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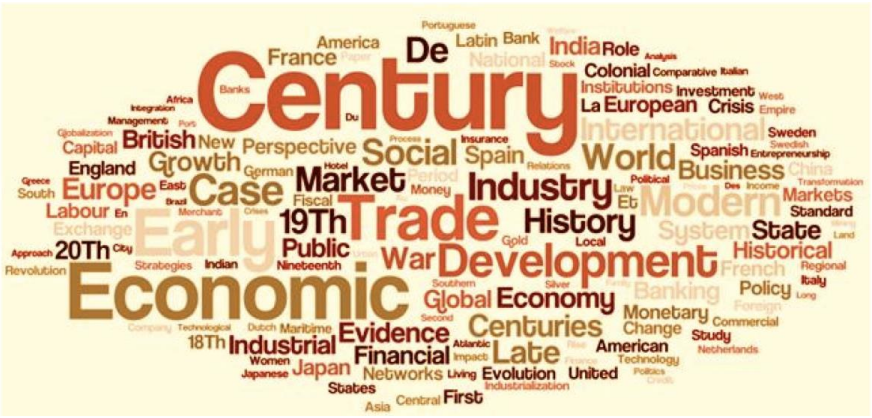

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Change for Continuity

The Making of the *société anonyme* in 19th Century France

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Abstract: The corporation (*société anonyme)* first appeared in French law in the *code de commerce* promulgated in 1807. Until 1863-1867, a special authorization granted by the government was needed for any creation of a SA. The literature generally emphasizes the importance of these two dates: the first one as the birth of a fundamental institution for the development of industrial capitalism; the second one as the triumph of private capitalism over the state and the liberalization of the SA. This paper challenges this narrative and shows that these changes in formal law were in reality vehicles for the continuity of practices. On the contrary, the stability of the law between 1807 and 1867 disguises radical change in the meaning of the SA. More generally, this paper highlights the importance of the actors' interpretation of the institutions they activate and, consequently, the limits of the approaches that are limited to observing the formal characteristics of the institutions.

I.Introduction

"The *société anonyme* [corporation] was established in France by the law of 24 July 1867" (Lemeunier, 1994, p. 10). This totally false assertion is the opening line in a popular textbook on corporate law that was widely used in the late twentieth century. In truth, the *société anonyme* (SA) had appeared for the first time in French law sixty years earlier, in the *code de commerce* (Commercial Code) promulgated in 1807, the economic component of a widespread drive for codification that was initiated by Napoleon in the 1804 *code civil* (Civil Code). This legal innovation was itself only a formality: in practice it gave a name to, and regulated, older commercial practices dating back to the chartered companies of the seventeenth century.

However, Lemeunier's 'mistake', cited above, is not trivial, and reflects a clear tendency in French historiography to overlook uses of the *société anonyme* form that were

not strictly capitalist. Consequently, Anne Lefebvre-Teillard and Charles E. Freedeman – the two foremost authorities on the history of the French SA – could agree upon a list of SAs formed in the nineteenth century that excluded not-for-profit organizations, even those explicitly founded as anonymous companies (Freedeman, 1979; Lefebvre-Teillard, 1985). This bias led to the exclusion of more than 15% of relevant companies from their analysis and, more importantly, an obfuscation of the formative years of the SA. The period from 1807 to 1867 (the date of the first fundamental reforms to corporate law) represented a time of transition during which case law and uses of the anonymous form developed. It therefore does not have the coherence or homogeneity that those scholars who, *a priori*, associate the SA with the birth of modern capitalism, seek.

In tracing the principal stages of the development of corporate law in France, this chapter aims to situate this pivotal period of the nineteenth century in the context of the long, and non-teleological history of a legal institution. Rather than denying the mercantilist origins of the SA, the aim is to bring them to light and to try to understand the slow mutation of the institution, notably between 1807 and 1867 when all SAs were required to obtain government authorization before they could be created. It should be noted from the outset that our approach is very different to a "lawyers' legal history"[1] that represents the history of law in terms of a series of texts that were providentially introduced by the legislature. Instead, we focus primarily on the interaction between the law, jurisprudence and practice. Ultimately, it appears that chronologies and interpretations that overlook the social history of law to focus exclusively on legislative texts are mistaken. In practice, continuities and discontinuities are not often found where formal law suggests they should be. Consequently, we argue that the alleged rupture of 1807 (with respect to the SA) was, in reality, a vehicle for the continuation of practices, and in no sense led to a break with those of the *Ancien Régime* – despite the desire for them to disappear. On the contrary, the period between 1807 and 1867 was marked by a slow evolution, and although the corporate law remained unchanged, practices were reinvented, giving new substance to the institution.

Section two discusses the features and characteristics of the SA and compares them with other legal forms that were envisaged by the Commercial Code of 1807, as well as their

[1] In the words of Harris (2003).

British and American counterparts. Distinct perceptions of American corporations and the SA – despite their many similarities – help us to understand their different trajectories. Section three concerns the drafting of SA legislation in the first decade of the nineteenth century, and the practices that it fostered. Unlike the standard interpretation proposed in the historical literature, we challenge the illusion that the Commercial Code represented a break with an archaic past. The fourth section focuses on changing uses of the anonymous company form in the middle of the nineteenth century, and the legislative changes that followed in the 1860s. Despite continuity in the formal aspects of the law, practices evolved a great deal, inviting us to reflect on the driving forces for legislative change, and the interactions between formal law and practice that they generated. The reforms of 1863–1867 put an end to the system of government authorization and made it possible to create an SA through a simple process of registration. Certainly it was a pivotal moment in the ongoing evolution of the SA, with the formal law responding to changes in practice. Nevertheless, these laws, although often presented as another discontinuity in the history of the SA, once again served more as a vehicle for continuity than as the foundation for a new period.

