The resilience of specialised labour courts: the cases of Belgium, France, and Germany

1. Introduction

When I first came across the theme of this LRN conference, it immediately felt familiar. However, I have never explicitly worked on the concept of 'resilience'. A closer look made me realise that this is because the subject of my doctoral research involves a phenomenon that has proven to be significantly 'resilient': the specialised labour courts in France, Belgium, and Germany.

Let me clarify what I mean by this. The term 'specialised labour courts' refers to courts with specific jurisdiction over labour disputes, which are, at least in part, composed of lay judges (employers and workers, essentially members of the 'world of labour'). From a theoretical point of view, this type of court cannot be considered as self-evident. Employment relationships are essentially based on employment contracts, private agreements between individuals. Contract law is a part of private law, which usually falls within the competence of ordinary civil courts. Why should one separate the resolution of disputes arising from employment contracts from all other contractual litigation?[1]

Moreover, the judiciary in all three countries broadly traces its roots back to the principles of the French Revolution. One of the main objectives of the judicial reforms implemented during the Revolution was the simplification of the judiciary and the abolition of exceptional courts.[2] Despite this all, various specialised courts from the *Ancien Régime*, focused on specific population groups, survived the revolution, as they generally possessed characteristics that aligned with other goals of the Revolution: for example, many of the courts in question were composed of lay judges and prioritised reconciliation, which matched the revolutionary ambition of deprofessionalising the judiciary.[3]

In this context, one might think of commercial courts[4], but also courts that adjudicate labour disputes. Both France, Belgium, and Germany inherited from the Napoleonic rule the so-called *conseil de prud'hommes* – literally 'council of wise men' – which in turn traced back to a pre-revolutionary institution in Lyon. In all three legal systems mentioned, this *conseil de prud'hommes* forms the progenitor of the specialised labour courts that are still operational today. This has only been possible because the institution demonstrated the necessary resilience:

[1] Van Eeckhoutte (2014), p. 15.
[2] Heirbaut (2007), p. 55.
[3] Heirbaut (2007), p. 64-66.
[4] E.g. Martyn (2008), p. 203-216; De ruysscher (2013), p. 137-168.

through repeated reforms, the *conseil de prud'hommes* managed to adapt to changing circumstances. This paper aims to demonstrate this, by 1) situating the *conseil de prud'hommes* and its legacy, 2) examining the evolution of labour adjudication in France, Belgium, and Germany from the Napoleonic period to the present day and 3) trying to give a legitimate explanation for the resilience of the *conseil de prud'hommes* by operationalising the concept of path dependence.

2. The Napoleonic *conseil de prud'hommes* and its transplantation

To understand the context in which this institution came into being, one has to go back to the early 19th century, to the silk industry in the French city of Lyon. As the French Revolution abolished the corporations of the *Ancien Régime*, disputes at the workplace that were previously dealt with by these organisms remained unsolved. These conflicts could be large or small, but above all they were numerous and they were damaging the economic climate.[5] The silk manufacturers in Lyon were the first to address Emperor Napoleon in the years 1801-1806, asking to allow them to do something about it.[6] Seeking inspiration from the '*Bureau de maîtres-gardes'* that had existed in Lyon during the *Ancien Régime*, they asked to be allowed to set up a *conseil de prud'hommes*[7], literally a "council of wise men", with the main objective of quickly settling minor disputes between workers and employers by reconciliation.[8] Only if reconciliation proved impossible, a judgement was pronounced.[9] The council was composed only of lay judges who were elected by and from the local manufacturers (the employers) and the workshop leaders. Workers were initially excluded from the right to vote and to stand for election. The idea was that individual labour disputes should not be handled by the ordinary civil courts, but by craftsmen, who were familiar with the ins and outs of the concerned industry and knew the customs and production processes. Involvement of legal professionals was deemed unnecessary and even undesirable.[10]

The institution proved successful, which prompted several other cities of the French Empire to follow the Lyon example and also request the establishment of a *conseil de prud'hommes*. In 1809, the first regulation for the entire empire came into force.[11] Nevertheless, the principle

[5] Dubois (2000), p. 61-62; Andolfatto (2006), p. 30; see also Cottereau (2002), p. 1521-1557.
[6] Andolfatto (2006), p. 30.
[7] Loi du 18 mars 1806 portant établissement d'un Conseil de Prud'hommes à Lyon, *Bulletin des lois de l'Empire français*, 1806, No. 1423, 352-358.
[8] Savigné (1862), p. 10-11; Andolfatto (2006), p. 30; Supiot (1987), p. 5.
[9] Vilain (1861), p. IX; McPherson & Meyers (1966), p. 16.
[10] Zavaro (1960), p. 74-75; Olszak (1987), p. 114; Le Goff (2019), p. 62; Durand (1950), p. 947.
[11] Décret impérial du 11 juin 1809 contenant Réglement sur les Conseils de Prud'hommes, *Bulletin des lois de l'Empire français*, 1809, No. 4450, 307-323.

