}{2}\int_0^{\overline{p}} (p^e(p_i) - p_R)^2 g(p_i)dp_i\right) \tag{28}$$

whereas the initial King's payoff is given by

$$W_S(\phi) = \int_0^{\overline{p}} \phi\, p^e(p_i)\,(D_p - D_d)\, f(p_i) dp_i - \frac{\psi}{2} \int_0^{\overline{p}} (p^e(p_i) - p_R)^2 f(p_i) dp_i.$$

From there we obtain the Proposition after a little algebra. □