II. Features and characteristics of the *société anonyme*

The corporation first appeared in French law in the Commercial Code of 1807. It was one of three legal forms available to businessmen who wanted to register a commercial association. The Code's definition of the corporation is minimalistic: it is referred to in only a dozen or so articles, which stipulate the principles of limited liability, the issue of tradable shares and the need for special authorization from the government prior to its creation. The fundamental feature that distinguished the SA from other legal forms recognized by the Code was the limited liability enjoyed by *all* partners. Unlike the general partnership (*société en nom collectif*), in which all partners were personally and fully liable, the limited partnership (*société en commandite*) divided partners into two types. General partners were responsible for the management of the company and as such were liable *in infinitum*, while sleeping partners owned stocks in the company; their liability was limited to the amount of their contributions, on the condition that they did not participate in the management of the business. The SA went a step further. In addition to these specific characteristics related to liability, it could divide its capital into shares (a prerogative that it shared with the *société en*

commandite), and its existence was not intrinsically linked to that of its members, being an independent legal entity.

Compared to their British or American peers, nineteenth-century observers and actors in France had a very different view of the importance of the existence of a separate legal body. In the former two countries, it was what fundamentally distinguished the corporation from other legal forms: the common denominator in all of the very diverse examples of a corporation[2]. Moreover, the very term 'corporation' indicated that it was the constitution of a body that was able to act. This was not the case in France, where actors were more interested in the generalization of limited liability. It became literally known as the 'anonymous' company (*société anonyme*), precisely because none of its associates gave it their name or held personal liability. This characteristic, far more than the constitution of a legal body, is at the heart of the French *société anonyme*, to the extent that, unlike the situation in the United Kingdom and the United States, it would have been unthinkable for them to be formed without general limited liability.

However, in France, the SA liability regime was deeply at odds with the spirit of the early nineteenth century. This was due to its inconsistency with what actors perceived as the necessary foundation for any business relationship: the commitment, by at least one individual, of their personal commercial credit. In the nineteenth century, the understanding of credit went well beyond simple financial guarantees, to include the confidence that a businessman inspired, and the resources (notably social and familial) to which he had access (Baubeau, 2007). Clearly such confidence was based partially upon financial guarantees but it also depended on a reputation for honesty, morality and seriousness. Thus, by undertaking commitments in his own name, and thereby risking his credit, a merchant built the trust that was necessary to establish a business relationship. In an SA, such a mechanism does not exist since nobody makes a personal commitment[3]. Consequently, contemporaries became very

[2] For example, in the United States, up until the 1850s some States had implemented general incorporation acts that did not recognize general limited liability (Hilt, 2015). In England, "limitation of liability became an inherent feature of the joint-stock corporation only relatively late" (Harris, 2000, p. 33).

[3] It is significant that the first article of the 1807 Commercial Code dealing specifically with the SA (Art. 27) states that "the *société anonyme* does not exist at all under a social name; it is not designated by the name of any of the partners."

wary of this legal form, and for a long time it was regarded as an exception to ordinary law. In 1863, a parliamentary debate states that:

> Until now, we have considered that personal liability, not only in trade but also in civil matters, was the principle of ordinary law [*droit commun*]. The only exception was introduced for SAs that, as we have noted, were not companies subject to ordinary law, but exceptional companies, as they were subject to a very different system of government authorization, and these companies, moreover, were only authorized for certain types of businesses that appeared to be in the general interest or of [particular] importance[4].

This special system for the liability of its partners and the perception of the SA as an 'exceptional' institution helps to explain the regulatory dispositions towards it in the first decades of the nineteenth century.

The most important of these dispositions was, without doubt, that its creation was subject to government authorization. The justification for this requirement was based on the idea that it was a substitute for the liability of partners:

> [...] As *sociétés anonymes* differ from other companies in that it is not necessary to have partners who are held indefinitely liable for all social debts; [...] as these partners, even when they are involved in the administration, cannot lose more than they have put in [...], we anticipated all of the adverse outcomes that establishments of this kind could have for creditors [...]. For this reason, in almost all countries, these kinds of companies are only allowed to be formed with the authorization of the legislature, or at least the government (Pardessus, 1857, pp. 137–138).

Specifically, individuals wishing to create an SA had to undertake a lengthy administrative procedure that could last from several months to several years. During this time, a multitude of actors (prefects, ministerial committees, the State Council, experts consulted by the administration) decided on, not only the financial capacities of the sponsors, but also their 'faculties', 'quality', and 'morality'. Their opinion was also required with respect to the usefulness of the business, its chances of success, and compliance with "morals, good faith in business matters, and a good order of business in general"[5].

Until the 1867 Act that ended the authorization system and allowed the creation of an SA by simple registration, only around 750 companies were established, in a limited number

[4] Intervention of State Councillor Vuillefroy. Sitting of the legislature of 4 May 1863, *Moniteur Universel* of 5 May, 1863, p. 709.
[5] See the *Instruction ministérielle* (Ministerial Statement) of 23 December 1807 reproduced in Jordan & Malepeyre (1833, pp. 437–439).

of sectors. Together, infrastructure and transport (233), insurance (203), banks and building societies (112) and the industrial sector (91)[6] represented almost 85% of new businesses. Compared to the overall number of new commercial companies, these figures were very low: between 1840 and 1880, about 75-80% of commercial companies were formed as general partnerships, and 20-25% in the form of limited partnerships. These numbers show that the anonymous company was never more than marginal (Guinnane et al., 2007; Verley, 2003, pp. 88–93). Between the 1880s and the First World War this proportion increased significantly (10% in the 1880s, 12% in the 1890s, 14% in the 1900s, and 17% between 1910 and 1913) but the real transformation only occurred from 1925, following the introduction of the limited liability company (*société à responsabilité limitée*; SARL), a legal form that was rapidly adopted by nearly 90% of new companies.

Interpreting the SA's characteristics

The literature has generally been unambiguous in its interpretation of the characteristics of the SA. The standard argument can be summarized as follows: (1) The SA has all of the features needed for the practice of an emerging industrial capitalism, notably by enabling the division of risk and the attraction of widely-dispersed capital. It was designed to be the legal response to the needs of an economy in revolution[7]. (2) The state, jealous of its quasi-monopoly in the financial markets (for the issuance of debt), sought to restrict and control its development through government authorization (Freedeman, 1965, p. 190; Lévy-Leboyer, 1964, p. 701). (3) The reforms of 1863–1867 marked a victory for the business community over the backward-looking state; it finally managed to wrest the SA out of the government's claws to deliver unfettered private capitalism[8].