was clear: *conseils de prud'hommes* should only be established where there a need was felt and if the local economic elite requested it.[12] This happened not only in present-day France but also in parts of the French Empire that became part of other states after the fall of Napoleon. In 1810, a *conseil de prud'hommes* was established in the Southern Netherlands, in Ghent. In 1813, Ghent was followed by Bruges.[13] And in the German Rhineland, no less than eight *conseils de prud'hommes* were set up between 1808 and 1813 (Aachen: 1808, Cologne: 1811, Krefeld: 1811, Mönchengladbach: 1813, Kaldenkirchen: 1813, Monschau: 1813, Düren: 1813 and Stolberg: 1813).[14]

The modern – read: post-revolutionary – handling of individual labour disputes hence began in all three countries with the installation of the same body by the Napoleonic government, which put local economic notables in charge. But after the fall of Napoleon in 1814-1815, the territories had different political regimes, and thus three different fates for the newly created council. These divergent evolutions will be discussed in the next section.

3. The subsequent evolution in France, Belgium, and Germany

a. France

History in 'motherland' France, has been turbulent, not least because of the many regime changes the country has experienced. Under the Bourbon Restoration and the July Monarchy, the body experienced a rapid territorial spread. However, its one-sided composition soon began to provoke opposition, primarily from the emerging labour movement. They regarded the *conseil de prud'hommes* as an opportunity to assert their demands, but then ordinary workers also had to be given the right to vote first.[15] It was waiting for the revolutionary spirit of the February Revolution to make this a reality: a decree was issued in 1848 with the aim of

[12] Dubois (2000), p. 70.
[13] Décret Imperial qui ordonne l'établissement d'un Conseil de Prud'hommes à Gand, *Bulletin des Lois de l'Empire français,* 1810, Nr. 5937; Décret Impérial portant établissement d'un conseil de Prud'hommes, département de la Lys, *Bulletin des Lois de l'Empire français,* 1813, Nr. 8949.
[14] All situated on the left bank of the Rhine, which was occupied by the French (as Département de la Roer). See Décret Impérial portant établissement d'un Conseil de Prud'hommes à Aix-la-Chapelle, *Bulletin des Lois de l'Empire français,* 1808, Nr. 3261; Décret Impérial qui ordonne l'établissement d'un Conseil de Prud'hommes à Creveld, *Bulletin des Lois de l'Empire français,* 1811, Nr. 6481; Décret Impérial qui établit un Conseil de Prud'hommes à Cologne, *Bulletin des Lois de l'Empire français,* 1811, Nr. 6760; Décret Impérial portant création d'un Conseil de Prud'hommes dans la commune de Gladbach, département de la Roer, *Bulletin des Lois de l'Empire français,* 1813, Nr. 8562; Décret Impérial qui établit un conseil de Prud'hommes à Kaldenkirchen, département de la Roer, *Bulletin des Lois de l'Empire français,* 1813, Nr. 8732; Décret Impérial qui établit un conseil de Prud'hommes dans la commune de Montjoie, département de la Roer, Nr. 9245; Décret Impérial qui établit un conseil de Prud'hommes dans la commune de Duren, départements de la Roer, *Bulletin des Lois de l'Empire français,* 1813, Nr. 9246; Décret Impérial qui établit un conseil de Prud'hommes dans la commune de Stolberg, département de la Roer, *Bulletin des Lois de l'Empire français,* 1813, Nr. 9248.
[15] Constant (1887), p. 39-42; Gouffier (1897), p. 11-13; Olszak (1987), p. 102-103; Dubois (2000), p. 162-166.

introducing full equality between workers and employers.[16] This was very ambitious: it classified 'higher' workers like workshop leaders and foremen as employers and introduced a complicated cross-election.[17] The time was clearly not ripe for this: the system did not work in practice. So, under Emperor Napoleon III, the sharp edges were filed off in 1853, though without touching the very principle of parity.[18] However, there was another major change under the Second Empire: henceforth, the chairman of the council was no longer elected by the *prud'hommes* themselves, but appointed by the Emperor, who could also choose a third party – a measure that would cause collective trauma in France.[19]

After the fall of the Empire, the republican parliament scaled back this measure: from now on, the chairman would be elected again. Since he had a decisive vote, this led to an undesirable side-effect: the group (employers or workers) that turned up in the most numbers when the chairman was elected gained control of the *conseil de prud'hommes*. This caused two decades of great agitation. Employers tried to block the operation if they could not deliver the chairman, by resigning collectively, or abusing the right of appeal to the commercial court. On the workers' side, unions in turn made a habit of putting only candidates on electoral lists who accepted an imperative mandate.[20] In the tumultuous reality, there were numerous bills, from both the left and the right, to reform the *conseils de prud'hommes*. For instance, it was proposed to counter polarisation by appointing a professional judge as chairman.[21] Remembering the trauma under the Second Empire, this was unacceptable to the labour movement.[22] The latter, in turn, wanted to replace the commercial court as an appeal court, with its own body that would be completely parity-based.[23] It eventually took until 1905 before a compromise was reached: no external element was introduced in the first instance, but in exchange, closer links with the traditional judiciary were established. In case of a deadlock, the justice of the peace would henceforth intervene (the so-called system of *départage*) and appeals were assigned to the civil court.[24] In 1907 and 1908, the scope was extended to white-collar workers and women, the

[16] Décret du 27 mai 1848 relatif aux Conseils de Prud'hommes, *Bulletin des lois de la République française*, 1848, Nr. 436.
[17] Employers electing workers and *vice versa*. See Article 6 & 12 of the 1848 Decree.
[18] Choffat (2006), p. 37-41; Kieffer (1987), p. 16.
[19] See Article 3 of the Loi du 1er juin 1853 sur les Conseils de Prud'hommes, *Bulletin des lois de l'Empire français*, 1853, No. 426; Supiot (1987), p. 8.
[20] Sumner (1912), p. 295-298; David (1974), p. 14-16; Baffos (1908), p. 93 & 96.
[21] Baffos (1908), p. 101-114; Sumner (1912), p. 295-296.
[22] Supiot (1987), p. 8 & 10; Guidicelli-Delage (1999), p. 8.
[23] Baffos (1908), p. 109-114.
[24] See Loi du 15 juillet 1905 relative à la composition des Bureaux de jugement et à l'organisation de la juridiction d'appel des Conseils de prud'hommes, *Journal officiel de la République française*, 16 July 1905. Both measures were deemed more 'acceptable' than their alternatives: a permanent professional judge as president and the commercial court as an appellate court, see Baffos (1908), p. 167-177.

imperative mandate was abolished and all existing regulations were coordinated in a single text.[25]

The justice of the peace was replaced as *départage* judge by the civil court of first instance in 1958 and the appellate court by the court of appeal.[26] Otherwise, the legislation of the early 20th century remained in place for no less than 70 years. Meanwhile, the legislation was severely outdated, after which a major reform was carried out under the impetus of Gaullist labour minister Robert Boulin.[27] Given the changed reality – labour law had meanwhile won its place as a fully-fledged branch of law – one would expect a large-scale legalisation. However, this failed to materialise, due to strong trade union opposition. In its place came rather a generalisation, professionalisation and nationalisation[28]: for the first time, all individual labour disputes, regardless of value and sector, were entrusted to the *conseils de prud'hommes*, and councils were set up all over France[29]. Costs have since been borne by the state (previously by local authorities).

Two recent changes still deserve mention, especially since they restrict two original features of the *conseils de prud'hommes*: the principle of conciliation and the election of the judges. Since the 'Loi Macron' of 2015, the conciliation attempt can be pushed aside more quickly.[30] Finally, an ordinance in 2016 abolishes elections of the *prud'hommes*, in favour of an nomination by the ministers of labour and justice on the proposal of employers' and workers' organisations.[31] However, further juridification – e.g. through the introduction of a magistrate at first instance, still fails to materialise. A recent working group report (2022) still states that the latter is not feasible. However, there are discussions on closer institutional cooperation with the ordinary courts and a name change to '*tribunal du travail'*.[32]

b. Belgium

The *conseils de prud'hommes* which were established by the French in the Southern Netherlands continued to function during the United Kingdom and early Belgian. Moreover, since the late 1820s, several other cities started to ask for the establishment of a *conseil de*

[25] Kieffer (1987), p. 21-22; Brun & Galland (1978), p. 219-220.
[26] Supiot (1987), p. 12.
[27] Supiot (1987), p. 11-24; Sachs-Durand (2000), p. 465-466.
[28] See Michel & Willemez (2007), p. 27-31.
[29] At least 1 per district of the civil court, but all those that existed may continue to exist.
[30] Willemez (2015), p. 167-168; Rey (2015).
[31] See the Ordonnance n° 2016-388 du 31 mars 2016 relative à la désignation des conseillers prud'hommes, *Journal officiel de la République française*, 1 April 2016
[32] See in that regard Jacquin (2022).