This story is based on the intrinsic qualities of the anonymous company (general limited liability and the issue of negotiable shares), and above all the uses of the SA in the second half of the nineteenth century (continuing into the twentieth century) as the preferred

[6] To a very large extent composed of mining, metallurgical, and glass companies.
[7] This is the story that is usually presented in a few lines in legal textbooks. See e.g. Constantin (2012).
[8] More-or-less explicit versions of this argument are found in most in the work that either directly or indirectly adresses it. See, for example, Freedeman (1979), Hilaire (1995), Lefebre-Teillard (1985), Lévy-Leboyer (1964, p. 701), and Ripert (1951).

instrument for large-scale private capitalism. However, the story changes dramatically, notably its chronology, if we shift the focus to actors' understanding of the SA and the uses they actually made of it. Later in this chapter we attempt to discard the idea that the SA began life in the early nineteenth century, and instead highlight its more distant origins (although in other forms). We then show that it only slowly became a support for private capitalism, remaining for a long time an instrument of state economic policy. In this context, we highlight the illusory effects of formal legislative changes (whether in 1807, or 1863–1867) and evaluate continuities and discontinuities through a focus on the practices and representations of the individuals who made and used the law.

III.The SA in 1807, a new institution?

The roots of the société anonyme

In the early nineteenth century, SA law (and, more generally, the Commercial Code) did not aim to found a new order of business, but rather to restore the old order that had been overturned by the Revolution. The first commentators on the text are very clear, "The spirit that dominates the new Code, the thinking that shows itself in every provision, is to remind business of the purity of principles, to remove it from the state of degradation that the demoralization of recent times has led it to [...]. The restoration of commerce is the sole purpose of this Code" (Fournel, 1807, pp. xii–xiii). The drafters of the Code themselves admitted that they drew most of their material from the Colbert Orders of 1673–1681, and the only novelty was what was said about bankruptcy (*Commercial Code Project, presented by the Committee appointed by the Government on 13 Germinal year IX,* 1801, pp. vii–xxxvii).

In terms of corporate law, any appearance of innovation is an illusion. While general and limited partnerships were already present in the 1673 ordinance, this was not the case for the SA, which is why the Code has been seen as a legally discontinuous move in the direction of modern capitalism. However, the real innovation of the Code was that it included the SA in the corpus of "ordinary" law texts, rather than inventing a new institution. The SA, as it existed in the early nineteenth century, was nothing more than a new form of chartered company, a form that was notably used in transoceanic trade (in the seventeenth century) and, later, for printing money. These semi-public companies were instruments of state power and

prestige and consequently benefitted from many privileges. They were all ‘exceptional’ and, as such, exempt from the usual trade regulations. More than an institutional tool in the hands of private business, they were an instrument of government economic policy; therefore, Colbert saw no need to include them in the companies listed in his Orders.

As the Commercial Code was being drafted (1801–1807), legislators had to clarify their intentions regarding the SA, and they invariably referred to the old chartered companies:

> “The need for movement has led to the birth of public institutions that are generally recognized as useful. Their beneficial influence on credit, in places where these institutions exist, especially in some trading nations, has made us think that they will soon form in the towns of France where trade is limited [...]. These large commercial associations are ordinarily created by *stocks* [...]. Public banks, commercial establishments either in remote regions or that require a sumo of capital that is beyond the reach of ordinary associations establish themselves [in this form]” (Gorneau, Roux, & Legras, 1803, pp. 19–20).

To sum up, the Commercial Code simply renamed the institution and integrated it into ordinary law. Here again, the most perceptive commentators on the Code make no mistake, “The *société anonyme*, which is a new creation in our legislation is in fact not: it was in use prior to the Commercial Code; but no law generally acknowledged it and determined its rules; even the name was never enshrined in any ordinance” (Jourdain & Malepeyre, 1833, p. 172).

In French historiography, this mercantilist origin of the SA has been largely overlooked, such has been the desire to see it as the embodiment of a new economy that broke with the system of privileges and legal exceptions that were characteristic of the abolished *Ancien Régime*[9]. However, highlighting these roots provides a way to understand how actors in the early nineteenth century perceived and used the institution. Far from the popular interpretation found in the literature, which emphasizes a fundamental conflict between the state and the private sector, and which is claimed to account for the limited number of new SAs, our perspective calls for an alternative explanation.

The practices that were observed, whether they related to regulation or how such companies were used, were unlike current commercial practices and suggest that the SA was

[9] Note that in this respect, historians of American law were more perceptive and have for a long time highlighted these origins, which have many similarities with the French case. See for example Handlin & Handlin (1945), Hovenkamp (1988), and Livermore (1935).

reserved for very specific purposes. These purposes shared a principal characteristic: its use was only perceived as legitimate insofar as the company contributed to the public interest. This suggests a legitimation system that itself was strangely reminiscent of the political economy of privileges under the *Ancien Régime*. In exchange for a contribution to the general interest, a commercial company was granted the privilege of being able to take the form of an SA, a privilege that actually lay in its general limited liability and the implied notion of state prestige. The close corporation, which is local and does not address the public interest, is therefore absent from the French legal literature although, as we shall see, it would have been useful to have (if only to understand its practices).