prud'hommes.[33] The newly born Belgian legislator therefore decided to take over the system themselves and to generalise it: from 1842 onwards, more and more *conseil de prud'hommes* – or in Dutch: '*werkrechtersraden'* – were created, not on the basis of the judicial organisation, but *ad hoc*.[34] Although the initial intention of the legislator was to set up councils all over the country, the diffusion was in this first phase mostly concentrated on the textile industry centres in the north-western part. The first Belgian act that made substantive changes from French imperial regulations was the 1859 Act. This introduced parity: henceforth, ordinary workers were allowed to vote and to stand for election.[35] Although the French antecedents clearly served as inspiration[36], Belgian parity did not emerge in an atmosphere of revolution and was thus much more moderate from the beginning.[37] Around the turn of the century, the second major wave of dissemination followed, particularly targeting the steel industry in the Walloon coal basin.[38]

A milestone for the Belgian case is the 1910 Act.[39] This act allowed women to become members of the council[40], brought white-collar workers under the scope of application[41], and above all, redrew the balance between the world of labour and the world of law. The strict anti-legal tendency was broken.[42] From the rationale that an increasing amount of legislation began to manage the employment relationship and that – especially for white-collar workers – employment contracts needed to be interpreted, the Belgian legislator decided to include one professional jurist in every council.[43] The same balance was reached on the level of appeal: the commercial court was pushed aside and an own appellate court was created, consisting of both a jurist as chairman and lay judges (*conseil de prud'hommes d'appel / werkrechtersraden van beroep*).[44] Thus, an important step in the emancipation of labour jurisprudence was achieved in Belgium: the principle of a specialised labour court was thereby consolidated, but also strengthened, as it was extended on the level of appeal.[45] Belgium had opted for a compromise between the judgement by peers and the necessity for legal knowledge both in the first and

[33] Debaenst (2013), p. 97.
[34] Magits (1991), p. 691-701; Debaenst (2013), p. 97-98.
[35] Loi organique du 7 février 1959 des conseils des prud'hommes, *Moniteur belge*, 15 February 1859; Heirbaut (2019), p. 49-50.
[36] See Exposé des motifs sur le projet de loi des conseils de prud'hommes, *Parl.St.* Kamer 1858, n°93, p. 1-8.
[37] And thus much closer to the 1853 French Act than to the 1848 Decree.
[38] Debaenst (2013), p. 99-100.
[39] Instellende Wet der Werkrechtersraden van 15 mei 1910, *Belgisch Staatsblad*, 8 July 1910.
[40] Article 11-12 1910 Act; Humblet (2009), p. 223.
[41] Article 25-26 1910 Act; Van de Woestijne (2021), p. 617-618.
[42] Debaenst (2013), p. 112-113.
[43] Van de Woestijne (2021), p. 617-618.
[44] Article 102-106 1910 Act; Van de Woestijne (2021), p. 624-636.
[45] Van de Woestijne (2021), p. 637-638.

second instance and avoided therefore – as was the case in France – a certain subordination of the labour courts and lay judges with regard to the ordinary civil courts.

In 1927, some councils were abolished due to a lack of workload.[46] After World War II, an important original feature of the *conseil de prud'hommes*, first as a crisis measure and later permanently, disappeared: the election of the lay judges was replaced by an appointment after nomination by the representative employers' and workers' organisations.[47] In 1960, the blind spots were filled: councils were created in the areas where there did not yet exist. At that moment, however, it was already clear that a major reform was imminent.[48]

As part of the major judicial reforms in the 1960s, the existence of specialised labour courts was seriously questioned. The report of the Royal Commissioner for Judicial Reform, Charles Van Reepinghen, had proposed to abolish the *conseils de prud'hommes* in favour of a unitary court, which would handle all judicial disputes.[49] For socialist parliamentarians and trade unions, this was unthinkable. Instead, they wanted to enable a strong and independent labour judiciary by expanding the competence to include social security disputes, and also provide a specialised Supreme Labour Court. Moreover, they made the approval of the entire judicial reforms conditional on the realisation of their demands.[50] Getting out of this stalemate required a delicate compromise[51], that eventually was adopted in 1967 and went as follows. The *conseils de prud'hommes* and *conseils de prud'hommes d'appel* were reformed respectively into 'labour tribunals' (*tribunaux du travail / arbeidsrechtbanken*) of first instance and 'labour appeal courts' (*cours du travail / arbeidshoven*), composed of both professional and lay judges and competent for both individual labour and social security disputes, but no specialised Supreme Court was established.[52] The jurisdiction of the common Court of Cassation was untouched. Furthermore, the professional judges in the labour tribunals are henceforth unconditionally considered part of the judiciary, the labour tribunals are established territorially according to the common judicial organisation and, lastly, the common procedural law applies, with nevertheless some

[46] Wet van 25 juni 1927 tot opheffing van sommige Werkrechtersraden, tot wijziging van het rechtsgebied van sommige andere en tot oprichting van een Werkrechtersraad te Hasselt, *Belgisch Staatsblad*, 29 June 1927.
[47] Van de Woestijne (2021), p. 633-634.
[48] Van de Woestijne (2021), p. 633-634; Debaenst (2013), p. 100-101.
[49] Van Reepinghen (1964), p. 91-110; Vankeersbilck (2018), p. 75-76 & Heirbaut (2019), p. 51.
[50] See the proposal by Louis Major, leader of the socialist union and Minister of Employment : Wetsvoorstel tot instelling van het Arbeidshof en de Arbeidsrechtbanken, *Parl.St.* Kamer BZ 1954, nr. 86/1; Heirbaut (2019), p. 51; Vankeersbilck (2018), p. 67 & 75-80.
[51] Mainly under the influence of Van Reepinghen's more moderate assistant, Ernest Krings; see Van de Woestijne (2022), p. 78; Vankeersbilck (2018), p. 83.
[52] Article 81-83 & 103-104 of the Belgian Judicial Code and Article 157 of the Belgian Constitution; Vankeersbilck (2018), p. 78-80.

minor derogations.[53] As in 1910, the world of labour saves the specialised labour courts by making a compromise: then it was about introducing jurists, now it is about further integration with the ordinary judiciary. This meticulous balance achieved in 1967, despite proposed reforms, remains to this day.[54]

c. Germany

The *conseils de prud'hommes* introduced by the French on the left bank of the Rhine continued to function after the area came under Prussian control. From 1834 onwards, new councils were established, but these remained limited to the Rhine Province.[55] In the rest of Prussia – and by extension the entire German Confederation[56] – the authority to resolve individual labour disputes fell to a multitude of other bodies: municipal authorities, remnants of the guilds and crafts, and civil courts, as well as factory courts (*Fabrikengerichte*) which were structured in a very different way from the French model.[57] Attempts to harmonise this complex system failed, both within Prussia and within the North German Confederation established in 1867[58].[59] Successful legislative action was delayed until after the unification of the German Empire in 1871. An act passed in 1890 introduced the possibility of establishing *Gewerbegerichte* based on the French model throughout the Empire, in all municipalities with more than 20,000 inhabitants.[60] This possibility became an obligation in 1901.[61] The 1890 Act stipulated that the chairman of the *Gewerbegerichte* had to be a neutral third party to avoid deadlocks between employers and workers. Unlike in Belgium, this person was not required to be a jurist; typically,

[53] Vankeersbilck (2018), p. 74-75 & 78-79; Matthijs (1972), p. 881; Van de Woestijne (2021), p. 368.
[54] See on the later (failed) reform plans Van de Woestijne (2022), p. 97-100, Heirbaut (2019), p. 51-52 & Van Hiel (2019), p. 204-205.
[55] Sawall (2007), p. 85; Linsenmaier (2004), p. 403; Zimmermann (2005), p. 41.
[56] The German Confederation (*Deutscher Bund*) (1815-1866) was a confederation of more than 40 German states, with certain federal features, see Kotulla (2008), p. 327-401.
[57] Sawall (2007), p. 98-167; Zimmermann (2005), p. 40-87; Stahlhacke (1994), p. 59-73.
[58] Following the dissolution of the German Confederation after the Austro-Prussian War in 1866, Prussia and its allies founded the North German Confederation in the same year. This union excluded Austria, as well as Bavaria, Württemberg, Baden and Hesse-Darmstadt. Initially intended as a purely military alliance, it turned into a federal state after the adoption of the constitution of 16 April 1867. This federal state had its own directly elected parliament, known as the *Reichstag*, and a Federal Council composed of representatives of the states (*Bundesrat*). Executive power rested with the Chancellor of the Confederation, who was the only federal minister with responsibility. See Kotulla (2008), p. 487-509.
[59] See in that regard Allgemeine Gewerbe-Ordnung vom 17. Januar 1845, *Gesetzsammlung für die Königlich-Preußischen Staaten*, 1845, nr. 2511; Verordnung über die Errichtung von Gewerbegerichten vom 9. Februar 1849, *Gesetzsammlung für die Königlich-Preußischen Staaten*, 1849, nr. 3103; Gewerbeordnung für den Norddeutschen Bund vom 21. Juni 1869, *Bundesgesetzblatt des Norddeutschen Bundes*, 1869, nr. 26; Sawall (2007), p. 150-159 & 170-179; Zimmermann (2005), p. 41-44 & 64-87; Zakowski (2019), p. 219-225; Sumner (1912), p. 342.
[60] Gesetz, betreffend die Gewerbegerichte vom 29. Juli 1890, *Reichsgesetzblatt*, 1890, nr. 1913; Linsenmaier (2004), p. 404.
[61] Gesetz zur Abänderung des Gesetzes, betreffend die Gewerbegerichte vom 30. Juni 1901, *Reichsgesetzblatt*, 1901, nr. 29.