Representations and uses of the société anonyme

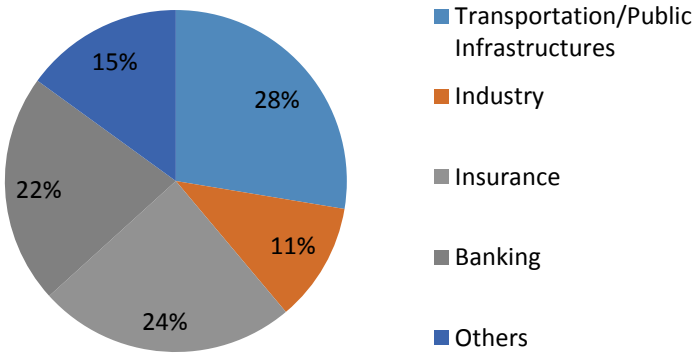
Armed with this understanding of what the SA meant for the actors of the early nineteenth century, a number of behaviors or practices that appear difficult to understand can be easily explained. First, we note the indifference that the SA inspired in the business community. When, in 1801, the drafters of the Code first circulated a draft text in order to gather feedback from the national business community, only a tiny minority deemed it necessary to provide an opinion on the SA. Following the entry into force of the Code in 1808, requests for authorization were limited: only a few dozen files are documented[10] and just over thirty SAs were created between 1808 and 1818. When the business community was not indifferent to the idea of the SA, their opinion seems to have been dominated by distrust for a legal form that was widely perceived as a support for dishonest businesses. For example, the Paris Chamber of Commerce, while very ready to complain about regulatory barriers, for a long time defended the system of government approval "in the name of protecting the public against 'schemers' who would seek to enrich themselves without incurring any liability" (Lemercier, 2003, p. 56). This distrust was still very evident in the 1860s; in discussions about the proposed liberalization of the SA, industrial circles proved

[10] For documentary reasons it was not possible to accurately count the number of failed requests, but the evidence suggests that during the entire period, 40–50% of requests were authorized.

hostile to state disengagement, denouncing "a certain school of economists who see barriers everywhere" and judging the new legislation "useless and dangerous"[11].

The SA was therefore very widely thought of as reserved for specific, mainly public, purposes. That perception explains the initial indifference of the business community to the SA, and its distrust when the privilege of forming an SA appeared to be opened up to the private sector. In the decades that followed the promulgation of the Code, the uses that were made of the SA make these representations clear (Figure 1). The presence of new SAs can be largely understood in terms of their contribution to the public interest. This statement does not mean that there was no motivation to make money in these ventures, but rather that the state sought to encourage companies and industries that had a positive impact on a wider public than just their partners. Before the railroads era, the most-represented sector (transportation and public infrastructure) was composed by canals companies, companies that built bridges and ran steamships. This shows a willingness at state level for national territorial unification in order to accelerate the country's economic development. The emblematic embodiment of the idea is seen in the Becquey Plan of 1820–1822, which aimed, under the aegis of the state, to form several SAs that would implement a comprehensive, national canal network (Becquey, 1820; Geiger, 1984).

Figure 1: Sectorial repartition of authorized SA 1808-1839 (n=373)



[11] National Archives of France, *Mémoires des chambres de commerce relatifs au projet de loi sur les SA*, AN C//1093. See also Courcelle-Seneuil (1865).

Almost half of the companies in the second-largest sector (insurance) were non-profit mutual insurance companies. Many others were marine (in ports) or agricultural insurers, where a professional community created an SA to provide a service to itself. The banking, savings and credit sectors were also comprised of predominantly public companies. Before the banking revolution in the second half of the century, over 80% were savings and contingency funds set up at the initiative of a municipality to encourage the working classes to save. Other banks in industrial centers, intended to act as relays for the Bank of France, were encouraged by the government. Finally, industrial establishments (in particular in the mining and metallurgical sectors) were encouraged because of their military importance, and in a spirit of national competition with the country's British neighbor.

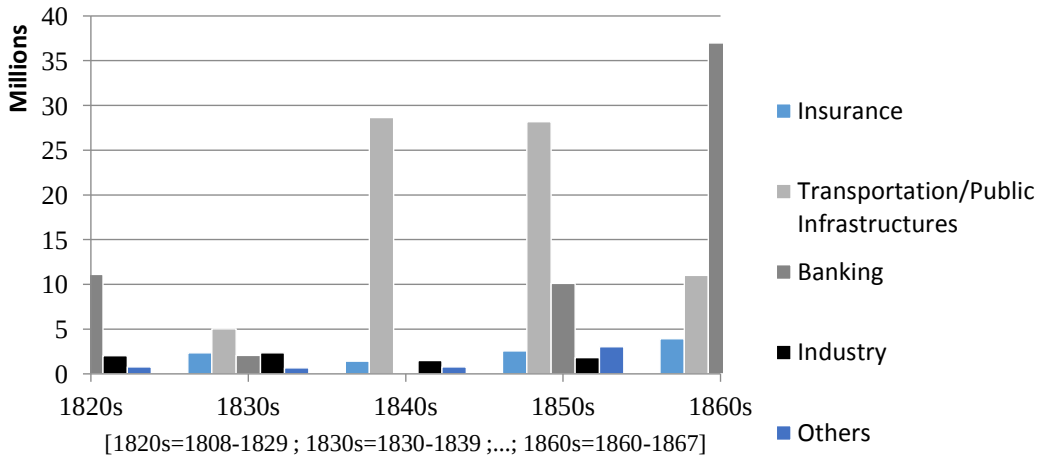
The SA of the first part of the nineteenth century could therefore be seen as a vehicle for the continuation of old practices, but in a form that was acceptable in post-revolutionary France. This formal transformation has deceived many scholars, who have described the SA as an essentially modern institution, and emphasized the contrast with an archaic and timorous state that for many years tried to control it. In practice, popular perceptions of the SA, the laws and regulations that related to it, and the uses made of it, were generally very coherent. What is clear is that this institution was not, first and foremost, a legal support for the birth of industrial capitalism. For this purpose, the Commercial Code offered alternative legal forms, notably the *commandite par actions* (limited partnership). However, little by little, new uses and understandings of the SA would be invented that were to provide a legal foundation for large-scale capitalism, notably in the guise of railways and joint-stock banks. We examine this diversification of uses in the following section, before summarizing the long history of changes in SA law.

IV.The diversification of uses of the SA and legislative change

The Commercial Code did not put an end to a political economics tainted by mercantilism. Nevertheless, at least with regard to the SA, it led to a renewal of institutional forms and their names that was intended to perpetuate practices in a transformed ideological environment. From the 1840s, in the absence of any legislative change, new uses were found for the SA in response to changing economic structures.