a local official was appointed.[62] As in France, the civil courts (in this case, the *Landgericht*) were designated as the appellate authority.[63] Satisfaction with the operation of the *Gewerbegerichte* led to demands from white-collar workers for a similar institution. However, in 1904, it was decided not to expand the jurisdiction of the existing courts but to create a comparable, parallel system for clerks: the *Kaufmannsgerichte*.[64]

After the First World War, in line with the trend towards a more unified labour law, the idea emerged that there should also be a unified labour judiciary. As a result, the idea of replacing the *Gewerbe*- and *Kaufmannsgerichte* with a fully independent system of labour courts, operating at three levels and across the whole of Germany, was proposed, mainly by the labour movement and the Social Democrats.[65] The bill introduced by the Social Democratic Minister of Labour, Heinrich Brauns, faced considerable opposition from the judiciary and the legal profession, and ultimately only partial autonomy was achieved in the final act (1926)[66]: the appellate labour courts (*Landesarbeitsgerichte*) and the Reich Labour Court (*Reichsarbeitsgericht*) were organisationally linked to the ordinary civil courts and the *Reichsgericht* – albeit with the participation of lay judges.[67] A significant substantive change was that, given the ever-increasing amount of labour legislation[68], the chair of the labour court was required to hold a law degree, and the election of lay judges was abolished in favour of appointments after nomination by trade unions and employers' organisations.[69]

However, this achieved balance soon came under pressure. The labour courts experienced difficult years during National Socialism, including purges of personnel and restrictions on the role of free trade unions.[70] After the Second World War, the 1926 system was restored, but the legislator went even further.[71] The events during the Nazi regime and the spirit of change after the war led to the realisation of the original post-World War I plans: since 1953, the appellate labour court and the Reich Labour Court – now the Federal Labour Court

[62] Sumner (1912), p. 355.
[63] See § 55 of the 1890 Act.
[64] Gesetz, betreffend die Kaufmannsgerichte vom 6. Juli 1904, *Reichsgesetzblatt*, 1904, nr. 3059; Stranz (1904), p. 185-192; Weiss (1994), p. 81.
[65] Stolleis (2014), p. 95-96 & 126-127; Stolleis (2013), p. 98-99 & 129-130.
[66] Arbeitsgerichtsgesetz vom 23. Dezember 1926, *Reichsgesetzblatt*, 1926, Part I, 508-524.
[67] Stolleis (2013), p. 130; Linsenmaier (2004), p. 405 en Douws (1969), p. 212.
[68] Douws (1969), p. 211.
[69] See § 6 & 25 of the 1926 Act.
[70] Cole (1941), p. 169-197; Mayer-Maly (1994), p. 89-104.
[71] At least in the Federal Republic. In the German Democratic Republic, independent labour courts were abolished in 1963. However, after the German reunification in 1990, the system from the Federal Republic was retained. See Gesetz über die Verfassung der Gerichte der Deutschen Demokratischen Republik vom 17. April 1963, *Gesetzblatt der Deutschen Demokratischen Republik*, 1963, Vol. I, 45-56; Linsenmaier (2004), p. 407.

(*Bundesarbeitsgericht*) – have also been separated from the civil courts. As a result, Germany today has a fully parallel judicial system for labour law with a comprehensive specialised procedural law. [72]

4. Resilience meets Path Dependence

Heikki Pihlajamäki, the Finnish legal historian, stated in his article *Medieval Swedish Provincial Laws as Example of Resilience?*: "*We could, however, well question the usefulness of the concept of resilience ass the best way of describing these long-term features. Should we not, instead, talk about path-dependence*?".[73] However, I do not see the two concepts as alternatives or opposites. I believe that path dependence can, in certain situations, be used as an explanation for the resilience of certain phenomena, in this case, legal phenomena. This is certainly true for specialised labour courts, both in terms of their initial 'survival' during the revolution and their later preservation.

First, I have to clarify what I consider path dependence to stand for. After all, there is, no uniform definition of path dependence, especially not when it comes to law. The supervisor of my PhD thesis, Dirk Heirbaut, for example explains the concept in an introductory text on legal historical research, as "the extent to which previous decisions or events make subsequent developments more difficult/easier or even impossible/possible."[74] Jaakko Husa, a renowned comparative lawyer describes path dependence in turn as "the idea that decisions we make depend on past decisions made and issues that have occurred well before the present day. Path dependence limits the choices of today."[75]

Four my understanding of the notion, however, I turn to the 2000 reference article on path dependence in politics, from Pierson. He elves deeper into the concept and points out that a broad and a narrow approach are generally distinguished.[76] The broad one implies "that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time."[77] In my opinion, this approach implies a simple cause-and-effect relationship and may offer us little useful insights.[78] It simply indicates that certain events