The railway sector was emblematic of these changes, and to some extent, the only clear example of them. First, companies became drastically bigger; the average capital of companies in the transportation and public infrastructure sector had increased nearly six fold before and after 1840 (Figure 2). Moreover, this sector included companies whose capital could not be measured against the standards of previous periods: 200 million francs, for example, for the *Compagnie des chemins de fer du Nord* or the *Compagnie des chemins de fer de Paris à Lyon*, authorized respectively in 1845 and 1846. The banking sector, which was no longer composed of small savings institutions, but joint-stock banks, would soon follow, reflected by some emblematic examples: the *Credit Mobilier* and its 60 million francs of capital in 1852, together with 60 million francs for *Crédit industriel et commercial* in 1859 or 120 million francs for the *Société générale* in 1864.

Figure 2: Average Capital of Authorized SA, by sector

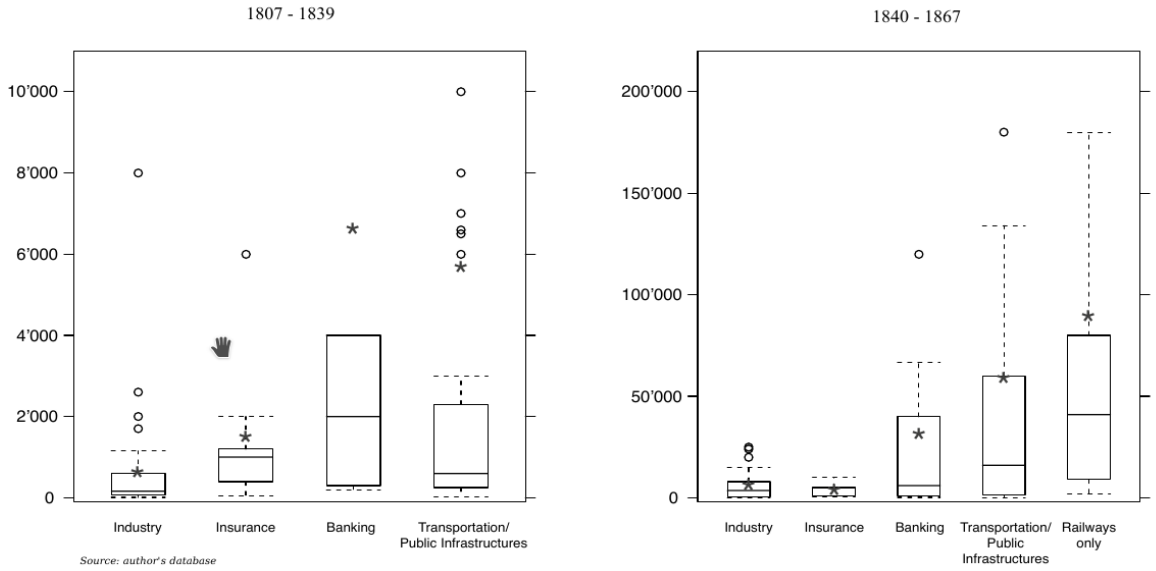


[1820s=1808-1829 ; 1830s=1830-1839 ;...; 1860s=1860-1867]

The SA therefore became the legal support for businesses that were typical of large-scale capitalism during the industrial revolution, and their uses were more consistent with classical descriptions of this legal form. Clearly, here the purpose of SA was to be able to attract small amounts of dispersed capital in order to fund companies that exceeded the financial capacity of an individual or their personal network, thereby facilitating risk management by limited liability. This new use of the SA can be seen in the figures below, which show stocks issued by companies (Figures 3 and 4). The first lesson that emerges concerns the number of securities issued, which grew significantly in all sectors, and particularly clearly in the banking and transport sectors. Mean values increased from a few hundred to several thousand francs, and sometimes even several tens of thousands. This was

the case, for example, for the *Compagnie des chemins de fer du Nord* that issued 400,000 stocks in 1845. At the same time, the nominal value of stocks decreased significantly in all sectors, and 500-franc stocks became standard in the banking and transport sectors (Figure 4). The latter development reflected a desire to stimulate interest in commerce among sections of the population that had hitherto been excluded. A logical extension was for these new companies to initiate trend towards listing on the stock exchange. The notion of the general interest faded, and links with the state gradually weakened, although they remained strong in the case of railway companies, which were subject to the law of 1842 that defined the network and the principal lines.

Figure 3: Number of Shares Issued[12]

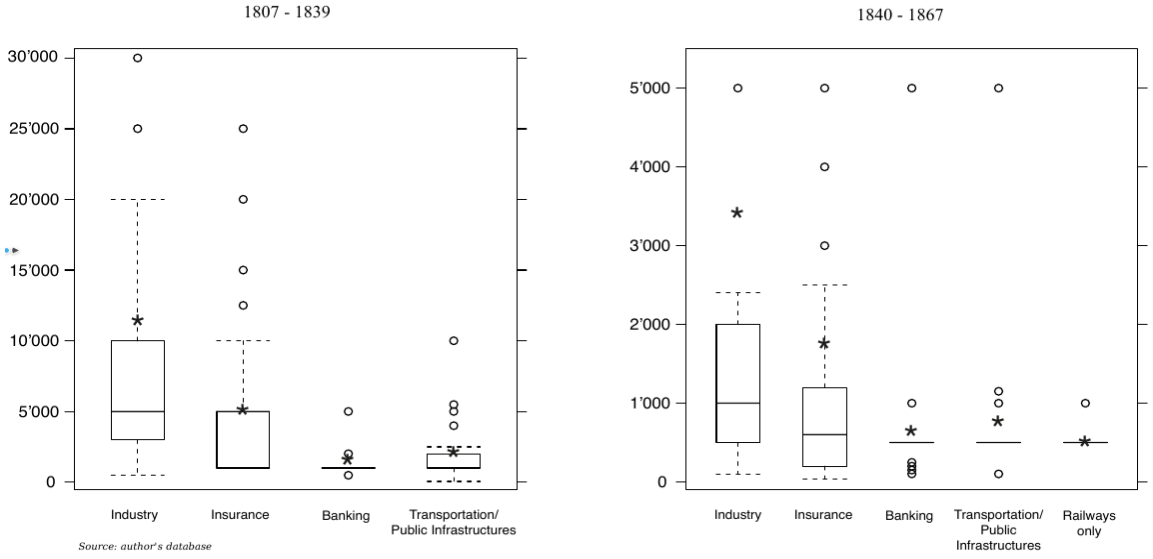


"The firm, in the opinion of a business historian, from now on will be less familiar with its stockholders than its capital [...]" (Gille, 1959, p. 39). Did the SA finally fulfill its promise of true anonymity? To some extent, yes. Stockholdings significantly expanded and restrictions

[12] Interpretation of boxplots: The box represents 50% of the observations. Its lower limit is the first quartile (25% of observations), its upper limit the 3rd quartile (75% of observations). The black line inside the box represents the median. Both whiskers delimit 1.5x the interquartile distance. The black star is the mean, the white dots are outliers. For readability reasons, I fixed an upper limit to the vertical axes, otherwise the boxplots were flattened down by some extreme values (which do not appear anymore).

on stock transfers were gradually lifted, meaning that it became more difficult to identify the company's owners. In practice, it was no longer possible to link a railway company to a family or a small business community, as was the case for most industrial or insurance companies where stockholdings were very limited, homogeneous and stable over time (Rochat, 2014). That said, these new large companies were not completely free of the aura of the family name. The big names of (usually Parisian) finance could still be found at their head; sometimes competing and sometimes combining to develop projects that were beyond

Figure 4: par Value of Shares (Francs)[12]



Source: author's database

the ordinary scope of business. Consequently, the Laffites, Pereires, Rothschilds or others, even if they had a limited share of the capital, remained the big names in railway companies and joint-stock banks[13].

Furthermore, the scope of these developments should not be underestimated. Business historians have to a very large extent focused on a small number of cases (notably banks and railway companies), suggesting that such companies were typical of this period[14]. It could be

[13] See for example, Gille (1970).
[14] It could be said that in France, each of the big companies of this period has their own historian who studied them in detail. See, to only cite two emblematic examples, Bouvier (1961) and Caron (1973).

argued that this limited focus is justified, because such companies were the face of new capitalism. However, they should not unduly distort our understanding of the French economy of the nineteenth century. The second lesson we can draw from Figures 3 and 4 lies in the vast heterogeneity of values, both within and between sectors. Figure 3 shows that in the banking and transport sectors, averages are always above the median, sometimes by significant amounts, indicating the presence of a small number of very-high-value companies[15]. The insurance and industrial sectors are far more homogeneous, suggesting more uniform practice seen, specifically, in few stock issues but with a high nominal value. As for the nominal value of securities (Figure 4), conversely, practices are far more standardized in new sectors, while extreme values are found in traditional sectors, both before and after 1840[16]. These indicative figures provide an outline of both typical uses and the diversity of practices. The invention of new uses for the SA, by banks and railway companies, therefore appears to be unusual. It was confined to very specific companies, and did not challenge the ongoing use of older customs, which remained the norm.

In the vast majority of cases, the companies that were created remained close corporations: they had a relatively small amount of capital (at least not significantly greater than that of *commandites pas actions*), few stocks were issued with a high nominal value. However, in the 1850s and 1860s very few SA were listed on the stock exchange, apart from railway companies, a few mining companies and some large banks (Hautcoeur, 2007). Finally, company statutes very often contained strict provisions aimed at controlling stock transfers. This was very far from the "modern corporation" described by Berle and Means in which ownership was separated from control. Stockholdings remained relatively limited[17], stable, homogeneous and controlled by a small group of individuals[18]. The anonymous character of these companies was therefore completely relative, and in reality they were very closely associated with a few of their most important members. More than a paradigm shift, therefore, the 1840s saw the diversification of uses and representations of the SA.

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[15] Note that most of these extreme cases do not appear on the boxplots above, where the Y-axis has been shortened to improve readability.
[16] A new record was reached in 1824 for the company *Verreries de Baccarat*, which issued eight stocks at 125,000 francs each for a total capital of 1million francs.
[17] The median size of stockholdings was a little more than 20 stockholders for the period 1808–1839 and just over 40 for the period 1840–1867 (data from the author's database)
[18] The average number of stockholders holding 50% of stocks in an SA was a little over seven for the period 1808–1839, and just over eleven for the period 1840–1867.

The laws of 1863 and 1867

So far we have seen that a change in the use of the SA occurred, while the laws that governed them did not. Following the enactment of the Commercial Code in 1807, the first reforms to SA legislation were seen in two laws that were passed in 1863 and 1867. Divided into two stages, these Acts allowed an SA to be created by a simple process of registration – first, in 1863 only for companies with capital of less than 20 million francs, then in 1867 for all SAs. At the same time, they became subject to more detailed provisions than those contained in the Commercial Code. While these laws put an end to the system of government authorization, they integrated the case law that had been established over the preceding 60 years through the practice of the authorization procedure. Included in this regard were the liberalization of stocks and the liability of principal stockholders; the evaluation of contributions in kind by commissioners; the distribution of dividends; the creation of a reserve fund; and the operation of various societal bodies, etc. Although the SA was no longer subject to a lengthy, expensive and arbitrary authorization procedure, the change did not really offer greater contractual freedom to businessmen. It could be argued that in abolishing the case-by-case assessment of the SA, it became apparent that its uses had changed. The SA was no longer the exceptional instrument of the state that it had been in the first half of the century, and it became clear that corporate law was not, by its very nature, a law of exceptions. Parliamentary debates in which these laws were discussed record the moment in detail, notably the words of the Parliamentarian Émile Ollivier, which were spoken at the time everything changed, and marked the point when the SA could begin to be considered as an institution subject to ordinary law:

> The Minister of State said: 'When you create an SA, you are beyond common law, it is a legal exception, and in this exceptional case, you must be subject to exceptional regulation like the Convention itself'. That, gentlemen, is a point of view that I cannot subscribe to. When a corporation is created, it is not a legal exception, it is part of common law (*droit commun*) applicable to associations (Ah ah). It is certainly not the usual law of individual commitments, but it is part of the usual law of capitalized associations, and there is just as much liability as if the commitment was personal; the only difference is that it is restricted and limited [...]. When one commits oneself, liability is unlimited; when one commits one's capital, liability does not disappear into the world, because a company with no liability would be a monstrosity; but it restricts and limits itself [...][19].