[72] Arbeitsgerichtsgesetz vom 3. September 1953, *Bundesgesetzblatt*, 1953, Part I, 1267-1286; Sawall (2007), p. 291-297.
[73] Pihlajamäki (2020), p. 201-217.
[74] Freely translated from: "*de mate waarin eerdere beslissingen of gebeurtenissen latere ontwikkelingen moeilijker/makkelijker of zelfs onmogelijk/mogelijk maken.",* see Heirbaut (2024), p. 23.
[75] Husa (2018), p. 130.
[76] Pierson (2000), p. 252.
[77] Wording of Sewell (1996), p 262-263.
[78] It teaches us, as Pierson says, only that 'history matters', see Pierson (2000), p. 252.

or decisions may have an influence on later events. The narrow approach is more interesting as it focuses more on the cause of the influence resulting from those decisions/events. Path dependence arises in this view because certain decisions or events have charted a certain path that is *difficult to leave*.[79] Despite a possible multitude of choices, deviating from the existing path is unlikely because the costs of change are too high.[80] The difference from ordinary causal historical processes is that the sequence of events on the path is self-reinforcing: the further along the path, the higher the costs if one deviates from it, and the higher the returns if one stays on the path. Pierson calls this the process of 'increasing returns'.[81]

In this paper, the narrow approach of Pierson is followed. Certain events or decisions determine the outcome of a process because alternative choices during the process are significantly hampered, as the costs of those alternatives outweigh their benefits (and only increase as the process progresses).[82]

The success of the *conseil de prud'hommes* in France, the Southern Netherlands (Belgium) and the Rhineland (Germany) can be explained by the path dependence of both regions favouring such an institution. One could argue that, in all three regions, the institution fitted into the ongoing path of self-regulation by the economic elite. For centuries, the corporations had a strong grip on the organisation of economic life and labour, including dispute resolution. Because this path was centuries old, there was a strong presence of what Pierson has labelled as 'increasing returns': as the path persists, deviation from the path becomes less likely because the costs of deviation outweigh the benefits.[83] This became evident during the French Revolution. Under the banner of freedom of industry, the Revolutionary regime abolished all corporative structures and privileges, but during the Napoleonic period, it became clear that the societal cost of this decision was too great. The revolution had sought to break the ongoing path – in other words: to represent a critical juncture[84] – but the path proved too resilient. Although the *conseil de prud'hommes* was formally a new institution, it fully aligned with the aims of the economic elite and the Napoleonic regime to restore the institutions and regulations of the corporations, at least in part. However, the institution was not an exact replica of the preceding

[79] Pierson (2000), p. 252.; Struyven (2006), p. 33.
[80] See in that regard the wording of Margaret Levi in: Levi (1997), p. 28.
[81] Pierson (2000), p. 251-257; Struyven (2006), p. 33. Earlier, Arthur had introduced this concept in economics, see Arthur (1994), 224 p.
[82] Own interpretation based on the mentioned views of Pierson, Struyven & Levi. See for an earlier application of this interpretation of path dependence: Van de Woestijne (2022), p. 101-104.
[83] Pierson (2000), p. 251-252.
[84] A critical juncture ushers in a new path, usually influenced by exogenous factors, see Struyven (2006), p. 33-34 & 256.

institutions: at the very least, formal attempts were made to sever ties with the *Ancien Régime*. In fact, it now represented more of a form of 'regulated' self-regulation.[85] However, this does not change the fact that the *conseil de prud'hommes* still fitted entirely within the outlined path-dependent evolution: at most, the modifications represent what is termed as 'bounded changes' in the literature on path dependence: changes that remain limited and still fit within the same path.[86]

The fact that, after the initial successful introduction of the *conseil de prud'hommes*, specialised labour courts based on the French model have been retained in France, Belgium, and Germany to this day, is also strongly path-dependent and self-reinforcing. Throughout history, other options were on the table at various times in all countries concerned: for example, in Germany, where the *conseil de prud'hommes* was just one of the systems operational in the 19th century, or the ideas of a Belgian unitary court in the 1950s-1960s. However, these alternative paths were not taken, as the costs of deviation did not outweigh the benefits and only increased over time. These 'costs' were mainly manifested in strong societal resistance from various stakeholders: social partners, labour-oriented politicians, but also from the judges of the labour courts themselves.