[19] Intervention of E. Ollivier, legislative hearing of 4 June 1867 *Moniteur Universel*, 5 June, 1867, p. 684.

Once again, this radical change (to all appearances) is in reality only formal, and it does not affect the substance of the institution. The 1860s Acts once again provided continuity of practice, rather than new practices: they only standardized case law that had been slowly established by actors in the course of the authorization procedure.

The literature often presents these laws as the outcome of a longstanding power struggle between the state and the business community: the first seeking to keep the economy under control, the latter invariably fighting for greater freedom (Lefebvre-Teillard, 1993; Ripert, 1951, p. 61). This interpretation requires greater nuance. First, as highlighted above, the SA was not really any freer post-1867 than it was before, if we consider the freedom that the business owner had to draw up their company statutes. This is seen in the words of Freedeman who wrote, "[a] regular external structure and a system of internal governance had been added to the bare framework of the code" (Freedeman, 1979, p. 144). While 'liberalizing' the institution of the SA, the Acts of 1863 and 1867 added to the legislative framework that applied to it. Second, the blocks in the supposed balance of power between the private sector and the state were not very clearly defined. Most chambers of commerce in the major port and manufacturing cities voted against the bill, clearly showing their ongoing distrust in the institution. Parisian high finance, represented at the parliament by the Péreire brothers, was strangely quiet: they did not participate in the debates of 1863 and 1867, or in the final vote. Surprisingly, the most active members in the debates, such as Jules Simon, tended to lie to the left of the political spectrum, and spoke on behalf of cooperatives and societies who saw the legal form of the SA as best-suited to their activity. In principle, the abandonment of government authorization seems to have been accepted by everyone, even before the parliamentary debate began. The lengthy debates therefore focused on specific articles that aimed to overcome the hazards created by a lack of personal liability: the protection of minority stockholders and third parties, the distribution and monitoring of power within the company, the protection of capital through the introduction of accounting rules, and the distribution of dividends. This pattern suggests that there was no obvious conflict between freedom and *dirigisme*, between the economic and the political, or between the business community and the state. Instead, what we observe is a program of judicial reform to reflect the updated practices and representations of the SA that had already emerged in French society, and that open the way to new practices in return.

The slow evolution of SA law

The 1867 Act established the foundations of the legal framework for the SA in the twentieth century. By facilitating the procedure for the creation of an SA, this Act opened the way for a significant increase in the number of new companies (*Compte général de l'administration…*, 1880). The annual number of new companies created increased to a few hundred, compared to an average of around ten prior to 1867. Indeed, the increase was such that, at the outbreak of the First World War, there were 13,000 SAs in France (Freedeman, 1993). Nevertheless, the number remained far from the 63,000 corporations in the United Kingdom, or the 250,000 in the United States (Guinnane, Harris, Lamoreaux, & Rosenthal, 2008, p. 83)[20]. Another century passed before there was any further substantial reform to the legal framework of the SA in France. It was only on 24 July, 1966 that new, far-reaching corporate legislation came into force. Ninety-nine years to the day after the 1867 Act, France adopted a new law on commercial companies that "is more indicative of an evolution than a revolution. It codifies scattered provisions, it takes into account case law, it clarifies, it rationalizes. But it does not really innovate" (Guyon, 1994, p. 4).

Over the long run, therefore, we observe two striking patterns in the unfolding of legislative change with regard to the SA in France. First, there was a constant back-and-forth between, on the one hand, the drafting of a coherent body of law from heterogeneous and disparate texts and, on the other hand, the disintegration of this unified law through a multiplication of orders, decrees, or jurisprudence. The 1807 Code sought to unite the proliferation of practices and regulations that had developed under the *Ancien Régime*, while the 1860 Act was an update to the Commercial Code that incorporated the jurisprudence forged during the intervening period. The 1966 Act, in turn, was intended to "clarify, put in order and codify corporate law that was in true legislative and regulatory chaos", and which "was found in various codes, various special laws that were repeatedly reworked and in numerous texts that had never been incorporated into the basic provisions" (Houin & Goré, 1967, p. 123). In the 2000s, we observe a renewed enthusiasm for codification and the reintegration of SA law into the Commercial Code (Monéger, 2004).

[20] Note that these numbers must be interpreted carefully, as these institutions are never perfectly identical in different countries (Hannah, 2014).

The slow evolution that we observe in France was not entirely autonomous as it was affected by external factors, notably the law of neighboring countries as well as modifications to alternative legal forms[21]. Certainly, this was the case in 1863–1867, when reforms were introduced that were, at least in part, a reaction to the 1856 Joint Stock Companies Act in the United Kingdom, the Treaty of 30 April 1862 that authorized British companies to freely operate in France, and a French law of 1856 that significantly strengthened restrictions on publicly traded partnerships (Doughi, 1979). And we observe a similar pattern in 1925, with the introduction of the limited liability company (*société à responsabilité* limitée) into French law. This innovation aimed to allow companies in regions that had been recovered from Germany by France during the First World War (in the form of GmBH) to continue to operate in an equivalent form under French law. Following its introduction, the limited liability company immediately became, by far, the most common legal form in France.

The second pattern concerns the terms of the debate, which remained remarkably unchanged. In 1807, 1867, 1966 and the 2000s, challenges related to the regulation of SA were couched in terms that, to a certain extent, hardly altered. In contemporary terms, the question is framed in the following way: is the company a *contract* between individuals who are free to shape it as they wish, or is it an *institution* that imposes its rules on the individuals who wish to be its members. There is a particular insistence on the fact that corporate law must be governed by the general principle of freedom of contracts. Equally important, however, is that this freedom must be organized and limited to protect the interests of third parties, or correct information asymmetries. Consequently, all of the legislative challenges, reforms and debates focused on the best way to limit the *liberté des conventions* (an ubiquitous expression in the second half of the nineteenth century), without negating its virtues. The archives of authorization applications from the first half of the nineteenth century (during which time the body of case law was slowly formed) are full of examples of these trade-offs:

> "I am far from pushing back these principles of freedom, I know as well as anyone that manufacturing companies in general cannot prosper if they are hampered by too many prohibitive measures that may restrict their operations; but I think that in the application of this

[21] The need to understand the law and the use of the anonymous company, taking into consideration all types of companies was highlighted by Guinanne, Harris, Lamoreaux, & Rosenthal (2007) and Lamoreaux & Rosenthal (2005).

> principle, there is a great distinction to be made between general and limited partnerships, and public companies; only the first should enjoy absolute freedom under the law, because the public knows that it has a guarantee in the personal solvency of managers [...]. But the only guarantee offered by the *sociétés anonymes* authorized by the King is that their capital must be subject to all precautionary measures, which tends to maintain this capital intact and ensures the long-term survival of the company, and as a consequence the rights of third parties and those of stockholders [...]"[22].

Nearly half a century later, in 1863, the constraints and freedoms of entrepreneurs remained the subject of Parliamentary debate:

> "Freedom is a very great and very beautiful thing, even with respect to commercial companies, provided however that with respect to the commercial company, as in any other matter, there should be corrective mechanisms in place without which it would be an abomination, a formidable danger, I do not hesitate to say this, on the condition that there should be as a correction the liability of the person who benefits from it. If you leave us free, and do not make us liable, you are doing a detestable work, and I do not want anything to do with your freedom"[23].

In the absence of constraints, it could be said that the freedom offered to small stockholders and third parties was, above all, "the freedom to be eaten by the predators of finance"[24]. With respect to the 1966 Act, legal textbooks generally consider that the principal innovations included "strengthening the security of third parties, the protection of associates and [the multiplication] of criminal accusations" (Merle & Fauchon, 2016, pp. 45–46).

Finally, at the dawn of the twenty-first century, although the vocabulary had (slightly) changed, the problem remained: in a report, submitted to the National Assembly in 2003, on a potential reform to corporate law, the authors wrote that they believe "unswervingly in liberty and the contract as the way to regulate the company, and also in its key corollary, transparency, and in the principle of liability that sanctions it [...]. For the system to work in the future it must be based on three pillars: freedom, transparency and liability"[25]. Ultimately, the story of the SA's legal framework (at the beginning of the twenty-first, as in the early nineteenth century) is as a sequence of step-by-step rearrangements of the principles of freedom and accountability to position and reposition the limits of contractual freedom.

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[22] Report by Brochant de Villiers, *Forges et Fonderies d'Imphy* sitting of the General Mining Council of 13 April 1829 National Archives F^{14} 17942.
[23] Intervention by E. Ollivier, legislative hearing of 4 May, 1863. *Moniteur Universel*, 5 May, 1863, p. 709.
[24] Intervention by H. Quesné, legislative hearing of 28 May 1867. *Moniteur Universel*, 29 May, 1867, p. 644.
[25] *Rapport d'information sur la réforme du droit des sociétés*, No. 1270, introduced by Mr. Pascal Clément, 2 December 2003, p. 59 and 61.

V.Conclusion

This overview of nineteenth century legislative changes and uses of the SA in France has highlighted the slow evolution of an institution that began life as an essentially mercantilist company form. This pivotal period of slow change is one in which the appearance of sharp discontinuities is misleading. The reforms of 1807 and 1867, which have been traditionally interpreted as such discontinuities, instead ensured continuity. Real change in the legal meaning of the SA actually occurred between these two dates, through an evolution of case law, practice and, more generally, a new shared understanding of the institution of the SA. The SA gradually lost its essentially public dimension, to instead become a legitimate instrument of private capitalism. The legal provisions that characterized it (general limited liability in particular) were gradually integrated into ordinary law, rather than constituting a legal exception. This article's reinterpretation of the origin of the SA and its history in the nineteenth century allows us to reassess the actions of the legislator and the government (which have been severely criticized in the literature), and to better understand the reactions of the business community. And, in avoiding the narrow prism of a public/ private opposition, we gain a better understanding of the various actors.

The legal changes that we have described also suggest a more nuanced view of a second fundamental opposition, found in a vast body of literature and following the work of La Porta and his co-authors (LLSV): namely the opposition between civil and common law (Beck, Demirgüç-Kunt, & Levine, 2003, 2005; La Porta, Lopez-De-Silanes, Shleifer, & Vishny, 1998). The argument put forward by LLSV that civil law systems have difficulty generating legal rules that are as high-quality as those of common law systems has been challenged by many scholars (Armour, Deakin, Lele, & Siems, 2009; Guinanne & Rosenthal, 2009; Musacchio, 2008; Musacchio & Turner, 2013; Pistor, Keinan, Kleinheisterkamp, & West, 2002). Although this chapter does not attempt to assess the quality of French law with respect to the SA, it counters the ideas of the LLSV in a different way by suggesting that there is not such a great difference in the operation and development of commercial law in countries operating according to a civil law regime and those with a common law[26] system. In France, case law was a major driver of the legislation changes that began in the nineteenth

[26] See Gordley (2000) and Martinez-Rodriguez (2016) for similar arguments.

century and continued into the twentieth century. To focus only on codified law is to overlook this crucial dynamic since jurisprudence and practice have been able to substantially change the outputs of the law without changing its letter. “Commercial law is the perfect example of customary law”, wrote a prominent lawyer in 1838 (Wolowski, 1838, p.10). It would seem that, in nineteenth-century France, that reality was widely understood. Although it is obvious that commercial practice was codified, great attention was always paid to leaving merchants sufficient flexibility to carry on their affairs. Therefore, each moment of codification was followed by a period of de-codification, which eventually becomes a re-codification. In practice, French commercial law was not nearly as static and rigid as the stylized description provided by LLSV suggests, and the dynamics of change are not so very different to those found in the common law system.

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