Note however that this is just one side of the story. I must also emphasise that path dependence can also explain *a lack of* resilience. This is particularly evident in the Netherlands. There as well, a *conseil de prud'hommes* was established by the French in Leiden in 1813[87], but specialised labour courts never gained a foothold because they did not fit within the 'ongoing' Dutch path.[88] Additionally, the above narrative should be nuanced in the sense that, even in the 'successful' countries France, Belgium, and Germany, the *conseil de prud'hommes* naturally had a divergent evolution, with each country having its own unique factors at play. Nevertheless, these divergent tendencies, are in itself again particularly 'path dependent'. A first important difference is the refusal of a profound professionalisation and especially juridification in France, as opposed to their integration in Belgium and Germany. By this, I mean there is not only a robustly path-dependent process in France concerning the preservation of specialised labour courts in general but also regarding the retention of various original characteristics of the Napoleonic *conseil de prud'hommes*. Similar to two centuries ago, the

[85] On this term, see Debaenst (2014), p. 189-212.
[86] Pierson (2000), p. 265.
[87] Décret Impérial portant creation d'un conseil de Prud'hommes dans la ville de Leyde, département des Bouches-de-la-Meuse, *Bulletin des Lois de l'Empire français,* 1813, Nr. 9597.
[88] See in that regards Van de Woestijne (2024) (*to be published*). In the framework of this paper, however, I cannot delve into this matter.

conseil de prud'hommes in France remains a single-tier judicial body (without a specialised appellate instance) and composed solely of lay judges. Although the possibility of adding professional judges has been repeatedly considered, it has never materialised due to staunch resistance from the world of labour, primarily from the trade unions. This resistance became evident for the first time at the occasion of the legislation adopted under the Second Empire, which not only encountered significant opposition but was swiftly rolled back following the fall of Napoleon III. The recurrent opposition from the labour movement has also proven to be highly self-reinforcing: while the juridification of labour courts appears to be a natural evolution in neighbouring countries, it is still considered unfeasible in France today. Although reforms under Boulin and Macron have indeed increased the professionalisation of the *conseil de prud'hommes*, they have fallen short in terms of juridification. Taking into account the current state of the *conseil de prud'hommes*, these reforms can be viewed merely as 'bounded changes'.

Secondly, path dependence is also helpful in explaining the varying degrees of emancipation and autonomy of the labour courts in the three legal systems. This also deserves a word of explanation. As to the Belgian case, on which I already have applied path dependence in an earlier study[89], the establishment of *conseil de prud'hommes d'appel* in 1910 and the transformation into labour tribunals and courts in 1967 can be seen as self-reinforcing sequences of the path initiated by the introduction of the first *conseils de prud'hommes*.[90] In France, the situation is particularly different. There, the choice of the civil court as the appellate body in 1905 resulted from a hard-fought compromise, with the path-dependent consequence that no other options have been considered since. As a result, France, much less than Belgium, has established a 'genuine' labour jurisdiction (the *conseil de prud'hommes* remains a single-level institution). In Germany, the initial path was similar to the French one, as in 1890, the civil court was also chosen as the appellate authority. Additionally, following the 1926 Labour Court Act, the new labour courts were to a large extend attached to the civil courts. However, this 'civil' path was ultimately interrupted. As a result of the events under Nazism and World War II, a fully independent labour court system of three levels was installed in 1953. To express it in terms of 'path dependence': the Nazi regime and its implications for the labour courts and

[89] See Van de Woestijne (2020), p. 93-97 (unpublished, can be consulted on https://libstore.ugent.be/fulltxt/RUG01/002/836/080/RUG01-002836080_2020_0001_AC.pdf.).

[90] As I have stated at the time: "a path of independent adjudicating (appellate) authorities, with the world of labour firmly in control and seeking to minimise the intervention of the traditional civil judiciary as much as possible", freely translated from: "*een pad van eigen, rechtsprekende (beroeps)instanties, met de wereld van de arbeid die de touwtjes stevig in handen houdt en de inmenging van de klassieke burgerlijke magistratuur zo beperkt mogelijk wil houden*", see Van de Woestijne (2020), p. 96.

organised labour formed a critical juncture, from which a new path emerged. These findings confirm the perspective from the literature that such a juncture requires a contingent event or even an 'exogenous shock'.[91] Lastly, it is worth noting that, due to this new path, Germany – and to a lesser extent, Belgium – has pushed the principle of specialised labour adjudication much further than in the 'motherland' France. It is a textbook example of what Mathias Siems has dubbed 'overfitting legal transplants'.[92]

In summary, I would like to emphasise that the relation between resilience and path dependence in the comparative history of the *conseil de prud'hommes* and its successors is threefold: path dependence both 1) elucidates the reasons behind the resilience of the *conseil de prud'hommes* and specialised labour courts in general in certain legal systems, 2) while accounting for the lack of resilience in one other, and 3) offers insights as to why there are divergent evolutions in terms of juridification, professionalisation, and autonomy of the labour courts within the 'successful' countries. After all, these three evolutions occurred with the aim of adapting the institution to changed circumstances, or, in other words: make the institution more resilient.

[91] Pierson (2000), p. 264-266; Steinmo & Thelen (1992), p. 16-17; Struyven (2006), p. 33-34 & 256. However, such a radical change or alteration of the institutional status quo, according to North, occurs only rarely, see North (1990), p. 83-91.
[92] Siems (2014), p. 133-146.